Putting the Public Back in the Public Trust Doctrine: A Reinterpretation to Advance Native Hawaiian Water Rights

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PUTTING THE PUBLIC BACK IN THE PUBLIC TRUST DOCTRINE: A REINTERPRETATION TO ADVANCE NATIVE HAWAIIAN WATER RIGHTS

Steven Hindman*

Abstract: The public trust doctrine guarantees that the government will hold natural resources in trust and protect them for the common good. The doctrine has played a key role in the allocation of water rights, particularly for Native American and Native Hawaiian interests in the United States. State and federal courts often consider the doctrine when deciding if certain use rights should be granted. In Hawai‘i, the doctrine has taken on a particularly robust form because the State Constitution expressly provides that all public natural resources are to be held in trust for the benefit of all Hawaiians. Unfortunately, the doctrine’s application has not always benefited Native Hawaiian interests.

This Comment analyzes the current status of the public trust doctrine in Hawai‘i and its unique relation to Native Hawaiian rights. Because the State has historically prioritized large sugar plantations on the islands over its Native population, modern applications of the doctrine to protect the islands’ natural resources are a relatively new concept in Hawaiian law. By evaluating statutes and cases from the Kingdom of Hawai‘i (1795–1893); the Territory of Hawai‘i (1900–1959); and the current State of Hawai‘i (1959–present), this Comment builds a more complete picture of Hawaiian jurisprudence around natural resource allocation and explores ways to reinterpret the public trust doctrine. One of the purposes of the doctrine has been to protect Native Hawaiian water rights and to uphold the exercise of Native Hawaiian traditions and customs, yet the State has yet to live up to that purpose. The State Legislature should enact laws that require consultation with Native cultural organizations when a state agency issues any permit in land, water, or other natural resource or when any court reviews the allocation and use of any natural resource.
INTRODUCTION

Some Native Hawaiians consider the Mauna Kea Mountain to be an ancestor: a living parent of Wākea (Sky Father) and Papa (Earth Mother). The summit is widely known as the “Kūkahau’ula (a cluster of cinder cones), . . . a wahi pana (storied place) and wao akua (the place where gods reside).” The “piko (navel)” touches the sky in a way that those who visit become aware of the connections to their ancient ancestors. Numerous shrines pepper the mountain, indicating a pattern of pilgrimage or “a walk upward and backward in time to cosmological origins” to worship various deities. The Mauna Kea summit can be thought of as the “piko ho’okahi (the single navel),” which secures the “spiritual and genealogical connections, and the rights to the regenerative powers of all that is Hawai‘i.” Before Europeans explored the islands of Hawai‘i, Native Hawaiians considered the summit off limits to all but the highest chiefs and priests.

The Mauna Kea summit has been a point of contention for Native Hawaiian rights. The State of Hawai‘i and the University of Hawai‘i sought use of the summit for the gigantic Thirty-Meter-Telescope (TMT) because of its favorable conditions for space observation. This project would be the first of its kind in size and capabilities but would desecrate highly sacred land.

1. J.D. Candidate, University of Washington School of Law, Class of 2024. I would like to acknowledge those affected by the recent wildfires in Maui. To donate to the relief efforts, please visit https://www.hawaiicommunityfoundation.org/maui-strong. I would also like to thank Professor Eberhard for his instrumental guidance and precious time spent helping me with this Comment. Finally, I would like to thank all my Washington Law Review colleagues for their thankless editing efforts.


3. Id.

4. See id. at 758.

5. Id. (quotation marks omitted).

6. Id.

7. Id.

8. See id. at 758–59.

9. See id. at 757, 759.
(CDUA) HA-3568 (Mauna Kea), the Hawai‘i State Supreme Court ruled in favor of the University and held that the public trust principles supported the construction of the TMT. Cases like this illustrate the need to adapt Hawai‘i’s public trust doctrine to meet the needs of the Native residents.

Native Hawaiians have always maintained some legal rights to use their land and water for subsistence farming practices. The State of Hawai‘i has a troubled relationship with the greater Native Hawaiian population, often because the State puts the interests of the influential sugar industry above all else. The Hawai‘i State Supreme Court has acknowledged in several opinions that the State owes some duty to protect the scarce and valuable resources on the islands. This acknowledgement has led to the emergence of the public trust doctrine through Hawai‘i State Supreme Court precedent. This Comment harmonizes the needs of Native Hawaiians with the needs of the state to protect its resources. Additionally, this Comment argues that the public trust doctrine can go beyond simply protecting the natural resources of the state and protect the people who have historically used and conserved those resources. By looking at recent decisions from the Court stripping Native Hawaiians of their rights, this Comment demonstrates the need for reforms and provides proposed amendments to better support Native rights. It is imperative to always uphold Native rights and freedoms in any situation. How the government treats one group of people informs us of how they treat

10. 431 P.3d 752 (Haw. 2018).
11. Id. at 775.
12. See Shaunda A.K. Liu, Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders, 25 U. HAW. L. REV. 85, 86–87 (2002) (explaining that “[i]n ancient times, the land and its resources were under the control of the king, who in turn parceled out areas to his chiefs and supporters down to the common people”); see also Hawaiian Homes Commission Act, 1920, Pub. L. No. 67–34, ch. 42, § 207(a), 42 Stat. 108, 110–11 (1921) (codified as amended in HAW. CONST. art. XII, §§ 1–3) (noting “[t]he commission is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands” for agricultural, aquacultural, pastoral, or residential purposes); see also HAW. REV. STAT. § 174C-101(c) (2022) (enumerating “traditional and customary rights [of Native Hawaiians] . . . include, but [are] not . . . limited to, the cultivation or propagation of taro on one’s own kuleana”).
13. See infra section I.D.
14. See, e.g., McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1338–39, aff’d on reh’g, 517 P.2d 26 (Haw. 1973) (concluding that the State of Hawaii’s is the “owner of the water [in streams in rivers]” and this water is “reserved for the people of Hawaii for their common good”); Reppun v. Bd. of Water Supply, 656 P.2d 57, 66–67 (Haw. 1982) (explaining that the Supreme Court justices concurred with the “conclusion reached in McBryde that . . . the ownership of water in natural watercourses, streams, and rivers remained in the people of Hawaii for their common good”).
15. See infra section I.F.
others. By ensuring our laws and judicial precedents protect Native Hawaiian rights, society as a whole benefits.

Part I of this Comment explores the complex history of Native Hawaiian water laws and explains how the legal landscape shifted when westerners encountered the islands. Concurrently, Part I establishes a framework for the public trust doctrine that led to the landmark McBryde Sugar Co. v. Robinson decision and the subsequent implementation of the doctrine into Hawai‘i State statutes. This framework creates a more complete picture of the doctrine and how it relates to Native Hawaiian culture and traditions. Part II analyzes the In re Water Use Permit Applications (Waiāhole Ditch) and Mauna Kea opinions to demonstrate when the doctrine can be used to benefit Native Hawaiians and, alternatively, when the doctrine can be used to acquire Native land and harm Natives in the process. In Part III, this Comment explores how the public trust doctrine can be amended in state statutes to require Native input in any resource allocation decision. Finally, this Comment concludes by framing the public trust doctrine in the context of the larger battle for increased sovereignty for the Native Hawaiian people and provides proposed amendments.

To develop a more accurate conveyance of Native storytelling, this Comment will use many important Native Hawaiian terms and expressions throughout. The use of these terms reflects the need to remain true to the Native perspective and reject the common practice of westernizing Native culture and erasing Native history. Each term will be defined at its first use but, for convenience and clarity, this Comment includes an appendix following the conclusion.

I. THE DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE IN HAWAI‘I

To examine the status of Native Hawaiian rights and their relationship to the public trust doctrine, this Part provides a brief history of Native Hawaiian laws relating to water, Anglo-American property concepts and their influence on the islands, and public trust doctrine jurisprudence which became enshrined in state statutes and the Hawai‘i Constitution.

16. See, e.g., Luis Angel Toro, “A People Distinct from Others”: Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15, 26 TEX. TECH L. REV. 1219, 1241 (1995) (“While gross physical similarities are used as shorthand for the differences among at least some of these groups, it is economic, political, and social forces, and not physical differences, that act to keep these groups internally similar and externally somewhat separate from the rest of society.”).
17. 504 P.2d 1330, aff’d on reh’g, 517 P.2d 26 (Haw. 1973).
18. 9 P.3d 409 (Haw. 2000).
This history details a foundation of ancient Hawaiian connections to water and the concurrent development of the public trust doctrine as an attempt to reconnect Native Hawaiians to those waters.

