Associate Professor D. Kapua‘ala Sproat

KA HULI AO

Center For Excellence in Native Hawaiian Law
William S. Richardson School of Law
University of Hawai‘i at Mānoa

KŪKULU WAIWAI:
BUILDING PONO WATER MANAGEMENT IN HAWAIʻI NEI

I. INTRODUCTION

Ola i ka wai: water is life. In ʻŌlelo Hawaiʻi, the mother tongue of the Hawaiian Islands, wai is water, waiwai means values or wealth, and kānāwai is the law. It is no coincidence that, in this island community, both wealth and the law were and continue to be defined by access to fresh water resources. For Kānaka Maoli (Native Hawaiians), appropriately managing wai is a true kuleana: both a privilege and a responsibility.

This summary highlights the basic principles of Hawaiʻi water law that affect Kānaka Maoli, overviews the legal authorities protecting those rights and practices, and describes the practical effects of those directives, especially as they apply to state and county decisionmakers. For those decisionmakers, managing water resources for the benefit of the public and the resource itself is not only a tremendous kuleana, but also a constitutional mandate.

II. CULTURAL CONTEXT FOR WATER USE AND MANAGEMENT IN HAWAIʻI NEI

Before the documented arrival of Westerners in 1778, water was the source of all life in Hawaiʻi. Continuous ma uka to ma kai (from the mountains to the ocean) stream flow provided fresh water for drinking, supported traditional agriculture and aquaculture, recharged ground water supplies, and sustained productive estuaries and fisheries by both bringing nutrients from the uplands to the sea and providing a travel corridor so that native stream animals could migrate between the streams and ocean and complete their life cycles. Water was also revered as a kinolau (physical manifestation) of Kāne, one of the Hawaiian pantheon's four principal akua (gods, ancestors). Traditional moʻolelo (stories or history) explain that Kāne brought forth fresh water from the earth and traveled throughout the archipelago with Kanaloa (another akua)

creating springs and streams, many of which continue to flow today. Kānaka Maoli relied on streams and springs to satisfy many needs. One principal purpose focused on distributing flow sufficient to cultivate the staple crop kalo (*Colocasia esculenta* or taro). Other objectives included sustaining natural systems and fisheries, as well as enabling cultural, religious, and other practices based upon free-flowing streams and springs.

Due to these important roles, much of traditional Kānaka Maoli law or kānāwai developed around the management and use of fresh water. Water was a public trust resource and could not be commodified or reduced to physical ownership, which means that no one – not even ali‘i (leaders) – could own water. Instead, ali‘i managed water resources for the benefit of present and future generations. Under the ali‘i nui, konohiki (resource managers) stewarded ahupua‘a (loosely defined as watersheds) or smaller land divisions including ‘ili or kū. Konohiki appointed kahuwai (water stewards or superintendents) to manage water distribution within and between land divisions.

The management of water resources changed dramatically with the establishment and growth of plantation agriculture, including sugar and pineapple. Massive ditch systems were constructed on most of the major islands to transport water from wet Windward communities to drier Central and Leeward plains, and ground water wells were developed to supplement surface water systems. Despite Kingdom laws that formalized and reduced Hawaiian custom and tradition to writing, large agricultural plantations increased their influence and soon controlled a large portion of Hawai‘i’s resources. The law was no exception, and cases during Hawai‘i’s Kingdom and territorial periods also began to reflect increasingly Western approaches to water use and management. Conflict ensued between and among Kānaka Maoli and others, especially plantation interests.

After about a century of plantation agriculture's monopoly over Hawai'i's ground and surface water resources, a movement resurfaced in the 1960s and 1970s to return water use to public management and control. A series of cases in both the state and federal court systems ultimately reaffirmed that Hawai'i's water resources are held in trust and should be managed for the benefit of present and future generations. See McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973). These cases also highlighted the need for a more comprehensive and equitable management system. The 1978 Hawai'i State Constitution was instrumental in this regard and established a new legal regime for water resource management.

