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## Beyond the Courts of the Conqueror: Balancing Private and Cultural Property Rights under Hawai'i Law.

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**BEYOND THE “COURTS OF THE CONQUEROR”:  
BALANCING PRIVATE AND CULTURAL PROPERTY RIGHTS  
UNDER HAWAI’I LAW**

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ROBERT R.M. VERCHICK††**

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**I. INTRODUCTION**

Conversations about cultural interests and private property often boil down to two questions. The first is, “How should we balance a property owner’s right to exclude outsiders with a community’s cultural right to access that property?” Economists would call this a commons issue.<sup>1</sup> Given a limited resource of river or field, what is the best way to distribute use so as to promote spiritual, cultural, and economic welfare? When in the seventeenth century John Locke declared, “ In the beginning, all the world was America,”<sup>2</sup> he meant America, the untapped commons. And in his view, North America’s bounty—like the bounty of other continents before—lay on the auction block.

To what extent we view seventeenth century America (or any place in time) as a commons open to distribution depends upon the second ques-

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1. See generally PROTECTING THE COMMONS: A FRAMEWORK FOR RESOURCE MANAGEMENT IN THE AMERICAS (Joanna Burger et al. ed., 2001).

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, book II, ch. V (1690).

tion: what traditions of law should determine how property interests are distributed or shared? For Locke, and later, for most American courts, the answer was almost always, “western traditions.” Thus, in the well-known case *Johnson v. M’Intosh*,<sup>3</sup> the U.S. Supreme Court held that the federal government possessed superior ownership interests to those of occupying Indian nations. The reasoning flowed not from fairness or even natural law (which the Court suggested might favor native ownership), but from the European tradition of conquest and discovery.<sup>4</sup> In a striking flash of candor, the Court announced, “[C]onquest gives a title which the courts of the conqueror cannot deny.”<sup>5</sup>

In the United States, the balance between western and non-western claims on property has mostly followed the *Johnson v. M’Intosh* model. Even when native property claims succeed over the establishment ones (and we do not suggest this doesn’t happen), the judicial tools used to fashion the outcomes are familiar objects of western law—the treaty obligation,<sup>6</sup> the prescriptive easement,<sup>7</sup> and the law of “English custom.”<sup>8</sup>

Not so in Hawai‘i. Over the last 25 years, the state’s Supreme Court has interpreted Hawai‘i’s unique constitutional and statutory provisions to require agencies to balance claims of native Hawaiians to engage in traditional cultural practices against the private owners’ rights of exclusion by resorting not simply to western models of property theory, but by braiding into the western tradition the hearty fibers of native Hawaiian tradition—conceptions of land use that are guaranteed a role in property law by the state’s own constitution. Specifically, the Hawai‘i Supreme Court is crafting a doctrine to resolve disputes in which native Hawaiians seek to practice traditional rituals on land that is privately owned. This modern property law, which draws from both western law and native Hawaiian custom and tradition, now controls not only the rights and expectations of private actors, but is also beginning to influence the duties of state administrative agencies, namely the very powerful state-wide Hawai‘i Land Use Commission (LUC).

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3. 21 U.S. 543 (1823).

4. *Johnson v. M’Intosh*, 21 U.S. 543, 570 (1823).

5. *Id.* at 568.

6. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195 (1999) (discussing the United States treaty obligations towards Chippewa Indians).

7. See *Jicarilla Apache Tribe v. Bd. Of County Comm’r, County of Rio Arriba*, 883 P.2d 136, 144 (1994) (finding that federal law did not preempt a state court’s review of a disputed easement to Indian land).

8. See *Stevens v. City of Carron Beach*, 510 U.S. 1207 (1994) (denying certiorari that claimed an Oregon court erred in applying English custom in a suit over a public easement by prescription).

This essay examines the modern development of land-use law governing the rights of native Hawaiians to access private and public lands to carry on traditional practices. We argue that the Hawai'i Supreme Court's doctrinal approach in this area is striking in its hybrid character. The combination of western and native Hawaiian legal elements used to resolve such disputes holds promise that someday a truly multi-cultural form of property law may be developed in Hawai'i, at least for certain purposes—a property law that explicitly reaches beyond that known by the “courts of the conqueror.”