A. History of Native Hawaiian’s Relationship with Water

“Mai hō’oni i ka wai lana mālie”: “Do not disturb the water that is tranquil.”\(^{19}\)

“The very first laws or rules . . . that the ancient Hawaiians ever had are said to have been those relating to water.”\(^{20}\) The ancient Hawaiians—the Kānaka Maoli—viewed water as a shared public resource for drinking and supplying life to the ecosystems that connected the streams and the mountains.\(^{21}\) The Kānaka Maoli developed complex social hierarchies to maintain the subsistence farming of taro and other crops.\(^{22}\) The Kānaka Maoli used ‘Ōlelo Hawai‘i, the islands’ Native language, and developed a land system where every “ahupua’a (land division)” had a “konohiki (resource manager/landlord)\(^{23}\)” who assigned a “kahuwai (water resource manager).”\(^{24}\) The chiefs delegated their supervisory power to the konohikis, who were lesser ranking chiefs.\(^{25}\) The kahuwai oversaw the distribution of water to the community and individual “‘Ohana (families)” managed the water for taro production.\(^{26}\)

The Kapu, or Codes of Behavior, imposed rules to ensure that no one polluted the streams.\(^{27}\) The konohiki made sure that all tenants of the ahupua‘as had the same access to water.\(^{28}\) The role and authority of the konohikis correlated directly with their duties to the maka‘ainana (commoners, native tenants).\(^{29}\) Under the system, each konohiki’s

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19. The expression is understood to mean that people should allow the “peaceful [to] enjoy their peace.” MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 2053 (Mary Kawena Pukui trans., 1983).
22. See id. at 205–06.
24. Nakanelua, supra note 21, at 206.
26. See Nakanelua, supra note 21, at 206.
28. Id. at 88.
29. See id. at 85, 88.
“‘right’... to control water was inseparable from his ‘duty’ to assist each of the deserving tenants.”

In this respect, early Hawaiians based their property and legal principles on the use of their own land and water, instead of relying on concepts of ownership. Westerners arrived in 1778 and imposed Anglo-American land ownership concepts alongside the development of industrial agriculture for sugarcane.

B. Anglo-American Water Law

Hawai‘i courts, utilizing existing Anglo-American common law, have interpreted Native Hawaiians’ rights to water by framing some of them as riparian rights. Riparian means “relating to... or located on the bank of a watercourse.” The riparian doctrine, which refers to riparian rights to water in its most basic form, means that property owners whose land abuts a source of water are entitled to use such water. So, riparian land refers to “a tract of land that borders on a watercourse or lake” and a riparian proprietor is someone “who is in possession of riparian land or who owns an estate in it.” Under a riparian system, the riparian proprietor may use water only if the water source is adjacent to or flowing through their property. The right is considered to be a use right—or usufruct—meaning a riparian proprietor does not own the water itself, like someone

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31. Ho‘oi’o Kāla‘ena'aua’ua Pa Martin et al., supra note 25, at 88 (emphasis added).
32. Cf. Reppun, 656 P.2d at 66–68 (explaining that in Hawai‘i, “the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom”); Nakanelua, supra note 21, at 204, 207 (describing the arrival of westerners to the islands as causing “the islands [to become] a hotspot for industrial agriculture, specifically the cultivation of sugar cane”).
33. See Reppun, 656 P.2d. at 67 (explaining that in Hawai‘i, “the presence of the riparian doctrine in this jurisdiction had, prior to 1930, been repeatedly adverted to in our caselaw”).
37. Id. § 844.
38. See Harris v. Brooks, 283 S.W.2d 129, 132 (Ark. 1955) (“[Riparian theory] is based on the old common law which gave to the owners of land bordering on streams the right to use the water therefrom for certain purposes, and this right was considered an incident to the ownership of land.”); Williams v. Altnow, 95 P. 200, 209 (Or. 1908) (“Every riparian proprietor is entitled to a reasonable use of the water of a nonnavigable stream flowing through his land, and, after the natural wants of all the other riparian proprietors have been supplied he may use their corresponding rights.”).
In the United States, the doctrine has evolved into two main theories: (1) the natural flow theory and (2) the reasonable use theory. Natural flow theory argues that a landowner may only use the water for domestic purposes—e.g., drinking, livestock, and gardening—and is required to keep the water source at a normal level for all other users. During the nineteenth century, United States courts assigned riparian rights based on the natural flow theory. The riparian theory, in its most rigid application, was originally used by courts to decide ownership of water rights when mill operators needed to secure their access to the full flow of water from rivers. The doctrine worked for nineteenth century mill owners, but was highly inefficient because most water users had to allow the full flow of the stream to go into whatever water body the water source ended up draining into (thus resulting in less water for riparian proprietors).

The second main theory that evolved from the doctrine of riparian rights is the reasonable use theory. Reasonable use theory states that the essential right of each riparian landowner is to be “free from unreasonable uses” by third parties. As American industry grew in the mid- to late-nineteenth century, courts started recognizing the inefficiencies of forcing water users to leave the streams effectively unchanged and at a set level. The new doctrine, based in reasonableness, was developed by courts out of the “necessity and desirability” of getting further benefits

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39. See Samuel C. Wiel, Running Water, 22 HARV. L. REV. 190, 201–02 (1909); see also Davidson v. Vaughn, 44 A.2d 144, 147 (Vt. 1945) (“But our rule is that the grant of a right to take water from a stream or spring conveys a right in the land itself, and is something more than an easement; it is an interest partaking of the nature of a profit à prendre.”).


41. See Harris, 283 S.W.2d at 133.

42. See, e.g., Parker v. Griswold, 17 Conn. 288, 300 (1845) (“[P]roprietor[s] had no right to divert the stream, and thus prevent it from flowing to the plaintiff’s land . . . .”).

43. See id. at 299–300 (“Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his land, as it was wont to run, (currere solebat,) without diminution or alteration.”).

44. JASON ANTHONY ROBISON & ANTHONY DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:55 (John Damico & Sandy Clark eds., 2020).


47. See Dellapenna, supra note 46, at 68; see, e.g., Harris v. Brooks, 283 S.W.2d 129, 133 (Ark. 1955) (describing in detail the inefficiencies of natural flow theory as a reason for adopting reasonable use theory).
The use of the water by each riparian owner must be understood in relation to the uses of other owners. Courts determine the level of reasonableness of each use. For example, if an owner needed to use all of a river’s water for their manufacturing needs, this would be reasonable if others were making no use of it. Today, reasonable use theory has won out in most United States jurisdictions, but a significant number of courts still use natural flow language in their opinions.

Additionally, Native Hawaiians obtained the right to use adjacent water sources through the doctrine of appurtenance. Appurtenance means “[s]omething that belongs [to] or is attached to something else.” As a product of ancient property law, appurtenances largely appeared in connection to land transfers or leases in land. Historically, when deeds and leases were more technical, including the phrase “appurtenant” greatly affected the right being transferred. An appurtenant easement, for example, traditionally referred to an easement created to benefit another tract of land. The general rule is that appurtenant easements attach to the land to be benefitted and cannot exist or be utilized apart from the dominant (benefitted) estate.

Today, the State of Hawai‘i has reinvigorated appurtenant rights as those attached to parcels of land that were “cultivated, usually in the traditional staple kalo, at the time of the [Great] Māhele of 1848.”

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48. Harris, 283 S.W.2d at 133.
49. See id.
51. See id. at 211.
54. Id.
55. See id.
57. See RESTATEMENT (FIRST) OF PROP. § 487, cmts. a, b (AM. L. INST. 1944).
C. The Great Māhele

Land, like water, was communally owned prior to the Māhele.60 European and American land policy, however, began to influence the Kingdom of Hawai‘i in the early 1800s after King Kamehameha III became concerned with the growing hostilities of foreigners on the islands.61 King Kamehameha III “did not want his lands to be considered public domain and subject to confiscation by a foreign power” and wanted “complete and free control over his lands.”62 The King did three things: (1) established the islands’ first constitution in 1840,63 (2) created a Land Commission to investigate and rule on property claims,64 and (3) instituted the Great Māhele.65 The Great Māhele of 1848 (the Māhele) was a series of land partitions (māheles) which ended the feudal structure of land management in Hawai‘i and specified and divided property rights for the King, konohiki (resource managers/landlords), and the other classes of citizens.66

In December of 1847, the Hawai‘i Legislature and Privy Council established a set of rules to assist the King, chiefs, and the konohikis in splitting up their land rights and interests.67 Some of the important rules were the following:

(1) The King was to retain all of his private lands as his own individual property, subject only to the right of tenants.

(2) One third of the remaining lands was to be for the Hawaiian Government, one third for the chiefs and konohikis, and one third to be set aside for the tenants, the actual cultivators of the land.68

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62. Id. at 53.

63. Id. at 48.

64. Id. at 49.

65. See id. at 52–53.

66. See Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai‘i*, 20 U. HAW. L. REV. 99, 114–17 (1998); see also Chinen, supra note 61, at 52–53 (explaining that the feudal structure of labor was unsustainable for the Hawai‘i economy and it needed drastic reform).

67. Chinen, supra note 61, at 52–53.

68. Id. at 53.
In 1848, the first phase of divisions took place, causing 245 separate māheles (partitions) for individual chiefs or konohiki. Each division was effectively a quitclaim agreement—a conveyance of “title, right, and interest that a grantor has in the lands”—between the King and chiefs or konohiki with respect to the lands in which they claimed interests. The Māhele—the book that delineated the rules—did not actually convey land, as parties were still required to present their claims to the Land Commission to receive awards for the lands quitclaimed by the King. The lands delineated for the King were again divided to cement the division among the King’s own lands and the lands which would be allotted to the government. The lands owned by the government were thereafter referred to as government lands, while those owned by the King were thereafter referred to as Crown lands.

The Māhele changed everything by effectively privatizing land and water through its conveyances. In 1850, the Legislature passed the Alien Land Ownership Act and the Kuleana Act of 1850. The Alien Land Ownership Act granted foreigners the right to acquire and convey fee simple titles (“the broadest [conveyable] property interest allowed by law”) to whomsoever they wanted.

