June 2002

He Kanawai Pono no ka Wai (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in In re Water Use Permit Applications

Keala C. Ede

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol29/iss2/8

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38R241

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
The development of the Public Trust Doctrine in the United States has led to varying state obligations with regard to water and other natural resources. The State of Hawai'i's Public Trust Doctrine jurisprudence recognizes an unusually broad range of public interests in water. The Hawai'i State Supreme Court's decision In re Water Use Permit Applications (Waiahole) stands as a milestone in the long legal battle over water on O'ahu, and has resulted in a broad articulation of the Public Trust Doctrine. In Waiahole, the Court applied the doctrine to all fresh waters, including ground water, and furthermore required the State to account for domestic and native uses in administering the water trust. Although this decision does mandate a doctrine with a greater reach than in any other jurisdiction, and is distinguishable from other jurisdictions because of its basis in Hawai'i's unique legal history, Waiahole does not radically deviate from Hawai'i's Public Trust Doctrine jurisprudence, and may influence the Public Trust Doctrine in other states.
INTRODUCTION

The Public Trust Doctrine (PTD) is a common law principle providing that the State holds title to certain natural resources for the benefit of the public.¹ The earliest forms of the doctrine, found in Roman and English law, applied primarily to lands beneath navigable or tidal waters and served the purpose of preserving navigation and travel.² In the last few decades, the PTD has evolved in American jurisprudence so that courts increasingly utilize the doctrine to protect a variety of public

---

¹ See David C. Slade, Putting the Public Trust Doctrine to Work 1 (2d ed. 1997).
interests in natural resources, particularly water. Contemporary PTD, while still founded upon the ancient conceptions of the doctrine, has become an important factor in water resource management, affecting both public and private water rights.

The Hawai‘i State Supreme Court’s holding in In re Water Use Permit Applications (Waiāhole) affirmed that the scope of the PTD in Hawai‘i is quite broad, and, in fact, is much broader than in other jurisdictions. Although other jurisdictions limit the PTD to surface water, the Waiāhole Court applied the doctrine to all fresh waters, including ground water. Waiāhole is also unique among PTD decisions in requiring the State to account for domestic and native uses in administering the water trust.

This Note begins with a brief history of the PTD, discusses the PTD in Hawai‘i, and outlines the facts, procedural history, and State Supreme Court holding in Waiāhole. The Note then analyzes the Waiāhole decision. The analysis first identifies potential conflicts between trust purposes and suggests that there will be practical difficulties in implementing the Court’s holding. The analysis then reveals that the Court did not significantly enlarge the scope of Hawai‘i’s PTD doctrine. In addition, the analysis argues that the Court’s PTD balancing test is appropriate for reconciling the trust’s mandates. Finally, the discussion compares Waiāhole’s articulation of the PTD to the doctrine’s status in other jurisdictions, finding significant distinctions but also commonalities and possibilities for influence upon other states. The Note concludes that, although the Waiāhole decision is exceptional as a result of Hawai‘i’s unique legal history, the holding may influence other jurisdictions to extend the scope of the PTD to ground water, and

4. See SAX ET AL., supra note 3, at 460-61.
5. 9 P.3d 409 (Haw. 2000).
6. Id. at 447 (“Based on the plain language of our constitution and a reasoned modern view of the sovereign reservation, we confirm that the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction.”). Even National Audubon, which represents one of the most liberal articulations of the PTD outside of Hawaii, only goes so far as to include non-navigable tributaries of navigable waters, excluding ground water from the scope of the doctrine. See generally National Audubon, 658 P.2d 709.
7. Waiāhole, 9 P.3d at 448-449 (“We thus hold that the maintenance of waters in their natural state constitutes a distinct ‘use’ under the water resources trust . . . . [We recognize domestic water use as a purpose of the state water resources trust . . . . [We continue to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.”).
encourage states to incorporate domestic and native water uses into the trust.

I

BACKGROUND

A. History of the PTD

The notion that the ownership of some types of property inherently vests in the public has its origins in ancient Roman and English common law. In its original form, the PTD "held that some resources, particularly lands beneath navigable waters or washed by the tides, are either inherently the property of the public at large, or are at least subject to a kind of inherent easement for certain public purposes . . . [.] foremost navigation and travel . . . ."  

American courts first applied the PTD in tidelands cases prior to the Civil War. The United States Supreme Court's landmark decision in Illinois Central Railroad Co. v. Illinois firmly established the rule that the PTD encompasses navigable waters and submerged lands beneath them, regardless of tidality. The Court reasoned that English jurisprudence limiting the PTD to tidal waters is inapplicable to American law because, unlike England, the ebb and flow of the tide does not determine navigability in the United States. For a number of years after


9. See Rose, supra note 2, at 351 (citing Patrick Deveney, Title, Jus Publicum, and the Public Trust: A Historical Analysis, 1 SEA GRANT L. J. 12, 14 (1976)).  

10. See, e.g., Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842); Arnold v. Mundy, 6 N.J.L. 1, 71-78 (N.J. 1821).  

11. 146 U.S. 387 (1892).  

12. Id. at 435-37 ("We hold . . . that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tidal waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, subject to the same trusts and limitations.").  