III. HAWAI'I'S LEGAL REGIME FOR WATER RESOURCE MANAGEMENT

Today, water law in Hawai'i nei is grounded in a Constitution, Water Code (Hawai'i Revised Statutes Chapter 174C), administrative rules for the Commission on Water Resource Management (Hawai'i Administrative Rules §§ 13-167 to 13-171), and court decisions interpreting relevant laws.

A. Hawai'i Constitution

Article XI, section 1 of Hawai'i's Constitution proclaims that "all public natural resources are held in trust by the State for the benefit of the people," and Article XI, section 7 of Hawai'i's Constitution specifically references water and includes the directive "to protect, control, and regulate the use of Hawai'i's water resources for the benefit of its people." Article XI, section 7 also established the State Commission on Water Resource Management ("Water Commission") within the Department of Land and Natural Resources. Although other county, state, and federal agencies may have overlapping jurisdiction in some areas, the Water Commission has primary authority over water use and management in Hawai'i.

The Commission is tasked with many duties including establishing water conservation, quality, and use policies, defining reasonable-beneficial uses, protecting ground and surface waters, and regulating all uses of Hawai‘i’s water resources while assuring appurtenant[1] rights and existing riparian[2] and correlative[3] uses. In addition to the kuleana it places on the Water Commission, the constitutional public trust imposes independent mandates on state and county decisionmakers to conserve and protect Hawai‘i’s water resources, which is discussed in more detail in Part IV, below.

B. Hawai‘i’s Water Code, Hawai‘i Revised Statutes chapter 174C

Today, the use of fresh water in Hawai‘i is managed largely through the State Water Code, Hawai‘i Revised Statutes chapter 174C. The Code also details the responsibilities and composition of the Water Commission. One of the Commission’s seats is reserved for an individual with “substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage such as those preserved by 174C-101.” HAW. REV. STAT. § 174C-7(b).

The Code manages fresh water by attempting to distinguish between ground and surface water, despite a clear connection through the hydrologic cycle. Regulation under the Code, therefore, depends on whether water is tapped underground via wells and pumps, or above ground by taking water from streams or springs via ditch systems.

---

[1] Appurtenant rights appertain or attach to land that was cultivated, usually in the traditional staple kalo, at the time of the Māhele of 1848. See Reppun v. Bd. of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).

[2] Riparian rights protect the interests of people who live along the banks of rivers or streams to

[2] Riparian rights protect the interests of people who live along the banks of rivers or streams to the reasonable use of water from that river or stream on the riparian land. See Reppun, 65 Haw. 531, 656 P.2d 57 (1982).

[3] Correlative rights are rights of individuals who own land overlying a ground water source or aquifer to the water below it. See City Mill Co. v. Honolulu Sewer & Water Comm’n, 30 Haw. 912 (1929).

The Code has several tools to manage water resources, including the designation of Water Management Areas. The Water Commission has a dual mandate to promote maximum reasonable-beneficial use while also protecting the community's interest in public trust resources. Although the Commission has tremendous kuleana to manage water resources, it lacks the administrative tools to make this happen unless an area is designated a surface or ground Water Management Area ("WMA"). The Water Code requires designation when a resource is or may be threatened with degradation. HAW. REV. STAT. § 174C-41(a). This can be raised either by the Commission on its own, or by an interested member of the public. HAW. REV. STAT. § 174C-41(b). Decisions by the Water Commission to designate a surface or ground WMA are final and are not judicially reviewable. Koʻolau Agric. Co., Ltd. v. Comm'n on Water Res. Mgmt. ("Koʻolau Ag."), 83 Hawaiʻi 484, 494, 927 P.2d 1367, 1377 (1994).