The Kuleana Act of 1850—later used as a justification for why Hawaiian lands remained in public hands—paved the way for the Land Commission to “make awards of small pieces of land to commoners for
subsistence purposes.” This effectively allowed common people to gain land in fee simple “to those parts of the lands of the government, the King or the chief or konohiki which they actually occupied and improved.” The Kuleana Act provided common tenants with the ability to apply for permanent titles to their property and land.

Supporters of various reforms in the land system hoped that reforms would result in a one-third split between the King, the chiefs and konohikis, and the common tenants, with each group receiving approximately the same amount of land. This, however, was not the case. Very few tenants actually acquired land. Tenants were unfamiliar with the new system and only had a short window where they could file their claims. Additionally, tenants had to deal with the difficult challenge of surveying the land while battling interference and threats by the chiefs and konohikis. Despite the supporters’ intentions, the Kuleana Act and Alien Land Ownership Act together caused the great dispossession of land out of the hands of the chiefs and commoners and into the hands of foreigners. The common people ended up owning less than one percent of the total acreage of Hawai‘i and, by 1896, around fifty-seven percent of the taxed land area was owned by white people and only fourteen percent to belonged to Native Hawaiians. The large shift in ownership of lands from the Māhele replaced the previous reciprocal relationship of the commoners with the chiefs, deteriorated living conditions, and caused the commoners to become a displaced, mobile population who were only occasionally employed in the new sugar

84. Sullivan, supra note 66, at 116 (emphasis omitted).
85. Wright, supra note 78, at 304 (quoting SALLY ENGLE MERRY, COLONIZING HAWAI‘I: THE CULTURAL POWER OF LAW 93 (2000)).
86. Chinen, supra note 61, at 53.
87. Id.
88. See Wright, supra note 78, at 304.
89. Id.
90. Id. at 304–05.
91. See Chinen, supra note 61, at 54–55.
92. The Great Displacement led huge numbers of foreigners to dispossess Native Hawaiians of their land. See Wright, supra note 78, at 305. Only nine percent of the population gained any land from the Māhele. Id. “[S]ome long time residents have the feeling that they are being dispossessed of their traditional access to the beauties and bounties of nature around them. . . . Frustration is felt as the future character of their shrinking world is being decided by landowners and developers.” Id. at 307 (quoting DAVIANNA PŌMAIKA‘I McGRGOR, NĀ KUA‘ĀINA: LIVING HAWAIIAN CULTURE 47 (2007)).
93. See Wright, supra note 78, at 305
94. Id.
The working conditions at these plantations were appalling, with “long hours, arduous and repetitive labor, and strict discipline.”

D. The Rise of the Powerful Sugar Industry and Its Effects on Hawaiian Water Law

The sugar industry in Hawai‘i started to take shape in the 1840s and 1850s, altering both the political and economic life on the islands by the end of the nineteenth century. The first sugar plantations emerged partly as a result of the Hawai‘i government’s push to encourage its citizens to engage in commercial agriculture. These early ventures in the 1840s were unsuccessful. Many plantations encountered severe financial losses because both managers and owners knew very little about how to organize a plantation and manufacture sugar. Then, as the Alien Land Ownership Act attracted would-be farmers to snatch up huge swaths of land and the United States Civil War required Hawai‘i to produce large amounts of sugar, industrial plantations started popping up on the islands in the 1860s. The Hawai‘i government supported the growing sugar industry by providing government subsidies to plantations and negotiating trade agreements that supported sugar exports. For example, in 1875, King Kalākaua signed a trade agreement with the United States, allowing the kingdom to export sugar to the United States duty-free. Soon after, sugar production increased rapidly on the islands. Native Hawaiians in rural areas suffered economically and

95. Id. at 305–06.
96. Id.
98. See id. at 34.
99. See id. at 43.
100. C.f. id. at 43, 53 (detailing the expansion of the sugar industry in Hawai‘i in the 1860s and the birth of the industrial sugar plantation).
101. Id. at 54.
103. 1875 U.S.-Hawai‘i Treaty, supra note 103.
104. CAROL A. MACLENNAN, SOVEREIGN SUGAR: INDUSTRY AND ENVIRONMENT IN HAWAI‘I 285–86 app. 2 (2014) (explaining that the amount of raw sugar produced in Hawai‘i increased from 8,564 tons per year in 1867 to 24,510 tons per year in 1879); see also MERRY, supra note 85, at 124 (describing how the Treaty “triggered a great expansion of sugar plantations”).
often found themselves unable to maintain local economies separate from the sugar industry as plantations took up vast land, water, and commercial resources.\footnote{106}{See MacLennan, supra note 97, at 54.}

Hawai‘i courts became dominated by Anglo-American attorneys who misinterpreted Hawaiian customs to serve the increasingly influential sugar industry.\footnote{107}{Ho‘oipo Kāla‘ena‘aua Pa Martin et al., supra note 25, at 92–94.} In 1892, Hawai‘i formally adopted English common law, as construed by American and English court decisions.\footnote{108}{HAW. REV. STAT. § 1-1 (1892).} By that time, it had already been established that Hawai‘i’s definition of real and personal property were consistent with English and American precedents.\footnote{109}{Sullivan, supra note 66, at 124–25; see also Oni v. Meek, 2 Haw. 87 (1858) (holding that the Kuleana Act repealed former legislation and ancient land tenure, while upholding the seventh section for the commoner tenants in their right to take firewood, house timber, or thatch (among others) for their own personal use); Kahinu v. Aea, 6 Haw. 68, 69 (1872) (holding that “[t]he only safe way . . . to regard real and personal property as defined by our statutes . . . [is] to intend and mean the same kind of property so designated in American, English, and Continental law”).}

Western ideas of private property are reflected in court decisions under the Kingdom of Hawai‘i (1795–1893) and the Territory of Hawai‘i (1900–1959) as both resource and water law in Hawai‘i were harnessed to support the needs of sugar plantations.\footnote{110}{See infra notes 113–144 and accompanying text; see also I.C. Campbell, A HISTORY OF THE PACIFIC ISLANDS, 47, 87 (1989) (explaining that the 100 year monarchy swiftly came to an end partially due to the pressures related to sugar production); Nakanelua, supra note 21, at 207–08 (explaining that western notions appeared in court decisions because water and water law were utilized to support “[sugar] plantations[s’] needs and seeds”).}

The cases of Horner v. Kumuliilii\footnote{111}{10 Haw. 174 (1895).} and Hawaiian Commercial & Sugar Company v. Wailuku Sugar Company\footnote{112}{15 Haw. 675 (1904).} demonstrate how the Hawai‘i judiciary favored sugar plantations over the traditional ancient water rights and customs belonging to Native Hawaiians.

In Horner, the Supreme Court of the Republic of Hawai‘i analyzed whether a sugar plantation owner held prescriptive rights to use the water in the Kauala stream.\footnote{113}{Horner, 10 Haw. at 178.} The plaintiffs, Horner and Isenberg, owned a large sugar plantation in the town of Lahaina on the island of Maui adjacent to the Kaua‘ula stream.\footnote{114}{See id. at 175.} Lahaina was previously densely populated\footnote{115}{See Robert C. Schmitt, Demographic Statistics of Hawaii: 1778–1965, at 71 tbl.13 (1968).} (and...
even served as the Kingdom’s capital from 1820 to 1845), but the plantation owners owned a large number of ahupua’a as (one of the smaller land divisions of kalana, made of several ili), ilis (smaller area of land within an ahupua’aahupua’a), and kuleanas (small piece of land with rights attached). The land where the plantation was located was traditionally used for kalo (taro) production, but by 1895—when the case was decided—the kalo patches were abandoned. The court recognized that the kalo farms and their accompanying water rights were purchased by the plantation owners. The defendants were small kuleana holders who farmed kalo. The defendants argued that they were entitled to use a continuous flow of water from the Kauala stream for their crops because their kuleana rights (to use the water) were never extinguished even though the plantation had bought the surrounding lands.

In order to rule on whether the plaintiffs had extinguished their rights to use water from the Kauala stream, the Court analyzed the ancient “eleven day” system of water diversion. The system was crafted by the konohiki (“head men under the chiefs” as defined by the Court) and functioned by assigning each ahupua’a a certain day to receive water for kalo production. Once every eleven days, the water was run into them by the lateral auwai (stream used for artificial irrigation) until filled. Then, the remaining water would be turned back into the main stream for the lands below. But this system did not work for sugar cane production, which needed water once every seven days. So, the plantation owners ignored this system and used the water as needed. This led the Court to reintroduce the ancient system of rotation. This designation of a water

118. Id. at 221.
119. Id. at 333; see HAW. REV. STAT. § 7-1 (1955); Horner, 10 Haw. at 175.
120. See Horner, 10 Haw. at 176–77.
121. Id. at 175.
122. Id. at 178, 180.
123. See id. at 178, 180.
124. Id. at 176–78.
125. Id. at 178.
126. Id. at 177–78.
127. ANDREWS, supra note 117, at 73.
128. See Horner, 10 Haw. at 177–78.
129. Id.
130. Id. at 177.
131. See id. at 178.
132. Id. at 182.
right incorporated the ancient tradition of linking a water right to a specific duty to assist neighboring tenants and translated western property ideas of ownership into the rotation system and on the town of Lahaina and all the islands in Hawai‘i.\(^{133}\)

In 1904, the Court in *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.* misconstrued ancient customs by holding that the konohiki had ownership rights over surplus water, which was not “appurtenant to any particular portion of the ahupua’a.”\(^{134}\) The dispute involved two sugar plantations—Hawaiian Commercial and Wailuku Sugar—fighting over the water allocation of the Wailuku stream within the Wailuku ahupua’a.\(^{135}\) Hawaiian Commercial owned 24,541.73 acres, while Wailuku Sugar owned 3,080.73 acres of land within the ahupua’a.\(^{136}\) Both parties argued that they held various rights to use water from the stream.\(^{137}\) The Court issued an injunction for Wailuku to stop “alleged illegal diversions of water from the Wailuku Stream.”\(^{138}\) The Court quoted an 1867 Hawaiian Kingdom case, *Peck v. Bailey*,\(^{139}\) to reason that when the ahupua’a lands were transferred from “some ancient King” to proprietors, the water rights were included as an appurtenance.\(^{140}\) Additionally, the Court declared that any water not covered by prescriptive or riparian rights was surplus water and the property of the konohiki.\(^{141}\)

Denoting the konohiki stewardship over water as nothing but an exclusive ownership right that could be sold commodified the konohiki’s duty and ignored the societal context of Native Hawaiian tradition.\(^{142}\) The

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133. Cf. Reppun v. Bd. of Water Supply, 656 P.2d 57, 68 (Haw. 1982) (explaining that, based on *Horner*, “the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom”).