This essay has five parts. Part II very briefly introduces the long history of Hawaiian property regimes, defines the Hawaiian concept of the *ahupua'a*, and explains its relationship to Hawai'i's constitution and its common law. Part III explains how traditional law and the more recent constitutional and common law have been woven into a balancing test by which claims of access and private ownership can hopefully be resolved. This development has unfolded over a series of state Supreme Court cases. Part IV evaluates the doctrine so far developed by examining its application in some brief case studies involving actions by Hawai'i's LUC. Part V concludes by noting that this new form of interest balancing holds hope for those looking for creative solutions to cultural disputes over land, but warns that its potential has not yet been realized.

As readers may be interested, we note up front that neither of us is a native Hawaiian; therefore, our essay does not pretend to offer a complete cultural perspective of Hawaiian property law. Yet each of us has spent the last decade studying and sometimes participating in environmental justice struggles. In addition, one of us has recently completed an eight-year tenure on Hawai'i's powerful statewide Land Use Commission.<sup>9</sup>

## II. A BRIEF HISTORY OF HAWAIIAN PROPERTY REGIMES

### A. *History of Hawaiian Property Regimes*<sup>10</sup>

The current property regime in Hawai'i is inextricably intertwined with the long, rich history of pre-contact Hawaiian culture and tradition.

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9. Professor Jarman served on the Hawai'i Land Use Commission (LUC) from July 1, 1994 to June 30, 2002. For a brief overview of the LUC, see DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 677-82 (3d ed. 1999).

10. The discussion in this section is necessarily brief and therefore does not adequately reflect the complexities of pre-contact Hawaiian society and land tenure. In addition, it does not reflect the inseparable spiritual connections between the native Hawaiians and the land (*'~ina*). For more detailed reading, see, e.g., LILIKALA KAME'ELEIHIWA, *NATIVE LANDS AND FOREIGN DESIRES: Pehea La E Pono Ai?* (1992); E.S. HANDY & E.G. HANDY, *NATIVE PLANTERS IN OLD HAWAII* (1972).

“Prior to Western contact, Hawaiians had developed a complex culture and stable land tenure system that supported a population conservatively estimated to be 300,000 people.”<sup>11</sup> Each island, or sometimes parts of an island, was ruled by a *mō‘ī* (chief) who controlled the lands within his district.<sup>12</sup> The islands were further divided into *ahupua‘a*, economically self-sufficient sections of land that ran from the mountains to the sea, often in pie-shaped wedges.<sup>13</sup>

The *mō‘ī* did not “own” land as understood in western law; rather, he controlled the lands, reserving certain lands for his own personal use and distributing other lands to lesser chiefs.<sup>14</sup> These lesser chiefs managed the lands under their control in a manner that would meet their obligations to the *mō‘ī*, yet would also ensure that the *maka‘~inana* (common people) of the *ahupua‘a* were adequately provided for.<sup>15</sup> Under the direction of the chief, or a *konohiki* (person appointed by the chief as a land manager), the *maka‘~inana* did most of the labor that produced food for the society.<sup>16</sup> Two aspects of this traditional land tenure system have turned out to be critically important in the development of the current property regime in Hawai‘i. First, although traditional Hawaiian society was hierarchical, with the *maka‘~inana* occupying the lowest strata, the *maka‘~inana* had rights to gather certain resources, to hunt and fish, and to cultivate certain lands for their own use.<sup>17</sup> These rights were later me-

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11. NATIVE HAWAIIAN RIGHTS HANDBOOK 3 (Melody Kailialoha MacKenzie ed., 1991) [hereinafter NATIVE HAWAIIAN].

12. *Id.* (citing E.S. HANDY & E.G. HANDY, NATIVE PLANTERS IN OLD HAWAII 53 (1972)).

13. NATIVE HAWAIIAN, *supra* note 11. “An *ahupua‘a* could range in size from 100 to 100,000 acres . . . An early Hawai‘i case explained that the *ahupua‘a* afforded to the chief and people ‘a fishery residence at the warm seaside, together with the products of the highlands, such as fuel, canoe timber, mountain birds, and the right-of-way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top.’ Many *ahupua‘a* were further divided into smaller units termed ‘*ili* and ‘*ili kōpono*. ‘*Ili* were merely subdivisions of the larger *ahupua‘a* created for the convenience of the *ahupua‘a* chief, while ‘*ili kōpono* were independent political units administered by separate chiefs or *konohiki*.” *Id.* at 3-4 [citations omitted].

14. *Id.* at 3.

