Developments in Native Hawaiian Law: Ea

Traditional and Customary Practices (Hawaiian Usage)

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Outline

• Brief history of traditional and customary practices, as incorporated in statutory and constitutional provisions
• Reconciling traditional and modern land use systems (selected Hawai‘i cases)
• Recent developments
Hawaiian usage is deeply rooted in the earliest written laws of these islands

• Historical usage was enshrined in the 1839 Declaration of Rights, as incorporated in the 1840 Constitution
• The 1847 Act to Organize the Judiciary authorized courts to adopt common law from other countries "founded in justice, and not in conflict with the laws of this kingdom"
• The 1859 Civil Code reaffirmed this understanding by requiring judges to consider "received usage"

Continuing recognition of Traditional and Customary Native Hawaiian rights

• Reservation in laws and original deeds from the Māhele (1845-1855)
• Government and Crown lands – Act of June 7, 1848
• Hawai‘i Revised Statute § 7-1
• Hawai‘i Revised Statute § 1-1
• Article XII, § 7 of the Hawai‘i Constitution

Reservation in Laws and Original Deeds From the Māhele

• Reservations in deeds "koe nae ke kulena o na kanaka maloko"
  – The kuleana of the people therein are reserved
  – The rights of the tenants are reserved
1850 Kuleana Act, Section 7
(Hawai‘i Revised Statutes § 7-1)

• People have right to take firewood, house timber, aho cord, thatch, or ti leaf from the land on which they live, for their own private use ...
• The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all ...
• DELETED: “should they need them”; “shall also inform the landlord or his agent, and proceed with his consent[.]”

HRS § 1-1 (1892)

• 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 . . . .

Justice Oliver Wendell Holmes, U.S. Supreme Court:

“A right of this sort is somewhat different than those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established . . . [t]he plaintiff’s claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit.”

Damon v. Territory of Hawaii, 194 U.S. 154, 158 (1904) (recognizing vested right to fishery abutting private property, in action to quiet title).
Chief Justice William S. Richardson, Hawai‘i Supreme Court:

“Hawaii’s land laws are unique in that they are based upon ancient tradition, practice and usage.”

In re Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968) (citing Keelikōlani v. Robinson, 2 Haw. 514 (1862)).

**Article XII, § 7 of the Hawai‘i Constitution**

- The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes possessed by ahupuaʻa 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.

**Reconciling Traditional and Modern Land Use Systems**

A brief discussion of some important Hawai‘i case law:
- Ka Pa‘akai o Ka ‘Āina v. Land Use Comm’n (2000)
- Non-resident kuleana owner sought to gather ti leaf, bamboo, kukui nuts, kiawe, medicinal herbs, and ferns within ahupua’a, but was denied access to newly fenced-in lands where his family used to gather.

Why is Kalipi important?
- Tenants have right to gather products enumerated in Kuleana Act, HRS § 7-1 (firewood, house timber, aho cord, thatch, or ti)
- For personal use
- Must be resident/tenant within the ahupua’a
- Must balance right to gather with private property rights
- Right can be exercised on undeveloped land
- Left open the question of other customary practices under HRS § 1-1… i.e., case-by-case determination

- Wao Kele o Puna historically served as a common gathering area utilized by tenants who resided in ahupua’a abutting Wao Kele o Puna.
- Gathering rights can extend beyond the ahupua’a.
Further context for PDF

- *Pele Defense Fund v Estate of James Campbell* (Haw. 3d Cir. 2002) (Amano, J.) (recognizing distinct values of `ohana as distinguished from the ali`i and konohiki)
- 1978 Con-con expressly contemplated that some rights might extend beyond the ahupua`a
- Temporarily reside and gather along trails
- Kahea
- Multi-local (new areas of practice), change of residence
- It was customary for Hawaiians to use trails outside the ahupua`a in which they lived to get to another part of the island
- May be accompanied by others related by blood, marriage, or adoption


- Community complex covering 450 acres of shoreline area
- The “western [private property] concept of exclusivity is not universally applicable in Hawai`i.”