135. *Id.* at 677–80. References to the Wailuku stream refer to the current day Wailuku River on the island of Hawai‘i.

136. *Id.* at 678.

137. *Id.* at 683–84 (“[Wailuku Sugar’s] claim is that it is entitled to . . . prescriptive rights, . . . [and] the right to use water at night.”); *id.* at 691 (“[C]omplainant contends that the water rights of certain ancient taro lands owned by [Wailuku Sugar] have been abandoned and reverted . . . to the konohiki.”).

138. *Id.* at 677.

139. 8 Haw. 658 (1867). *Peck* holds that an easement appurtenant is attached to any land transfer, regardless of whether an easement is ever mentioned by landowners. *Id.* at 661.

140. *Hawaiian Com.*., 15 Haw. at 682 (quoting *Peck*, 8 Haw. at 671).

141. See *id.* at 680 (“Surplus water. This, in our opinion, is the property of the konohiki . . . By ancient Hawaiian custom this was so.”).

commodification of water resources was a trend over the Hawaiian territorial period and some scholars have argued that it served the interests of the sugar industry at the expense of Native Hawaiians.143

E. The Winters Doctrine and the Road to Transforming Hawaiian Water Law

While the Hawai‘i Supreme Court was altering Native Hawaiian water rights, the United States Supreme Court was transforming the framework of American Indian water rights.144 In Winters v. United States,145 the United States Supreme Court decided who had the rights to water on the Fort Belknap Indian Reservation.146 Winters, a landowner whose land bordered a waterway on the Reservation, and the Gros Ventre and Assiniboine Tribes of Indians in Montana each claimed they owned the rights to water from the Milk River.147 The Court examined the 1888 agreement approved by the United States Congress and the Tribes to establish the Fort Belknap Reservation.148 The treaty did not explicitly address the Tribes’ water rights, so the Court turned to treaty interpretation to decide.149 A common rule for treaty interpretation (referred to as a canon of construction) for cases involving Native tribes is to resolve ambiguities in a way that is favorable to Native tribes.150 The Court analyzed the time at which the treaty was signed and found that the arid land of the Reservation, without water and irrigation, were “practically valueless.”151 In interpreting the 1888 agreement in the Tribes’ favor, the Court concluded that the Tribes would have never

143. See, e.g., Ho‘oipo Kāla‘ena‘auao Pa Martin et al., supra note 25, at 94–95 (arguing that the commodification of water resources was to “the detriment of [Native] Hawaiians” and “[t]hose who . . . obtained land from konohiki . . . withdrew unlimited quantities of water regardless of the consequences to the environment and other water users”).
145. 207 U.S. 564 (1908).
146. Id. at 565.
147. Id. at 565–66, 568.
148. Id. at 567–68.
149. See id. at 576 (“[T]he Indians . . . made no reservation of the waters.”).
150. The United States Supreme Court has recognized that many Indian treaties were signed under unequal conditions, where the United States government had the upper hand in understanding the treaty provisions, while some Indian communities could not read or were not educated in technical legal terms. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 37 (1942 ed.); see also Winters, 207 U.S. at 576–77 (“By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.”).
signed an agreement without retaining their right to water to make the land livable.\textsuperscript{152}

Following this case, the \textit{Winters} doctrine emerged and developed,\textsuperscript{153} evolving from the original finding that “water was impliedly reserved to ensure that the land set aside for a permanent homeland would have water necessary for the purposes of the \textit{R}eservation.”\textsuperscript{154} The Court, in the 1960’s decision \textit{Arizona v. California},\textsuperscript{155} has since found that a water right will be implied for all Native tribes and other reservations when it is needed to conduct reservation purposes.\textsuperscript{156} Later, Hawai’i state courts drew parallels to the \textit{Winters} doctrine as a source for finding that Native Hawaiians had an implicit right to use water.\textsuperscript{157} In June of 2023, however, the United States Supreme Court found the government bore no duty to take affirmative steps to provide water to the Navajo Reservation or any tribe, reversing \textit{Arizona, Winters}, and decades of precedent demonstrating the duty the United States has to provide Native tribes with water.\textsuperscript{158}

One major development in Hawai’i’s water management came when Hawai’i became a state in 1959.\textsuperscript{159} After statehood, judges were appointed locally instead of being chosen from Washington, D.C.\textsuperscript{160} (whom were appointed by the United States President with advice and consent of the Senate)\textsuperscript{161} as they were during the Territorial period (1900–1959).\textsuperscript{162} Hawai’i Supreme Court justices are now appointed by the Hawai’i elected State Governor, with advice and consent of the state Senate.\textsuperscript{163} Generally,

\begin{footnotes}
152. \textit{See id.} at 576–77.
158. The Tribe argued that, in 1868, the Navajos would have understood the treaty to mean that the United States must take affirmative steps to secure water for the Tribe. But the text of the treaty says nothing to that effect. \textit{Arizona v. Navajo Nation, 599 U.S. __}, 143 S. Ct. 1804, 1816 (2023); \textit{see also id.} at 1814 (“[T]he 1868 treaty did not impose a duty on the United States to take affirmative steps to secure water for the Tribe . . . .”).
160. \textit{SPROAT, supra} note 59, at 6.
161. \textit{See An Act to Provide the Government for the Territory of Hawaii, ch. 339, § 82, 56th Cong. (1900) (repealed 1959).}
163. \textit{HAW. CONST.} art. VI, § 3; Ho'oko Kälæna'aauo Pa Martin et al., \textit{supra} note 25, at 98 (explaining that the Hawai’i Supreme Court set aside misinterpretations of Native Hawaiian culture, which were originally made in different political regimes).
these new judges were more educated in and familiar with local laws and issues, especially and including Native Hawaiian culture, customs, and traditions.\footnote{SPROAT, supra note 59, at 6.} After this change in makeup of the Hawai‘i Supreme Court, it went on to set aside previous misinterpretations of ancient Hawaiian customs and traditions.\footnote{See Ho‘oipo Kāla‘ena‘auao Pa Martin et al., supra note 25, at 99.}

\textit{F. When McBryde Changed Everything}

This section explores the dramatic reinterpretation of Native Hawaiian water rights by the Hawai‘i State Supreme Court.\footnote{See infra sections I.F.1–F.2.} The Court’s \textit{McBryde} and \textit{Reppun} decisions delineated new rights to water for Native Hawaiians and played large roles in establishing the public trust doctrine in Hawai‘i. The doctrine requires the Hawai‘i government and state agencies to protect and conserve the island’s resources for future generations.\footnote{HAW. CONST. art. XI, § 1.}

\textit{1. McBryde Laid the Foundation for Hawai‘i’s Public Trust Doctrine}

The 1973 Hawai‘i Supreme Court’s decision of \textit{McBryde Sugar Co. v. Robinson} started a movement to completely transform water law in Hawai‘i.\footnote{McBryde Sugar Co. v. Robinson, 504 P.2d at 1333–34.} The Court ultimately found that the state held “ownership of water in natural watercourses streams and rivers” for the common good of Hawai‘i’s citizens.\footnote{Id. at 1334.} This holding is the public trust doctrine, which later was included in Hawai‘i’s constitution.\footnote{Id. at 1339.} The case involved a dispute between two plantation owners, McBryde and Gay & Robinson, over the right to use water from the Koula stream and Hanapepe River basin on the island of Kauai.\footnote{Id. at 1334.} Both were depleting the Hanapepe River so much that the river was “practically dry throughout the year.”\footnote{Id. at 1339.} The trial court previously calculated each party’s appurtenant water rights.\footnote{Id. at 1339.} Ultimately, the Court followed the trial court’s findings that McBryde was entitled to 4,915,400 gallons of water per day, the State was entitled to
4,167,650 gallons per day, and Gay & Robinson was entitled to 1,533,050 gallons per day as appurtenant water rights.\(^\text{175}\) The Court cited Hawaiian Commercial and stated that the Great Māhele conveyed land with the appurtenant right to use water for taro growing.\(^\text{176}\) But, the Court said that the right to use water acquired as appurtenant rights was only allowable in connection to those particular parcels of land and may not be transported away from those parcels, thus overruling Hawaiian Commercial.\(^\text{177}\) Appurtenant rights, however, stayed intact.\(^\text{178}\)

In examining the State of Hawai‘i’s sovereign rights, the Hawai‘i Supreme Court reexamined Hawaiian Commercial’s finding that surplus water was the property of the konohikis after the Great Māhele.\(^\text{179}\) Among its other arguments, the Court reasoned that since the land abutting the Hanapepe River was very large, it would be “foolish to say the least” for the King to convey or transfer all his rights to surplus water to the konohikis.\(^\text{180}\) Furthermore, without express intent, the Court held that the Great Māhele and the subsequent Land Commission Award did not transfer the right to surplus water.\(^\text{181}\) Instead, King Kamehameha III retained his right to surplus water and reserved it for the people of Hawai‘i for their common good in all of the land grants.\(^\text{182}\) The State was therefore now the owner of the water in the Koula stream and Hanapepe River.\(^\text{183}\) With the State as the owner, the two water sources were now protected as a public resource and common property to be used by all.\(^\text{184}\) This state ownership did not mean, however, that the parties in the case had no rights to water as there were still usufructuary—or use—rights.