15. MAHEALANI KAMAAU, HE ALO } HE ALO: FACE TO FACE 15, 18 (Roger MacPherson Furrer ed., 1993) (stating that freedom of movement by the *Maka‘~inana* meant that the chief had to provide for them).

16. “The *maka‘~inana* worked together under the direction of chiefs and priests in clearing the land, constructing irrigation systems, cultivating taro, building fish ponds for breeding fish, and many other communal endeavors. Each strata of society owed allegiance to those above and the *maka‘~inana* supported the chiefs and priests by their labor and its products.” NATIVE HAWAIIAN, *supra* note 11, at 4.

17. *Id.* at 18.

morialized by statute<sup>18</sup> and through the Hawai'i Constitution.<sup>19</sup> Second, the *maka'~inana* were not bound to the land, but rather were free to move from one district or *'ahupua'a* to another.<sup>20</sup>

Arrival of Captain Cook and the "discovery" of the Hawaiian Islands in 1778 marked the beginning of the end of Hawai'i's traditional social system, including its land tenure system. The influx of westerners following Captain Cook's voyages led to substantial changes. Western diseases seriously reduced the population of native Hawaiians introduction of a cash economy replaced the former communal based economic system, and lands once available for forage and food production became unavailable to the vast majority of native Hawaiians. This followed the conversion of the land tenure system to one based upon fee simple ownership of land. During the early period of the transition, many conflicts arose between native Hawaiians and foreigners over land. Although the ruling kings during this era attempted to preserve the traditional land system, foreign interests eventually won the power struggle, culminating in the *Mahele* process.<sup>21</sup> The *Mahele*, which began in 1848, paved the way for fee simple ownership of land in Hawai'i.

Three aspects of the *Mahele* are germane to understanding today's property regime. First, the *Mahele* resulted in the King retaining approximately sixty percent of the land, which he then divided into two portions. He set aside 1.5 million acres for "the chiefs and people" that were subject to the rights of native tenants and became known as "government lands."<sup>22</sup> The King kept the remaining lands (Crown lands) under his control, subject again to the rights of native tenants.<sup>23</sup> Second, the chiefs, whose lands are known as *konohiki* lands, were required after the *Mahele* to make claim to their lands before a Land Commission, at which time they received "awards to their lands by name only."<sup>24</sup> Third, the interests of the *maka'~inana* were set out in the Kuleana Act which authorized the Land Commission to grant native tenants, upon application, fee simple ownership in their lands.<sup>25</sup> The end result of this process was the allocation of less than one percent of land in Hawai'i to the *maka'~inana*, many of whom eventually lost title to their land due to their lack of understanding of the newly-imposed western legal system; chiefs did not fare much

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18. HAW. REV. STAT. §§ 1-1, 7-1 (1995).

19. Haw. Const. art. XII, sec. 7.

20. NATIVE HAWAIIAN, *supra* note 11, at 4.

21. NATIVE HAWAIIAN, *supra* note 11, at 6-10. The *Mahele* was a several year process that divided the lands in Hawai'i among the king, the chiefs, and native tenants. *Id.*

22. *Id.* at 7.

23. *Id.*

24. *Id.*

25. *Id.* at 8, citing the *Kuleana* Act of August 6, 1850, Revised Laws 1925 at 2141-42.

better.<sup>26</sup> By 1890, a little over 100 years after the arrival of Captain Cook, three-quarters of the land in Hawai'i was under the ownership or control of non-Hawaiians.<sup>27</sup>

Three years later, in 1893, the transformation was completed when a group of U.S. businessmen, with the assistance of U.S. Minister to Hawai'i John Stevens, de-throned Queen Lili'uokalani, the reigning monarch. Following the overthrow, they established a provisional government which in 1894 became the Republic of Hawai'i.<sup>28</sup> Under the Republic's constitution, all Government and Crown lands inured to the Republic.<sup>29</sup> Hawai'i was annexed to the United States in 1898, became a territory in 1900, and a state in 1959.<sup>30</sup> At statehood, title to the former Government and Crown lands, which had been ceded by the Republic to the U.S. upon annexation, was transferred to the state with some exceptions.<sup>31</sup>

One of the most remarkable aspects of this story is that despite the dramatic social, cultural, and economic changes, much of the culture and traditions of native Hawaiians survived.<sup>32</sup> Upon statehood, efforts were made to ensure that these traditional practices would be protected by law. Haw. Rev. Stat. § 1-1 establishes Hawaiian customary practice as part of the laws of the state, putting Hawaiian custom on equal footing with the common law.<sup>33</sup> Haw. Rev. Stat. § 7-1 preserves gathering rights for certain materials, access rights, and rights to drinking water.<sup>34</sup> In 1978, native Hawaiian gathering rights gained constitutional protection. Article XII, section 7 iterates the state's obligation to preserve and en-

26. *Id.* at 9.