The Code thus establishes a "bifurcated system of water rights." Koʻolau Ag., 83 Hawaiʻi at 491, 927 P.2d at 1374. In WMAs, the Code regulates all consumptive uses of water via Water Use Permits. In contrast, "water rights in non-designated areas are governed by the common law." In re Waiāhole Combined Contested Case ("Waiāhole I"), 94 Hawaiʻi 97, 178, 9 P.3d 409, 490 (2000). So far, all of Oʻahu except Waiʻanae, the island of Molokaʻi, and the ʻĪao aquifer on Maui have been designated ground WMAs. A petition is currently pending to designate the Keauhou Aquifer System on Hawaiʻi Island a ground WMA. In April 2008, the Water Commission designated Nā Wai ʻEhā, Maui the first surface WMA in the history of the Water Code. It is important to know whether an area is designated because the Water Code allows the diversion of water outside of the watershed of origin only if the area is designated and the appropriate permits have been secured.

The Water Code also affirms Kānaka Maoli rights and practices. In addition to the protections set forth in Article XII, section 7 of Hawai‘i's Constitution,[4] the "traditional and customary rights of ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter." HAW. REV. STAT. § 174C-101(c). The Code makes clear that such rights include but are not limited to the cultivation of kalo on one's own kuleana, as well as the ability to gather various resources for subsistence, cultural, and religious purposes, including: hīhīwai (or wī), ‘ōpae, ‘o‘opu, limu, thatch, kī, aho cord, and medicinal plants. HAW. REV. STAT. § 174C-101(c). The Code also protects appurtenant rights and allows the Department of Hawaiian Home Lands to reserve water for the current and foreseeable development of its lands. HAW. REV. STAT. §§ 174C-101(d, a).

IV. THE PUBLIC TRUST DUTY TO PROTECT WATER RESOURCES ALSO APPLIES TO STATE AND COUNTY DECISIONMAKERS

Although the Water Commission has the primary kuleana to protect Hawai‘i's water resources, other state and county agencies have an independent duty to conserve natural resources, including water. See HAW. CONST. art. XI, § 1; Kelly v. 1250 Oceanside Partners, 111 Hawai‘i 205, 225, 140 P.3d 985, 1005 (2006). In Hawai‘i, we trace the origin of the public trust to Indigenous custom and tradition, which firmly established that natural resources, including water, were not private property, but were held by the government for the benefit of the people. Today, "the people of [Hawai‘i] have elevated the public trust doctrine to the level of a constitutional mandate." Waiāhole I, 94 Hawai‘i at 131, 9 P.3d at 443. Courtesy of the

[4] HAW. CONST. art. XII, § 7 ("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 Hawaiians Islands prior to 1778.").

Constitution, Water Code, and common law, the "state water resources trust" applies to "all water resources without exception or distinction." Waiāhole I, 94 Hawai'i at 133, 9 P.3d at 445.

The Hawai'i Supreme Court examined applicable Constitutional provisions and the Water Code in a series of cases, which clarified an agency's kuleana in upholding the public trust. The public trust imposes "a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." Waiāhole I, 94 Hawai'i at 139, 9 P.3d at 451. This establishes an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." Waiāhole I, 94 Hawai'i at 141, 9 P.3d at 453. The Court has identified a handful of public trust purposes: environmental protection; traditional and customary Native Hawaiian rights; appurtenant rights; domestic water uses; and reservations for the Department of Hawaiian Home Lands. Waiāhole I, 94 Hawai'i at 137-39, 9 P.3d at 449-51; Wai'ola o Moloka'i, 103 Hawai'i 401, 431, 83 P.3d 664, 694 (2004). Public trust purposes have priority over private commercial uses, which do not enjoy the same protection. The public trust dictates that "any balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment" and "establishes use consistent with trust purposes as the norm or 'default' condition." Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454. After all, "Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state." Waiāhole I, 94 Hawai'i at 141, 9 P.3d at 453.

The public trust also prescribes a higher level of scrutiny for private commercial uses. Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454. State and county boards and commissions must, therefore, closely examine requests to use public resources for private gain to ensure that the public's interest in the resource is fully protected. See Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454. Moreover, "permit applicants have the burden of justifying their proposed uses in light of

protected public rights in the resource." Waiāhole I, 94 Hawai‘i at 160, 9 P.3d at 472. Agencies "may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." Waiāhole I, 94 Hawai‘i at 143, 9 P.3d at 455. After all, "[t]he duties imposed upon the state [and counties] are the duties of a trustee and not simply the duties of a good business manager." Waiāhole I, 94 Hawai‘i at 143, 9 P.3d at 455. For example, the Hawai‘i Supreme Court ruled that the public trust requires that agencies do more than simply impose requirements and conditions; they also have an obligation "to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts . . . on the State's natural resources." Kelly, 111 Hawai‘i at 231, 140 P.3d at 1011.