For riparian rights to water, the Court examined the Kuleana Act of 1850, which is now embedded in section 7-1 of the Hawai‘i Revised Statutes.\(^\text{185}\) It specifically addressed the provision explaining that “[t]he people (meaning owners of land) also shall have a right to drinking water,
and running water, and the right of way.” 186 The Court construed “running water” to mean “water flowing in natural water courses, such as streams and rivers” at the time of the Māhele. 187 By construing English and American common law in light of the history of the Hawaiian Kingdom, the Court found that the “right to drinking and running water” was a codification of riparian rights descended from English and Massachusetts courts. 188 McBryde, the State, and Gay & Robinson were therefore entitled to riparian water rights for their adjoining parcels of land on the Hanapepe River or Koula stream. 189

The Court next effectively terminated all prescriptive rights to water in Hawai‘i. 190 McBryde had previously held some right to water by adverse or prescriptive use. 191 The Court reasoned that because the ownership of water in the Koula stream and Hanapepe River belonged to the State 192 and the general law is that “one may not claim title to or interest in state-owned property by adverse use,” McBryde acquired no prescriptive right to water. 193

Finally, the Court extinguished the right to “normal daily surplus water”—also known as konohiki rights. 194 Previous court decisions recognized that Gay & Robinson was entitled to such water, but at that time, the Court had not yet determined whether owners of land in the Hanapepe Valley had the same right. 195 Since both the State and McBryde owned land abutting the Hanapepe River and were entitled to riparian and appurtenant rights to water, there could not have been any “surplus water.” 196 There was no surplus because, generally, under the riparian doctrine, a party is entitled to the entire flow of the water in the stream in which it is formed in nature. 197 So, no surplus water existed.

The Court held that

186. McBryde, 504 P.2d at 1341.
187. Id. at 1342.
188. Id. at 1344.
189. Id.
190. Id. at 1345.
191. Id. at 1344–45.
192. Id. at 1338.
193. Id. at 1345.
194. Id. For an in-depth discussion of konohiki rights and their interpretation by Hawai‘i courts, see Tanaka, supra note 142, at 258–62.
195. See McBryde, 504 P.2d at 1345; Territory of Haw. v. Gay, 31 Haw. 376 (1930), aff’d, 52 F.2d 356 (9th Cir. 1931).
196. McBryde, 504 P.2d at 1345.
197. Id.
REINTERPRETING THE PUBLIC TRUST DOCTRINE

1) HRS § 7–1, originally enacted in 1850 as section 7 of our [K]uleana act, imposed the “natural flow” doctrine of riparianism upon the waters of our state;
2) that riparian water rights appertain only to land adjoining a natural watercourse for its use; and
3) that the right to the use of water by virtue of its application to the land at the time of the Mahele, i.e., appurtenant water rights, may be used only in connection with those parcels of land to which that right appertains.\textsuperscript{198}

Following this decision, the plantation owners were naturally upset by the loss of some of their rights to their water. \textit{McBryde} faced legal challenges over nearly fifteen years, as the parties claimed the decision was an unconstitutional taking.\textsuperscript{199} The United States Supreme Court denied certiorari in 1974\textsuperscript{200} and the Ninth Circuit upheld the ruling in 1985, 1986, and 1991.\textsuperscript{201}

In \textit{McBryde}, the Court’s decision firmly decided that the State held ownership rights to the water sources and had a duty to protect such sources, while simultaneously terminating prescriptive and surplus water rights.\textsuperscript{202} This duty led to further refinement and codification of the public trust doctrine in \textit{Reppun v. Board of Water Supply}, the Hawai‘i State Constitution, and the Hawai‘i Water Code.\textsuperscript{203} \textit{McBryde} symbolized a major shift in how the Court treated Native Hawaiian rights (by reinterpreting Native customs and culture) and led to further protections of Native rights through the public trust doctrine.

2. \textbf{Reppun Refined Hawai‘i’s Public Trust Doctrine}

While the parties in \textit{McBryde} were appealing the case, the Hawai‘i Supreme Court upheld \textit{McBryde}’s principles in \textit{Reppun v. Board of Water Supply} and further expanded the riparian doctrine.\textsuperscript{204} \textit{Reppun} involved six taro farmers as plaintiffs who all claimed appurtenant and riparian rights in the Waihe‘e stream on the island of O‘ahu.\textsuperscript{205} The farmers claimed they

\begin{footnotesize}
\textsuperscript{198} Reppun v. Bd. of Water Supply, 656 P.2d 57, 63 (Haw. 1982).
\textsuperscript{199} See Ariyoshi v. Robinson, 477 U.S. 902, 902 (1986); Robinson v. Ariyoshi, 933 F.2d 781, 783–86 (9th Cir. 1991).
\textsuperscript{201} See Robinson v. Ariyoshi, 753 F.2d 1468, 1475 (9th Cir. 1985), vacated, 477 U.S. 902, 902 (1986); Robinson v. Ariyoshi, 796 F.2d 339, 339 (9th Cir. 1986); Robinson v. Ariyoshi, 933 F.2d at 786.
\textsuperscript{202} McBryde, 504 P.2d at 1339, 1345.
\textsuperscript{203} See infra section I.F.2.
\textsuperscript{204} Reppun v. Bd. of Water Supply, 656 P.2d 57, 63, 69, 78 (Haw. 1982).
\textsuperscript{205} Id. at 60.
\end{footnotesize}
were entitled to a flow “sufficient to maintain their crops” pursuant to riparian and appurtenant rights due both to their status as lessees or landowners and because their lands were used as taro farms during the Great Māhele. The Board of Water Supply (BWS) claimed its predecessor in interest purchased much of their claimed rights to the water in 1955. The trial court found all of the plaintiffs’ lands to be riparian (except for three areas) and the plaintiffs were entitled to 2.7 million gallons per day (mgd) for taro farming. The plaintiffs claimed that riparian rights entitled them to at least 4.0 mgd, as that was the amount necessary to irrigate their crops and stop the spread of pythium (a pathogen that turns normal edible taro into a “soft, mushy, often evil-smelling mass, unfit for human consumption”). Additionally, the parties disagreed about whether the plaintiffs’ water rights were severed and transferred by deed to BWS in 1955. That was one of the critical issues on appeal.

In examining the severability of the farmer’s riparian rights, the Court looked to see whether McBryde prevented those rights from being severed at all. It found McBryde was both applicable and good law and also found it to be “a necessary and proper step in the rectification of basic misconceptions concerning water ‘rights’ in” Hawai‘i. It examined the Kuleana Act and established that the King’s concerns that “[a] little bit of land even with allodial title, if they be cut off from all other privileges would be of very little value,” and found this to mean that riparian rights were established to enable tenants of ahupua‘a’s “to make productive use of their lands.” The Court found that Native riparian rights were analogous to the federally reserved water rights in Winters v. United States. Because, under the Winters doctrine, the U.S. government implied a reservation of unappropriated waters for the Fort Belknap Indian Reservation, the Court drew a parallel to the doctrine and similarly concluded that the language in the Kuleana Act and section 7-1 of the Hawai‘i Revised Statutes are limited by the purposes for the establishment

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206. *Id.* at 60–62.
207. *Id.* at 62.
208. *Id.*
209. *Id.* at 60 n.4, 62.
210. *Id.* at 62.
211. *Id.*
212. *Id.* at 69.
213. *Id.*
214. *Id.*
215. *Id.* at 69–70; Winters v. United States, 207 U.S. 564 (1908).
of the water rights. The language referring to the privileges as “for their [the people’s] own use, but they shall not have the right to take such articles to sell for profit” thus established the sole purpose was to make tenants’ lands productive. Therefore, all attempts to sever or extinguish the riparian rights by BWS were unsuccessful and plaintiff’s rights were held to be intact.