27. *Id.* at 10.

28. *Id.* at 12.

29. *Id.* at 13.

30. *Id.* at 15-20.

31. *Id.* at 18.

32. Kapua Sproat, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. LAW REV. 321, 329 (1998).

33. "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution of laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage . . . ." HAW. REV. STAT. § 1-1 (1995).

34. "Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use." HAW. REV. STAT. § 7-1 (1995).

force such rights: "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."<sup>35</sup> With this backdrop, the next section discusses how the Hawai'i Supreme Court has interpreted these statutory and constitutional provisions in light of Hawai'i's unique history.

### III. FROM KALIFI TO KA PA'AKAI

As noted above, Hawai'i's constitution, revised in 1978, protects cultural rights of native Hawaiians.<sup>36</sup> The extent of the state's power "to regulate such rights" is not clearly defined. By statute, Hawai'i's common law also incorporates cultural norms that limit the familiar "common law of England, as ascertained by English and American decisions," by other laws "established by Hawaiian usage."<sup>37</sup>

The relationship between Western law and the traditions of native Hawaiians was tested in *Kalipi v. Hawaiian Trust Company, Ltd.*<sup>38</sup> The case involved an attempt by William Kalipi, a native Hawaiian, to enter privately owned land on the island of Moloka'i in order to engage in traditional gathering practices.<sup>39</sup> The land at issue was undeveloped and part of an *ahupua'a*. Because Kalipi owned a parcel of land within the *ahupua'a*, he claimed that his ownership gave him gathering access within the entire *ahupua'a* under native Hawaiian tradition.<sup>40</sup> The owner of the larger parcel, Hawaiian Trust Company, argued that whatever Kalipi's rights were under traditional law, those rights must yield to its right to exclude, a power granted by the almighty fee simple absolute.<sup>41</sup> But the court rejected this reasoning. Drawing from the acknowledgement of traditional rights under the state constitution and the common law (as secured by statute), the court reasoned that traditional property rights must not always shrink against western ones. "We recognize," the Court wrote:

that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity tradi-

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35. Haw. Const. art. XII, § 7.

36. Haw. Const. art. XII, § 7.

37. HAW. REV. STAT. § 1-1 (2001).

38. 656 P.2d 745 (1982).

39. *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 747 (1982).

40. *Id.* The arguments are based on ancient statutes, customs and tradition, and a reservation in all Hawai'i fee simple conversions. *Id.*

41. *Id.*



tionally associated with fee simple ownership of land. But any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail.<sup>42</sup>

The court suggested that the competing notions of exclusivity and access for native Hawaiians be determined by “balancing the respective interests and harm” on a case-by-case basis.<sup>43</sup> Where the land at issue is undeveloped, harm to the owner is minimal and outweighed by the interests of native claimants. The court thus fashioned a rule permitting “lawful occupants of an [ahupua‘a] . . . [to] enter undeveloped lands within the [ahupua‘a]” to gather traditional items.<sup>44</sup> Limiting native access to undeveloped land was key. Otherwise, the court reasoned, “there would be nothing to prevent residents from going anywhere within the ahupua‘a, including fully developed property to gather enumerated items.”<sup>45</sup> Such a result would “conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral to parts of the culture.”<sup>46</sup>

Ultimately, the court never applied this rule because it found instead that Kalipi had lost his gathering rights under traditional law when years ago he ceased living on his land in the ahupua‘a, even though he continued to own the property.<sup>47</sup> The detail is instructive because it shows, ironically, how the court’s application of a more traditional concept of access rights (which linked access not to ownership, but to actual residence in the ahupua‘a) proved to be the undoing of Kalipi’s claim.

The Court’s defense of traditional gathering rights and its proposed balancing test, both dicta in *Kalipi*, took the force of law in *Pele Defense Fund v. Paty*,<sup>48</sup> a case involving a native Hawaiian group’s claim to gathering rights on private undeveloped land based on members’ historical and customary practice, rather than on members’ residence within the ahupua‘a.<sup>49</sup> The court in *Pele Defense Fund* affirmed the reasoning of *Kalipi*, finding that traditional claims based on use as well as on residence could be protected assuming that the objecting landowner’s interests did not outweigh those of the native Hawaiian people.<sup>50</sup> Balancing the inter-

42. *Id.* at 748.