PASH/Kohanaiki Takeaways

- Hoa`āina (native tenants) can gather anywhere that such rights have been customarily and traditionally exercised for traditional and customary subsistence, cultural and religious purposes
- Can gather on land that is less than fully developed
- Government cannot regulate traditional and customary rights out of existence
- Interests of the property owner and hoa`āina must be balanced
- Balance weighs in favor of property owner if hoa`āina exercise otherwise valid customary rights in an unreasonable manner
Ka Pa‘akai o Ka ‘Āina v. LUC (2000)

- Over 1,000 acres of privately owned conservation and agricultural land in the ahupua‘a of Ka‘upulehu to facilitate a luxury residential development
- Plaintiffs asserted traditional and customary right to gather sea salt, ‘opihi, limu, kūpe‘e, Pele’s tears, and hā‘uke‘uke

Ka Pa‘akai Court Ruling

1) The state and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Native Hawaiians to the extent feasible;
2) Agencies are obligated to make an assessment, independent of the developer or applicant, of the impacts on customary and traditional practices of Native Hawaiians; and
3) The independent assessment must include three factors known as the “Ka Pa‘akai framework”

Ka Pa‘akai Framework

a) The identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
b) The extent to which those resources including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and
c) The feasible action, if any to be taken by the Land Use Commission to reasonably protect native Hawaiian rights if they are found to exist.
Mauna Kea Anaina Hou v. BLNR (2015)

- Appeal from issuance of a permit to construct the Thirty Meter Telescope in a conservation district on Mauna Kea
- BLNR “put the cart before the horse” when it issued the permit before the request [by Native Hawaiian cultural practitioners] for a contested case hearing was resolved and the hearing was held.
- “a contested case hearing was required as a matter of constitutional due process. The right to exercise Native Hawaiian customs and traditions is explicitly protected by article XII, section 7 of the Hawai’i Constitution”
- Case remanded to BLNR for a contested case hearing before the Board or a new hearing officer – opportunity to be heard at a meaningful time and in a meaningful manner.

Mauna Kea I concurring opinion, Pt. IV

- Justices Pollack (author), McKenna, and Wilson – i.e., a MAJORITY of the court
- “an agency of the State must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations . . . ”
- “In particular, an agency must fashion procedures that are commensurate to the constitutional stature of the rights involved . . . and procedures that would provide a framework for the agency to discover the full implications of an action or decision before approving or denying it.”

In re Thirty Meter Telescope (“Mauna Kea II”)

- July 26, 2017 – Hearings Officer’s Recommended Findings of Fact, Conclusions of Law, Decision & Order
- September 20, 2017 – BLNR hearing on Written Exceptions by Parties & Intervenors
- September 28, 2017 – BLNR’s FOF, COL, D&O
- June 21, 2018 – HISCT oral argument
Some Issues that the HISCT May Need To Resolve

• Burden of Proof
• Public Trust
• Analysis of Cumulative Impacts under Ka Pa‘akai
• Religious Practices

Burden of Proof

"In cases where Native Hawaiian rights figure in an agency’s public trust balancing, the burden is not on parties of Native Hawaiian ancestry to prove that the proposed use would harm traditional and customary Native Hawaiian rights; rather, the permit applicants and the agency are the parties obligated to justify the proposed use and the approval thereof in light of the trust purpose of protecting Native Hawaiian rights."


Ching v. Case (Haw. 1st Cir. Apr. 3, 2018)

• DLNR Chairperson and BLNR breached their trust obligations to mālama ‘āina Pohakuloa after leasing the land for United States military training (including live ammunition fire).
• The court described “virtually nonexistent” reports issued 20 and 30 years after signing the lease as “grossly inadequate”; year 40 report (submitted after the lawsuit was filed) accepted military representations that were directly contradicted by the available evidence.
• Recognized the “crucial importance” of mālama ‘āina to practitioners, as the foundation of their cultural and spiritual identity and part of their ‘ohana, in addition to their kuleana as stewards of the land.
Questions?
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