In its analysis of the severability of plaintiffs’ appurtenant rights, the Reppun Court determined that appurtenant rights are different than riparian rights because appurtenant rights have a common law origin and were incident to land ownership, while riparian rights were incident to water and have a statutorily-defined origin in Hawai’i’s Water Code. The Reppun Court concluded that appurtenant rights were superior to riparian rights based on their analysis of Peck v. Bailey, which previously concluded that appurtenant rights “constituted ‘an easement in favor of the [property with an appurtenant right], as the dominant estate.’” Appurtenant rights were, thus, rights to the “use of water utilized by parcels of land at the time of their original conversion into fee simple land” and run with the land. The Court found that McBryde was consistent with the general rule of appurtenant easements and held that the appurtenant nature of these rights precluded the transfer of such rights by any subsequent deed. Thus, the severance or transfer of appurtenant rights was precluded in Reppun. BWS’s deed did, however, extinguish the appurtenant rights instead of transferring them. The Court explained that while appurtenant easements cannot be used for any other purpose except to benefit the dominant estate, there is nothing to prevent a transferor from deciding not to pass on the appurtenant easement to the transferee of a dominant estate.

The Court next attempted to quantify the amount of water included in the plaintiffs’ riparian and appurtenant rights. After McBryde found the amount to be “the right to the natural flow of the stream without

217. Reppun, 656 P.2d at 70.
218. Id.
219. Id.
220. Id.
221. Id. at 69–70.
222. Id. at 71 (quoting Peck v. Bailey, 8 Haw. 658, 662 (1867)).
223. Id. at 71.
225. Reppun, 656 P.2d at 71.
226. Id.
227. Id.
substantial diminution and in the shape and size given it by nature”\textsuperscript{228} and thus “incapable of measurement,”\textsuperscript{229} the Reppun Court declined to quantify the amount of water included in plaintiffs’ riparian rights as their amount was already established as reasonable.\textsuperscript{230} This “natural flow” language mirrors that of the natural flow theory of riparian rights.\textsuperscript{231} BWS argued that the natural flow theory had largely been abandoned in favor of the reasonable use theory, but the court was not persuaded.\textsuperscript{232} The Court was still convinced that the exclusive purpose of the riparian doctrine in section 7-1 of the Hawai‘i Revised Statutes was for farming and the natural flow version of riparianism served this purpose.\textsuperscript{233}

The holdings in Reppun were extremely significant for Native Hawaiian rights. Some main holdings were: (1) water rights attached to riparian lands by virtue of section 7-1 of the Hawai‘i Revised Statutes cannot be severed; (2) riparian landowners are entitled to make “reasonable use of the quantity and flow”\textsuperscript{234} of their watercourse and taro farming is a reasonable use; (3) appurtenant water rights may not be transferred or applied to other lands, they may only be extinguished by the grantor; and (4) the plaintiffs’ lands with appurtenant water rights are therefore “entitled to the quantity and flow of the water which was utilized to irrigate crops prior to the diminution of the stream that damaged their crops.”\textsuperscript{235} Section 7-1 of the Hawai‘i Revised Statutes allowed water to be free for all land granted in fee simple, meaning those rights that were transferred in the Great Māhele.\textsuperscript{236} So, the water rights transferred in the Great Māhele could not be severed and still attached to the land.\textsuperscript{237} Additionally, the riparian water rights—many owned by Native Hawaiians on their own lands—could not be extinguished by the grantor.\textsuperscript{238} The Māhele did not extinguish those rights and instead, the “ownership of water in natural watercourses, streams and rivers remained in the People of Hawaii for their common good.”\textsuperscript{239}

\textsuperscript{228} McBryde, 504 P.2d at 1344.
\textsuperscript{229} Id.
\textsuperscript{230} Reppun, 656 P.2d at 72.
\textsuperscript{231} Id. at 71.
\textsuperscript{232} Id. at 71–72.
\textsuperscript{233} Id. at 72.
\textsuperscript{234} Id. at 78.
\textsuperscript{235} Id. at 78–79.
\textsuperscript{236} Id. at 65–68.
\textsuperscript{237} Id. at 69–70.
\textsuperscript{238} Id. at 78.
\textsuperscript{239} Id. at 66–67.
G. The Public Trust’s Codification in the Hawai‘i State Constitution and Water Code

Following the McBryde and Reppun decisions, competing water users sought political solutions in the form of the 1978 Constitutional Convention.240 Private and public interests disputed the new solutions to regulate water, eventually culminating in a compromise between the two groups as a constitutional amendment to cement the public trust doctrine was firmly inserted into Hawai‘i law.241 Reports from the convention indicate that delegates were concerned that “past and present actions by private landowners, large corporations, . . . and government entities . . . preclude native Hawaiians from following subsistence practices traditionally used by their ancestors.”242 The 1978 amendment declared that the State of Hawai‘i had “an obligation to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people.”243 The amendment further provided for the establishment of a water resources agency which . . . shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii’s water resources.244 This amendment initiated the establishment of a water resources agency and a statutory scheme to manage Hawai‘i’s water resources, culminating in the new six-member Water Commission within the Department of Land and Natural Resources and the adoption of the Water Code.245 The Water Code conferred to the Water Commission statewide jurisdiction to hear claims and make final decisions regarding Hawai‘i’s water rights, the selection of “water management areas,” permits, and any disputes over water allocation when there is not enough water.246

241. Id. at 105–08.
243. HAW. CONST. art. XI, § 7.
244. Id.
246. Id. at 111; HAW. REV. STAT. § 174C (2023).
The purpose of the Code is to conserve water resources and obtain maximum beneficial uses of the waters of the state.\textsuperscript{247} Under the Code, permit applicants must demonstrate their use is a “reasonable-beneficial use” and is “consistent with the public interest.”\textsuperscript{248} Chapter 174C became increasingly important to subsequent public trust litigation because the Code required parties to apply for a permit from the State Water Commission (which is bound to follow public trust principles) to secure the protection of their water rights under state law.\textsuperscript{249} The Code firmly cemented Native water rights in state law by providing that the water rights of “\textit{ahupua’a} tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by [the Water Code].”\textsuperscript{250} Additionally, the Code called for the State to protect traditional and customary Hawaiian rights.\textsuperscript{251}

II. MODERN APPLICATION OF HAWAI’I’S PUBLIC TRUST DOCTRINE

This section explores recent applications of the public trust doctrine that was established in the \textit{Waiāhole Ditch} and \textit{Mauna Kea} cases to document how the doctrine operates today.

A. Waiāhole Ditch Defined the Scope of the Public Trust Doctrine

The \textit{Waiāhole} decision by the Hawai‘i State Supreme Court was a landmark decision as the Court for the first time applied the public trust doctrine and defined the scope of the trust and the powers and duties the doctrine confers on the state.\textsuperscript{252} The Court affirmed the doctrine, as enumerated in Hawai‘i’s Constitution, applied to “all water resources without exception or distinction.”\textsuperscript{253} Yet, the Court fell short of extending this trust to all other public resources, as Hawai‘i’s Constitution requires.\textsuperscript{254}

The Waiāhole Ditch System on the island of O‘ahu previously diverted water from the Ko‘olau mountain range to irrigate a nearby sugar

\textsuperscript{247} HAW. REV. STAT. § 174C-2(c) (1999).
\textsuperscript{249} \textit{Id.} § 174C-49(a); HAW. CONST. art. XI, § 1; \textit{In re Water Use Permit Applications (Waiāhole Ditch)}, 9 P.3d 409, 453 (Haw. 2000) (holding that the State must take the public trust into account for water resource allocation).
\textsuperscript{250} HAW. REV. STAT. § 174C-101(c) (2022).
\textsuperscript{251} HAW. REV. STAT. § 174C-2(c) (1999).
\textsuperscript{252} \textit{Waiāhole Ditch}, 9 P.3d 409.
\textsuperscript{253} \textit{Id.} at 445.
\textsuperscript{254} HAW. CONST. art. XI, § 1.
plantation. The ditch system operated for nearly eighty years until the plantation closed in 1995 and the system ceased operations. Diversions by the system reduced flows of the “Waiāhole, Waianu, Waikāne, and Kahana streams,” gravely impacted and “impaired native stream life and may have contributed to the decline in the greater Kāne‘ohe Bay ecosystem.” Many of these impacts remained largely unacknowledged until the plantation’s closure brought them to light—presumably attributed to the sugar industry’s lengthy influential grip on power. Hawai‘i’s Commission on Water Resource Management found some of the water in the streams and Kāne‘ohe Bay to be a part of the public trust and thus, it required protection by the state.

The Court subsequently examined the Commission’s final decision and balanced the competing interests of the newly available water source. The interests included nonagricultural uses—like the state prison, a cemetery, and two golf courses—and diversified agricultural uses for soybean and corn cultivation. The Court recognized “the actual need for 2,500 gallons per acre per day” in every acre of varied agriculture and that the Water Commission had improperly weighed instream and offstream uses. Next, the Court examined the intricacies of the state’s public trust doctrine. In terms of scope, the Court found the public trust doctrine to apply to all water resources, regardless of the surface-groundwater distinction, akin to the ancient Native Hawaiian notion of shared resources. The land conveyances in the Great Māhele were made to expressly reserve certain sovereign prerogatives to “encourage and even to enforce the [use] of lands for the common good” and these could therefore not be transferred. The Court acknowledged ancient Hawaiian principles regarding shared resources and found the State of Hawai‘i bore 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.”