43. *Id.* at 751.

44. *Id.* at 749.

45. *Id.* at 750.

46. *Id.*

47. *Id.* at 752.

48. 837 P.2d 1247 (1992) (holding that the greater protection afforded by the Hawai‘i constitution gave standing to those seeking to enjoin a breach of public trust).

49. *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1270 (1992).

50. *Id.* at 1271.

ests and harms before it, the court in *Pele Defense Fund* ruled in favor of the native Hawaiians, stressing the "undeveloped" status of the land and the absence of potential harm.<sup>51</sup>

But what if the landowner has plans for development? The question arose in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH)*,<sup>52</sup> which considered whether Hawai'i island's Planning Commission had acted properly in granting a special management area (SMA) permit for development of a resort complex on the Island of Hawai'i.<sup>53</sup> While the facts of *PASH* are complicated, the substantive dispute essentially involved an opposition group's claim that in granting the SMA permit without proper restrictions, the Planning Commission had failed to protect the traditional gathering rights that then existed on the land.<sup>54</sup> The land developer defended the permit grant on the grounds that the Planning Commission owed no special duty to protect native cultural rights; and even if it did, the developer argued, those cultural rights necessarily yield to the developers' right to develop.<sup>55</sup> In an opinion that would surprise most lawyers in the Lower Forty-Eight, Hawai'i's Supreme Court rejected both arguments.

Quoting the state's constitution, the court held that because the state owed a duty to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes," the Planning Commission must protect against unreasonable adverse cultural effects.<sup>56</sup> It then went on to say that even though *Kalipi* and *Pele Defense Funds* involved access claims to undeveloped land, that fact was not essential to the reasoning.<sup>57</sup> Rather cultural and development interests would be balanced to determine if one outweighed the other. In the case of "fully developed" land, the court suggested that the burden of providing cultural access might prove unreasonable. But where a project was still in the planning stage, that is, "less than fully developed," a planning commission might be required to forge a compromise in which both native Hawaiians and resort guests could happily share the land.<sup>58</sup>

To those wary of promoting conflicts over land, the court served up the state's well-known "aloha spirit:" "Although this premise [of fee ownership limited by cultural rights] clearly conflicts with common 'understand-

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51. *Id.* at 1272.

52. 903 P.2d 1246 (1995).

53. *Pub. Access Shoreline Hawaii v. Hawai'i County Planning Comm'n*, 903 P.2d 1246, 1250 (1995).

54. *Id.* at 1256.

55. *Id.*

56. *Id.* at 1258 (quoting HAW. CONST. art. XII, §7).

57. *Id.* at 1259.

58. *Id.* at 1272.

ings of property' and could theoretically lead to disruption, the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances."<sup>59</sup> This statement is striking in its optimism (and, perhaps, naïveté), but it is striking in another way too: here the court justifies its approach to the rights of cultural access by drawing not only from native Hawaiian law, but from native Hawaiian *attitude or personality*, which the court believes will allow this otherwise confrontational rule to work smoothly in practice.

Still, several questions about use balancing remained unresolved. First, how comprehensive must development be before cultural rights must yield to it? Where land is undeveloped, the Supreme Court suggests cultural rights will often trump landowner's right of exclusion.<sup>60</sup> Where land "is less than fully developed," both landowner and native gatherers may have to adapt their uses in the interest of coexistence.<sup>61</sup> But under what conditions would further compromise on the part of landowner prove too much? And under what conditions would further compromise on the part of native Hawaiians prove too much? Second, *PASH* left open the question of what people could legitimately claim cultural access rights. Recall that these rights are based on non-western law, flowing from the "native Hawaiians' pre-existing sovereignty."<sup>62</sup> Who, then, is heir to these rights? Must a claimant trace her lineage to a pre-1778 island resident? Or is it enough to trace one's lineage to a citizen of the Kingdom of Hawaii (who may not have resided there before 1778)? Third, what analysis must state and county agencies undertake to ensure they adequately balance private property rights with native Hawaiian gathering rights as required in *PASH*?