In addition to the public trust, the Hawai‘i Supreme Court also adopted the "precautionary principle," ruling that "the lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation" and that "where [scientific] uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource." Waiāhole I, 94 Hawai‘i at 154, 9 P.3d at 466. Although the court recognized that the principle must vary according to the situation, it agreed with what it considered the principle's quintessential form – that "at minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest." Waiāhole I, 94 Hawai‘i at 155, 9 P.3d at 467. Based on the Commission's duties as trustee and the interest in precaution, the court held that "the Commission should consider providing reasonable 'margins of safety' for instream trust purposes when establishing instream flow standards." Waiāhole I, 94 Hawai‘i at 156, 9 P.3d at 468.

Issues for Hawai‘i decisionmakers often arise in the context of permit or other applications that may impact streams, springs, groundwater, or traditional and customary Native Hawaiian practices dependent upon those resources such as kalo cultivation or gathering practices. For example, a planning commission may receive a permit application from a water bottling company. Or, the Board of Land and Natural Resources may want to lease state land where streams are diverted. Many different scenarios arise in which decisionmakers must consider their duty to protect and conserve Hawai‘i’s precious water resources.

At bottom, the public trust provides independent authority to guide decisionmakers in fulfilling their mandates. For example, in examining the interplay between the constitutional public trust and an agency’s enabling statute, the Hawai‘i Supreme Court explained:

> The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code’s interpretation, define its permissible “outer limits,” and justify its existence. To this end, although we regard the public trust and Code as sharing similar core principles, we hold that the Code does not supplant the protections of the public trust doctrine.

Waiāhole I, 94 Hawai‘i at 133, 9 P.3d at 445.

Practically speaking, the public trust is a prism through which state and county decisionmakers must carefully examine their kuleana under the specific law(s) each agency is charged with enforcing. In addition to the guidance detailed above, the Hawai‘i Supreme Court recently highlighted six principles that state and county agencies must apply to fulfill their mandates and appropriately consider the public trust:

(1) “The agency’s duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use[;]”
(2) Agencies “must determine whether the proposed use is consistent with the trust purposes[;]”

(3) Agencies need to "apply a presumption in favor of public use, access, enjoyment, and resource protection[;]"
(4) Agencies must "evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water[;]"
(5) "If the requested use is private or commercial, the agency should apply a high level of scrutiny[;]" and
(6) Agencies must apply "a 'reasonable and beneficial use' standard, which requires examination of the proposed use in relation to other public and private uses."

Kauai Springs, 133 Haw. 141, 174, 324 P.3d 951, 984 (2014) (citations omitted). This is critical given that agencies have "duties under the public trust independent of [any] permit requirements[.]" Kauai Springs, 133 Hawai'i at 177, 324 P.3d at 987. The Court also underscored four affirmative showings that permit applicants must make to carry their burdens under the trust.

(1) "their actual needs and the propriety of draining water from public streams to satisfy those needs[;]"
(2) the absence of practicable alternatives, including alternate sources of water or making the proposed use more efficient;
(3) "no harm in fact" to public trust purposes "or that the requested use is nevertheless reasonable and beneficial[;]" and
(4) "if the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved."

Kauai Springs, 133 Hawai'i at 174-75, 324 P.3d at 984-85 (citations omitted). After all, "a lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource." Kauai Springs, 133 Hawai'i at 174, 324 P.3d at 984. Hopefully, these guidelines will help decisionmakers to 'auamo i ke kuleana kūkulu waiwai: shoulder the responsibility and privilege of building prosperity through pono (just, balanced) management of our fresh water resources.