255. Waiāhole Ditch, 9 P.3d at 423.
256. Id.
257. Id.
258. Id.
259. Id. at 426.
260. Id. at 429, 476.
261. Id. at 501.
262. Id. at 465–67.
263. Id. at 447.
264. Id. at 440–41.
265. Id. at 447, 453 (emphasis added) (quoting Nat’l Audubon Soc’y v. Superior Ct., 658 P.2d 709, 728 (Cal. 1983)).
commitment, the Court determined that economic development is acknowledged by the trust but stopped short of embracing private commercial use as a protected trust purpose.\textsuperscript{266} The Court held that under article XI, section 1, the State must both “‘protect’ natural resources \textit{and} . . . promote their ‘use and development.’”\textsuperscript{267} The State water resources trust has a “dual mandate of 1) protection and 2) maximum reasonable and beneficial use” to ensure the most reasonable and beneficial use.\textsuperscript{268}

The Court also acknowledged that the State had a public trust duty to protect Native Hawaiian water rights and upheld the exercise of Native Hawaiian traditions and customs as a public trust purpose.\textsuperscript{269}

Before the Māhele, the law “Respecting Water for Irrigation” assured native tenants “their equal proportion” of water. . . . Subsequently, the . . . Kuleana Act provision ensured tenants’ rights to essential incidents of land beyond their own kuleana, including water, in recognition that “a little bit of land even with alodial title, if they be cut off from all other privileges would be of very little value.”\textsuperscript{270}

The \textit{Waiāhole Ditch} Court reaffirmed the notion that the public trust duty required the State to protect Native rights to water.\textsuperscript{271} The Court specifically upheld Native Hawaiian traditional and cultural rights as a public trust purpose.\textsuperscript{272} In doing so, the Court cited the public trust doctrine in the Water Code when discussing correlative rights, writing that the “appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section . . . shall not be diminished or extinguished by a failure to apply for or receive a permit.”\textsuperscript{273} This statement was powerful in that it required the State of Hawai‘i to protect Native resources without requiring excessive procedural hurdles, such as applying for water permits.\textsuperscript{274}

\textsuperscript{266} Id. at 450.
\textsuperscript{267} Id. at 450–51 (emphasis added). The Court here used slightly different wording than the Hawai‘i Constitution, which states “the State . . . shall conserve and protect Hawai‘i’s . . . natural resources . . . and shall promote the development and utilization of these resources.” HAW. CONST. art. XI, § 1 (2023).
\textsuperscript{268} \textit{Waiāhole Ditch}, 9 P.3d at 451.
\textsuperscript{269} Id. at 449, 488.
\textsuperscript{270} Id. at 449 (citations omitted).
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} Id. at 491 (quoting HAW. REV. STAT. § 174C-101(d) (1991)).
\textsuperscript{274} See id.
One key public trust instrument that emerged from *Waiāhole* is the public trust balancing test.\(^\text{275}\) The Court dictated the following test: In any analysis involving competing public and private water uses, the Water Commission or court must start with the important presumption for “public use, access, and enjoyment.”\(^\text{276}\) Hawai‘i’s Constitution requires a balancing of protecting natural resources, on one hand, and developing and utilizing those resources on the other.\(^\text{277}\) This balancing of competing uses must include a “higher level of scrutiny” for private commercial uses, such as using the water for a golf course like one of the litigants.\(^\text{278}\) Public trust purposes are also protected and have priority over private, commercial ones.\(^\text{279}\) Public trust purposes include both (1) domestic use by the general public, such as for drinking water and (2) “the exercise of Native Hawaiian traditional and customary rights, including appurtenant rights.”\(^\text{280}\) Now, realistically, public uses cannot always triumph over commercial ones and this is evident in the subsequent *Mauna Kea* opinion.

In the end, the *Waiāhole* case remanded the issues of water allocation for Native farming practices (notably taro farming) and setting an interim standard for the Waikāne stream and the need for water for all acres in diversified agriculture.\(^\text{281}\) This balancing of protecting resources yet factoring in social and economic uses is a key aspect of subsequent cases following *Waiāhole*.\(^\text{282}\) The opposing concepts of protection and maximum reasonable beneficial use set forth by the court in *Waiāhole* set the stage for later litigation involving the public trust doctrine.

### B. Mauna Kea Expanded the Public Trust Doctrine and Dispossessed Native Hawaiians of Their Land

Because the Mauna Kea Mountain is on sacred public land, Native rights advocates challenged the Board of Land and Natural Resources’s (BLNR) approval of the Thirty Meter Telescope (TMT) in the Hawai‘i State Supreme Court, arguing it violated the public trust principles

\(^{275}\) *Id.* at 450.

\(^{276}\) *Id.* at 454.

\(^{277}\) *Id.* at 445.

\(^{278}\) *Id.* at 454, 480–81.

\(^{279}\) SPROAT, *supra* note 59, at 8.


\(^{281}\) *Waiāhole Ditch*, 9 P.3d at 501.

\(^{282}\) See, e.g., *In re Conservation Dist. Use Application HA-3568 (Mauna Kea)*, 431 P.3d 752, 773–75 (Haw. 2018) (using the public trust balancing test to examine if a telescope could be built on Native Hawaiian lands).
embedded in the State’s constitution. The Court reviewed whether the BLNR properly approved the construction of the telescope. Many Native Hawaiians consider Mauna Kea to be sacred and the “citadel” of Hawaiian culture. Some Native Hawaiians trace their ancestry to the mountain, and it is the site of many cultural practices, such as solstice and equinox observations, blessing, burials, and other rituals. Many shrines were built on the mountain, indicating a pattern of pilgrimage or “a walk upward and backward in time to cosmological origins.” Some Native Hawaiians even consider the Mauna Kea Mountain to be an ancestor of Wākea (Sky Father) and Papa (Earth Mother). Clearly, the mountain has some spiritual and cultural importance to some Native Hawaiians. The summit has thirteen telescopes, and the University of Hawai‘i has operated several telescopes there since 1968 when it first entered into a general lease with the BLNR, but the TMT, however, would be “the largest [telescope] ever contemplated in the Northern Hemisphere.”

The Court weighed the public benefits and costs of constructing the TMT. The Court followed the Waiāhole precedent, holding that the Mauna Kea summit was on publicly held “conservation district land” and thus, the land itself was a public resource needing conservation and protection under the public trust doctrine. The Court, for the first time in Hawai‘i jurisprudence, applied the doctrine to land. The presumption in favor of public use, access, and enjoyment actually favored allowing the TMT project to be built on the sacred Mauna Kea summit because the land was held to be protected as a public trust resource. The Court here rejected the claim that the use of the summit by Native Hawaiians was a public use, while the TMT uses of the same land was a private use. This rejection centered on the fact that there was no evidence that the TMT

283. Id. at 757, 773–75.
284. Id. at 757.
285. Id. at 757, 795.
287. Mauna Kea, 431 P.3d at 758.
288. Id. at 757.
290. Mauna Kea, 431 P.3d at 758.
292. Mauna Kea, 431 P.3d at 773.
293. See id.
294. Id. at 774–75.
295. Id. at 775.
Observatory site was used by Native Hawaiian practitioners—ignoring the many shrines on the mountain to honor Native ancestors. The Court cited that the BLNR, the agency conducting a land survey of the site, found “no evidence . . . of Native Hawaiian cultural resources . . . within the TMT observatory site area.” Yet, the opinion later detailed the fact that a shrine is about 225 feet away from the site.

For conservation purposes, the Court found that the TMT project aligned with public trust purposes because it did “not involve the irrevocable transfer of public land to a private party.” The land would be transferred to University of Hawai‘i under a fifty-year lease and then be decommissioned and restored. The TMT’s permit required that measures be taken to protect the land, and the Court contended that “astronomy and Native Hawaiian uses on Mauna Kea [had] co-existed for many years.

For the benefits, the Court found the TMT project would allow scientists to answer “some of the most fundamental questions” of astronomy. Furthermore, the telescope would result in millions of dollars in scholarships for Hawai‘i students and jobs for those “trained in science, engineering, and technical positions.” The Court examined the public trust doctrine to see if the TMT project violated any public trust principles embedded in article XI, section 1 of the Hawai‘i Constitution, specifically the statement that “[a]ll public natural resources are held in trust by the State for the benefit of the people.” The Court held that public trust conservation lands, such as the lands in the summit area of Mauna Kea, are public resources for the purposes of the constitutional protection.

The Court found the benefits to outweigh the public harm and thus, the TMT project comported with article XI, section 1’s public trust principles. It upheld the BLNR’s decision to approve the project, allowing the project to go through and the TMT to be built on public trust land.
advocates argued that the project would spoil the sacred land, further straining the relationship between the Native Hawaiians and the judicial system. Respecting the needs and culture of Native Hawaiians is important. Next, Part III discusses proposals for amending the public trust doctrine to better suit the needs of Native Hawaiians.

III. HOW THE PUBLIC TRUST DOCTRINE CAN BE ADAPTED TO FURTHER NATIVE HAWAIIAN INTERESTS

This section examines how the public trust doctrine’s success in Waiāhole Ditch to protect Native interests is inadequate. It reveals how the inadequacies of the public trust doctrine led to the Mauna Kea opinion and the ultimate betrayal that the Hawai‘i government showed towards its Native citizens. It discusses the reforms necessary to ensure that Native perspectives are put at the forefront of any resource allocation. Finally, this section concludes by demonstrating that the proposed amendments to the Water Code can lead to more favorable outcomes for Native Hawaiians.