The first two questions remain unanswered. But in 2000, the Hawai'i Supreme Court answered the third question in *Ka Pa'akai o ka 'Aina v. State Land Use Commission*.<sup>63</sup> *Ka Pa'akai* arose from a decision by the state Land Use Commission (LUC) to reclassify roughly one thousand acres of land in the Ka'upulehu *ahupua'a* on the Big Island of Hawai'i. The reclassification, from a state "Conservation District" to an "Urban District," would have allowed the developer to expand its neighboring resort complex (adding buildings, landscaping, a golf course, and so on), but also threatened to disrupt native Hawaiian practices that took place on that land.<sup>64</sup> Mindful of the state's responsibility (as articulated in *PASH*) to protect cultural practices, the LUC included in its reclassifica-

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59. *Id.* at 1268 [citation omitted].

60. *Public Access Shoreline Hawaii*, 903 P.2d at 1272.

61. *Id.* at 1271.

62. *See id.* at 1270.

63. 7 P.3d 1068 (2000).

64. *Ka Pa'akai o ka 'Aina v. State Land Use Commission*, 7 P.3d 1068, 1087 (2000).

tion grant a one-page discussion of impact on culture and a general condition that the developer "preserve and protect any gathering and access rights of native Hawaiians."<sup>65</sup> Hawaiian activists charged that these minimal efforts were inadequate and the court agreed.<sup>66</sup>

On the subject of fact-finding, the court found the LUC's one-page discussion of cultural impact insufficient and cursory at best. It then set down a minimum standard to be followed by the LUC where cultural land-use rights were at stake. Specifically, the LUC must make "specific findings and conclusions" as to the following:

- (1) 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; (2) the extent to which those resources— including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.<sup>67</sup>

The court noted that the LUC's grant of permission neither specifically identified the Hawaiian rights that would be affected nor consider specific kinds of protective actions the developer might employ. On the subject of the LUC's vague condition that the developer, by itself, work to protect cultural rights, the court found this an impermissible delegation of the state's responsibility to oversee its protective mandate. If the LUC appeared unable or unwilling to identify cultural rights needing protection, how could it expect a private company—the developer, no less—to engage in such efforts? Thus, the court in *Ka Pa'akai* required the LUC to actively research cultural rights issues, propose protective limits on development plans if needed, and to supervise the developer's adherence to those limits.

#### IV. APPLYING *KA PA'AKAI*

##### A. Case Studies: *Ka'upulehu and Destination Villages Kaua'i*<sup>68</sup>

###### 1. The Context

The state has a significant role in land use decisions in Hawai'i. All lands of the state are zoned into one of four districts: conservation, agri-

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65. *Id.* at 1076.

66. *Id.* at 1085.

67. *Id.* at 1072.

68. Professor Jarman, one of the authors of this article, was a member of the state Land Use Commissions during the first and second *Ka'upulehu* cases as well as for the

culture, rural, or urban.<sup>69</sup> A property owner is restricted to using her property only for those uses permitted in the district.<sup>70</sup> Because the vast majority of land in Hawai'i falls into the conservation and agriculture districts,<sup>71</sup> most large urban-like developments, such as the resorts at issue in our two case studies, go through the quasi-judicial boundary amendment process of the state Land Use Commission (LUC).<sup>72</sup> When approving boundary amendments, the LUC's practice has been to attach conditions to the approval that are designed to mitigate adverse impacts of the development and which are now being used to comply with the Commission's statutory and constitutional duties to native Hawaiians as interpreted by the Hawai'i Supreme Court in *PASH* and *Ka Pa'akai*.

## 2. Ka'upulehu

The state Land Use Commission had its first opportunity to implement the *Ka Pa'akai* opinion when the Court remanded the Ka'upulehu boundary amendment petition to the LUC to apply the new analytical framework. After holding further hearings on the matter,<sup>73</sup> the LUC adopted a new final order that included the findings necessary to comply with *Ka Pa'akai*. The order re-affirmed the decision to grant the boundary amendment, but attached additional conditions to comply with the *Ka Pa'akai* decision. None of the parties, including the native Hawaiian intervenor groups, had any substantial objections to the compromise reached in the final order.

Unlike the original order, the amended order identified "valued cultural resources" found in the petition area as well as the traditional and customary practices exercised there. The primary resources identified are Pele's Tears,<sup>74</sup> *kupe'e*,<sup>75</sup> sea salt, and certain archeological sites; in addition, the decision recognized that some consider the entire lava flow to be

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Destination Villages Kaua'i decision. Much of the information in this section is based upon her experiences as one of the decision-makers in the two case studies.

69. HAW. REV. STAT. § 205-2(a) (Supp. 2001).

70. HAW. REV. STAT. § 205-2.

71. See HAW. REV. STAT. § 205.

72. The nine-member Land Use Commission has jurisdiction over boundary amendment petitions of greater than fifteen acres. HAW. REV. STAT. § 205-4 (Supp. 2001). Commissioners are appointed to four year staggered terms by the Governor with the advice and consent of the Senate. HAW. REV. STAT. § 205-1 (1993). The statute provides that Commissioners receive no compensation for their services. *Id.*

73. The hearings were not designed to gather additional information, but rather to give the parties the opportunity to make their recommendations on how to craft a new decision using the new analytical framework and the evidence adduced in the original hearing process.

74. Pele's Tears are pebble-sized, tear-shaped lava created during certain types of volcanic eruptive events.

a *wahi pana*, which in Hawaiian culture is a storied place of significant historical and cultural value. The D&O designates a 235-acre resource management area in a coastal portion of the property that is to be set aside and managed for both natural and cultural resource protection.

One of the most unique provisions in the LUC's order is the creation of the Ka'upulehu Development Monitoring Committee (KDMC) to settle any conflicts arising over the exercise of native Hawaiian cultural practices in the petition area. The developer must fund the KDMC, which is comprised of "(1) a person of native Hawaiian ancestry who is knowledgeable regarding the type of cultural resources and practices within the Petition Area, as selected from a list of three names submitted by each of the parties . . . ; and (2) a management member knowledgeable regarding the type of cultural resources and practices within the Petition Area, as selected by Petitioner and landowner."<sup>76</sup> At a subsequent hearing, the LUC chose the person recommended by the intervenor groups to serve as the native Hawaiian KDMC member.

What did native Hawaiians gain and lose in the balance struck by the LUC? First and foremost, they gained a stronger voice. In its remanded decision, the LUC was forced to do more than pay lip service to the cultural interests and rights of native Hawaiians. The LUC had to make explicit the trade-offs. Under the initial order, the developer would have made those trade-offs with little, if any, real consultation with cultural practitioners. In the second order, native Hawaiians were given a prominent role in ensuring compliance with the conditions protecting native Hawaiian cultural practices and resources through their co-equal participation in the KDMC; in addition, the native Hawaiian member can be compensated for her time on the KDMC through the requirement that the developer fund the work of the KDMC.

Second, the trade-offs in the later order benefited native Hawaiians more than in the initial order. For example, even though the gathering of Pele's Tears in most of the development area would no longer be possible under either order, more of the coastal portion of the property gained protection in the second order to preserve salt gathering, opihi, limu, and *kupe'e* harvesting. When the first order was issued, the resource management plan for the 235 acres was conceptual only. By the issuance of the second order, the resource protection and native Hawaiian use portions were more fleshed out. Access rights were also stronger in the second order.

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75. *Kupe'e* are small edible marine snails whose shells were used for ornaments. HAWAIIAN DICTIONARY 170 (1971).

76. Remanded Ka'upulehu FOF, COL, D&O at 47.

What did the native Hawaiians lose? They lost the sense of place that this undeveloped lava flow represented. Native Hawaiian fishermen lost landmarks on the lava flow used for navigation and as an aid for locating productive fishing grounds. In some instances, generations of fishermen had used these landmarks, some of which had cultural significance to their fishing. Native Hawaiian practitioners also lost part of the sacredness of their practice. For example, salt gathering is more than going to the seaside and scraping sea salt from depressions in the lava; it involves certain protocols and is a spiritual experience that can't be separated from its context. Salt gathering at a wild undeveloped area of the coast is an entirely different experience from gathering salt within feet of a golf fairway or green. And as one of the native Hawaiian witnesses in the first hearing told the LUC, loss of that more indefinable nature of the cultural practice leads inexorably to a loss of cultural identity, both for individuals and the larger native Hawaiian community. The practice is no longer the same. It is changed, and changed on western terms, not as a natural evolution of a culture.