A. Inadequacy of the Public Trust Doctrine’s Application

In order to reform the public trust doctrine, courts and legislators must look at its inadequacies. Waiāhole Ditch provided a win for Native farming practices but fell short of establishing solid judicial precedent to truly protect Native rights. The public trust balancing test offers a guarantee to uphold public trust purposes but fails to give Native Hawaiians any guarantee that the State will not put large corporations’ interests over their own, like it did in the late nineteenth and early twentieth century in the Horner v. Kumuliilii and Hawaiian Commercial & Sugar v. Wailuku Sugar decisions.

The Mauna Kea Court ruled against Native Hawaiian rights and allowed the TMT project to go through. This ruling furthered state government encroachment into land considered sacred by some Native Hawaiians. The Court blatantly twisted the doctrine to support their view that the TMT project should continue as planned. In this way, the Court not only failed to live up to its promises in Hawai‘i’s Constitution to

309. Mauna Kea, 431 P.3d at 782.
uphold Native rights, but also set a precedent that a Hawai‘i court may use the doctrine to further strip Natives of their land and water rights. The *Mauna Kea* decision is a step backward for Native Hawaiians’ rights—a potential impetus to greater deprivation. Once rights start relinquishing for one group, every group suffers in knowing they may be next.

**B. Reforms Necessary to Improve the Public Trust Doctrine’s Application**

Because the current doctrine has empowered courts to deprive Natives of their ancient and established rights, the Hawai‘i legislators should amend the provisions in the Water Code applying the public trust doctrine to deter such decisions. The proper avenue for changing Hawai‘i’s public trust doctrine is the method used to enshrine it: Hawai‘i’s State Legislature. Hawai‘i’s constitutional obligations “to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people” is vague, but sufficiently gives the State a duty to allocate water for the benefit of its people. The Water Code, however, declares that “adequate provision shall be made for the protection of traditional and customary Hawaiian rights.” This single provision is simply not powerful nor clear enough to protect Native interests in the face of land developers and multinational corporate interests. The Water Code does not “abridge[] or den[y]” the rights of the decedents of Native Hawaiians, but this does not require state courts or the Water Commission to do the same. The Water Code’s provisions are, therefore, inadequate and fail to protect Native rights.

**C. Proposed Amendments to the Public Trust Doctrine**

This section explains this Comment’s proposed amendments to the Water Code. The Legislature should amend the Water Code to require consultation with certain Native organizations when issuing any permit in land, water, or other natural resource or when any court is reviewing the allocation of any resource right. Consultation with Native organizations may simply require a letter or formal discussion explaining the proposed resource allocations and how traditional water uses may be affected. These groups can include the Council for Native Hawaiian Advancement—a non-profit organization tasked with enhancing the “cultural, economic, political, and community development of Native

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310. HAW. CONST. art. XI, § 7.
311. HAW. REV. STAT. § 174C-2(c) (1999).
312. HAW. REV. STAT. § 174C-101(c) (2022).
Hawaiians"—or the Office of Hawaiian Affairs—a semi-autonomous state agency working to improve the well-being of Native Hawaiians. If the Hawai’i State government includes these groups in any discussions of resource allocations, the State can ensure that Native perspectives are heard and Native practices are not misinterpreted. The State should be required to allow the leaders of these organizations to vote on any decision affecting Native water rights. Furthermore, the State Legislature should add a “historical use” provision in the Water Code, requiring consultation with these organizations to identify any and all Native historical uses of the water source and an implied presumption against infringing on any ancient use.

Applying the proposed statutory framework to the Mauna Kea decision, the outcome of the TMT project might have been different. If the Hawai’i Supreme Court followed the proposed amendments to the Water Code, local leaders would be allowed to vote on the project and subsequently explain how important the site was for Native cultural practices. Next, if the Legislature requires the judiciary or Water Commission to consult with Native leaders and take Native cultures, traditions, and historical use into consideration, the public trust doctrine could further protect Native Hawaiians and their rights.

For example, imagine a scenario where a powerful land developer wants to infringe upon Native water rights. Say a Native Hawaiian community had been diverting a stream for centuries for farming and personal use. The government, meanwhile, had been in discussions for a new mega-development waterpark that would revert the stream back to its original ancient location. The developers argue that the waterpark would provide enormous economic benefits and bring prosperity to the islands, while the Native Hawaiians argue that their farming practices deserve protection due to their historical legitimacy and cultural importance. By abiding by the proposed statutory framework in this Comment, the Court would have to consult with local Native organizations and learn about the historic use of the water resources. And, with a presumption against infringing on any ancient use and a guaranteed vote, the Native leaders could potentially prevent the waterpark’s construction and secure the continuance of Native Hawaiian farming practices. Although success is not guaranteed under this framework, it would mean more Native Hawaiians are included in the discussion and more just outcomes in cases concerning Native Hawaiian water rights. Based on our current history, if


we continue on our current path and fail to amend the Water Code, we can expect the state courts to continue to strip Native Hawaiians of their land and water rights. This may prevent Natives from carrying out their traditional agricultural practices, and these practices may be at risk of dying out.

The public trust doctrine is more than a mere promise that the State will protect natural resources. If the Legislature adapts and amends the doctrine, it can become a mechanism to turn the tide of the United States’ historic injustice shown toward the Native Hawaiian people and an advocacy tool to further Native rights.

CONCLUSION

The fundamental flaw in Hawai‘i’s public trust doctrine is in its judicial and regulatory enforcement. The constitutional mandate and the State Water Commission’s application is powerful in terms of resource inclusion and steadfast protection of Native interests. The problem for Native Hawaiian culture and traditions is that the doctrine does not always protect them. It is jarring that the state judges and justices fail to do more to protect Natives as the American colonial experiment on the islands is still fresh in people’s minds. In systematically oppressive societies, the only thing between the status quo and a revolution is a spark.

Examining the effects of Mauna Kea and Waiāhole Ditch and the development of the public trust doctrine provides insight into the reforms for the doctrine. Hawai‘i’s jurisprudence has always included special protections for its Native population, but rarely has the State’s actions lived up to those protections. Adapting the public trust doctrine to center around Native interests is one consequential way to further support the vision of some Native Hawaiians for increased sovereignty and self-governance.
APPENDIX OF TERMS AND EXPRESSIONS

Ahupua’a. One of the smaller land divisions of kalana, made of several ili.\textsuperscript{315}

‘Auwai. Stream created for artificial irrigation.\textsuperscript{316}

The Great Māhele of 1848 (The Māhele). A series of land partitions (māheles) which ended the feudal structure of land management in Hawai‘i.\textsuperscript{317}

Mai hōʻoni i ka wai lana mālie. Do not disturb the water that is tranquil.\textsuperscript{318}

Ili. Smaller area of land within an ahupua’a.\textsuperscript{319}

Kahuwai. Water resource manager.\textsuperscript{320}

Kalo. Taro.\textsuperscript{321}

The Kānaka Maoli. The ancient Hawaiians.\textsuperscript{322}

Kapu. Codes of Behavior.\textsuperscript{323}

Kūkahau‘ula. A cluster of cinder cones.\textsuperscript{324}

Kono‘hi. Resource manager/landlord.\textsuperscript{325}

Kono‘hi stewardship. Duty of the konohiki to provide water access to the maka‘ainana.\textsuperscript{326}

Kuleanas. Small piece of land with rights attached.\textsuperscript{327}

Kuleana rights. Right to use the land/water, specifically reserved for descendants of Native Hawaiians.\textsuperscript{328}

Maka‘ainana. Commoners, Native tenants.\textsuperscript{329}

\textsuperscript{315}. ANDREWS, supra note 117, at 32.

\textsuperscript{316}. Id. at 73.

\textsuperscript{317}. See Sullivan, supra note 23, at 114–17.

\textsuperscript{318}. KAWENA PUKUI, supra note 19, at 2053.

\textsuperscript{319}. ANDREWS, supra note 117, at 221.

\textsuperscript{320}. Nakanelua, supra note 21, at 206.


\textsuperscript{322}. Nakanelua, supra note 21, at 190.

\textsuperscript{323}. Ho‘oipo Kāla‘ena‘auao Pa Martin et al., supra note 25, at 87.

\textsuperscript{324}. In re Conservation Dist. Use Application HA-3568 (Mauna Kea), 431 P.3d 752, 757 (Haw. 2018).

\textsuperscript{325}. Sullivan, supra note 23, at 113 (defining konohiki as “landlord” when examining Hawaiian laws published between 1823 and 1842); Nakanelua, supra note 21, at 205–06.

\textsuperscript{326}. Ho‘oipo Kāla‘ena‘auao Pa Martin et al., supra note 25, at 88.

\textsuperscript{327}. ANDREWS, supra note 117, at 333.

\textsuperscript{328}. Horner v. Kumulilii, 10 Haw. 174, 178, 180 (Haw. 1895).

\textsuperscript{329}. Ho‘oipo Kāla‘ena‘auao Pa Martin et al., supra note 25, at 85, 88.
Māheles. Land partitions.330
‘Ohana. Family.331
‘Ōlelo Hawaiʻi. Native Hawaiian language.332
Papa. Earth mother.333
Piko. Navel.334
Piko hoʻokahi. The single navel.335
Wākea. Sky Father.336
Wahi pana. Storied place.337
Wao akua. The place where gods reside.338

331. Nakanelua, supra note 21, at 206.
332. Id. at 205.
334. Id. at 758.
335. Id.
336. Id. at 757.
337. Id.
338. Id.