### 3. Destination Villages Kauai (Kapalawai)

The Kapalawai boundary amendment raised issues different from Ka'upulehu because the petition area has been used as a ranch, farm and dairy since its purchase in 1865 by the ancestors of the current owners. Evidence presented at the hearings suggests that even before the Sinclair-Robinson family bought the property,<sup>77</sup> Hawaiians did not settle in or use this area extensively. The only feature of the property with known Hawaiian usage is a 6.5 acre degraded fishpond; fire ash deposits confirm some prior habitation near the fish pond by the *maka'~inana* around 1100 A.D.<sup>78</sup> Historical evidence indicates that the fish pond was used historically by both the *ali'i* (chiefs) and the *maka'~inana* for fish farming and to provide a home for a legendary *mo'o wahine* that sat on a *pohaku* (rock) near the edge of the pond. Presence of a *mo'o* in a pond was said to contribute to the productivity of the pond.

The focus of the *Ka Pa'akai* analysis was on the fishpond itself. This boundary amendment differed also in that no native Hawaiian groups intervened as parties in the process.

The developer's plans included restoration of the fishpond using traditional and cultural methods of pond repair and reconstruction. Once rebuilt, the pond would be stocked and then maintained and operated as a

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77. Mrs. Sinclair bought the property in 1865. Because the family jealously guarded their privacy, no outsiders were permitted on the property without prior permission.

78. No one documented any Hawaiian usage after the Sinclairs bought the property in 1865.

Hawaiian fishpond with provisions for native Hawaiians to harvest fish using traditional methods. These plans were memorialized in the LUC order as a condition of the reclassification. Under the LUC order, more detailed decisions regarding restoration, maintenance, access and use will be undertaken by a fishpond entity modeled after the KDMC. The two-member Kapalawai Fishpond Committee is charged with developing a management plan for the maintenance, operation, and use of the fishpond consistent with traditional and customary Hawaiian practices. It also prohibits the building of any structure within one hundred (100) feet of the fishpond.

What did the native Hawaiian community gain from the Kapalawai decision? First and foremost it gained the full restoration of an inactive, degraded fishpond that would otherwise have disappeared with time. Second, since the pond is designated solely for traditional and customary use, it will provide a place to teach the younger generations about the role of fish ponds in the culture and let them participate in that aspect of their traditions, helping the traditions to flourish and evolve. Third, for the first time in over a century in a half, native Hawaiians will have access to this property.

Because the petition area was already degraded and off limits for traditional and cultural uses, the community lost little directly from the reclassification. Some would argue, however, that any major development that dramatically changes the landscape puts stress on the *'~ina* (land) and the adjacent ocean and its resources. Increased run-off from the development could lead to degradation of offshore waters that could ultimately impact fishing and use of the waters by native animals such as the Pacific green sea turtle and the Hawaiian monk seal. It's debatable as to whether the LUC delegated too much decision-making power to the Kapalawai Fish Pond Committee by not mandating clearly how the pond is to be used, defining what traditional uses are to be allowed and who has access, among others.<sup>79</sup> As such, the order is arguably inconsistent with the Supreme Court's mandate in *Ka Pa'akai* and sets a bad precedent for future decisions.

#### V. BEYOND THE "COURTS OF THE CONQUEROR"

It is clear Hawai'i's unique property law will continue to shift, change shape, and evolve. It is equally clear that the greatest modifications will not follow from internal dynamics, but from external ones—pressure from Hawaiian activists to soften western ideals of exclusive property use, pressure from real estate developers to bend native Hawaiian rituals

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79. In fact, the co-author of this essay and one other commissioner voted against the reclassification for that very reason.



away from requirements of vast open space. The progressions of state property law and culture will always be open to objections that their development is “unnatural” and, therefore, undesirable. In this sense, any attempts by the courts or the LUC to “balance” development are innately artificial.

But that does not mean that *Ka Pa‘akai*’s balancing approach is wrong. On the contrary, it provides the very real hope of protecting native practices from the bulldozers of development—not completely, not always, but at least to a degree that may vastly improve the lives of many native Hawaiians. We say, “may” because we are acutely aware that the promise of *Ka Pak‘akai* to native Hawaiians has not been realized. That would require more responsibility and supervision on the part of the LUC and other agencies to protect native Hawaiian rights. But the opportunity is there for judges and agency officials to protect the interests of those whom recent history has cast aside. These leaders should insist on broader protections for cultural access to property, backing them up with detailed orders subject to governmental supervision. At stake is what image Hawaiian property law will ultimately assume—a sword issued from the Courts of the Conqueror or a tapestry rising from the Courts of the *kanaka*, that is, “the people.”