13. Id.
Illinois Central, no significant developments of the PTD occurred, although various state cases applied the doctrine.\(^\text{14}\)

In 1970, Professor Joseph Sax authored his seminal article on the PTD, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, generating renewed interest in applications of the PTD to natural resources.\(^\text{15}\) Sax's article framed the PTD as a common-law form of the "hard-look" doctrine, and argued that the doctrine compels public bodies to take note of, and properly respond to, shifts in public interest while also closely scrutinizing government actions to privatize natural resources.\(^\text{16}\) In subsequent articles, Sax argued that the PTD should not be limited by classifications such as navigability, but instead should be employed as a tool for implementing shifts in natural resource policy and incorporating public opinion concerning natural resources into policy decisions.\(^\text{17}\)

Critics of Sax's conceptualization of the PTD argue that flaws in Sax's theory detract from its applicability to natural resource management. A chief grievance is that the PTD is too vague in its definition.\(^\text{18}\) Other commentators assert that the PTD is simply wrong in its assumptions, and maintain that a privatized system of resource management would result in greater environmental protection.\(^\text{19}\) Finally, some critics argue that state-controlled regimes place undue restrictions on the transferability of water from less economically beneficial uses to more productive uses, resulting in "waste."\(^\text{20}\)


\(16\) Id. at 557-65.


\(18\) See Rose, *supra* note 8, at 722 (indicating how vaguely some articles and cases define PTD).


\(20\) See Douglas W. MacDougal, *Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?*, 18 U. Haw. L. Rev. 1, 68 (1996). Under the common law notion of waste, instream resource protection had no value, since "nonuse was never a beneficial use." Id. at 69. Commentators have furthermore asserted, under the beneficial use doctrine, "nonuse of water is waste per se." Id. at 20 n. 92 (citing A. Dan Tarlock, *Law of Water Rights and Resources* § 5:16(3)(a) (6th ed. 1994)).
Notwithstanding the scholarly debate, the PTD remains a vital common law doctrine, providing that, at the very least, title to some natural resources is held in trust by the State for the benefit of the public.\textsuperscript{21}

\textbf{B. The PTD and Water Resources in Hawai'i}

The evolution of the PTD in Hawai'i is a complex interweaving of unique principles of Hawai'i law and shared aspects of American jurisprudence. The concept of the PTD in Hawai'i began with the ancient Hawaiian system of water rights.\textsuperscript{22} Up until the mid-nineteenth century, land was managed in a system that has been analogized to feudalism, although tenants had important customary rights to water that were superior to those of the ruling class.\textsuperscript{23} The first Constitution of the Kingdom of Hawai'i, written in 1840, established that although the King controlled all property, "it was not his private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head, and had the management of the landed property."\textsuperscript{24} In 1848, King Kamehameha III instituted the Great Māhele, a division of all of the land in the Hawaiian Kingdom between himself, the state, the konohiki (low ranking chiefs who regulated land and water use), and the tenants.\textsuperscript{25} Following the Great Māhele, a "fairly complicated system of water rights prevailed ... [i] consisting of three different rights - appurtenant, surplus, and prescriptive."\textsuperscript{26}

In 1899, the high court of the Republic of Hawai'i incorporated the Illinois Central rule into Hawai'i's water management regime. The Court's decision in \textit{King v. O'ahu}

\begin{footnotesize}
\begin{itemize}
\item[21.] SLADE, supra note 1, at 1.
\item[23.] SAX ET AL., supra note 3, at 335.
\item[24.] HAW. CONST. of 1840, reprinted in \textit{THE FUNDAMENTAL LAW OF HAWAII} 3 (Lorrin A. Thurston ed., 1904).
\item[25.] See SAX ET AL., supra note 3, at 335.
\item[26.] Id. Appurtenant rights were reserved to every tenant and preempted all others, authorizing every tenant to use on their land the amount of water that would have been required to grow kalo, the Native Hawaiian staple crop, on that tract of land in 1848. See id.; see also Reppun v. Board of Water Supply, 656 P.2d 57, 71 (Haw. 1982) ("[A]ppurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land."). Surplus water was the amount of "water remaining in a stream after all appurtenant water rights were met, . . . [and was reserved] to the konohiki." SAX ET AL., supra note 3, at 336. Prescriptive water rights allowed "a water user . . . [to] gain a prescriptive right [which was] good against both appurtenant and surplus water rights." \textit{Id.}
\end{itemize}
\end{footnotesize}
Railway & Land Co.\textsuperscript{27} established the principle that "[t]he people of Hawai‘i hold the absolute rights to all its navigable waters and the soils under them for their own common use. The lands under the navigable waters in and around the territory of the Hawaiian Government are held in trust for the public uses of navigation."\textsuperscript{28}

After Hawai‘i achieved statehood in 1959, the State Supreme Court began to use the PTD in ruling on various shoreline cases, gradually expanding the Illinois Central form of the PTD.\textsuperscript{29} Then, in 1973, the Court’s decision in McBryde Sugar Co. \textit{v.} Robinson\textsuperscript{30} profoundly altered the boundaries of the PTD in Hawai‘i. The dispute involved two large sugar growers seeking offstream diversions from the Hanapepe River on the island of Kaua‘i.\textsuperscript{31} One company claimed surplus rights and purchased appurtenant rights, while the other claimed prescriptive rights and purchased appurtenant rights.\textsuperscript{32} This conflict led the downstream owner, McBryde Sugar, to bring suit against the upstream owner, Robinson, to determine the relative water rights of the two parties.\textsuperscript{33} The Court held that, despite the grants of land ownership interests in the Great Māhele, the Hawaiian Kingdom specifically reserved its sovereign authority "'[t]o encourage and even enforce the usufruct of lands for the common good.'"\textsuperscript{34} Furthermore, the Court established that

[t]he right to water is one of the most important usufruct of lands, and it appears clear... that by the foregoing limitation the right to water was specifically and definitely reserved for the people of Hawai‘i for their common good in all of the land grants. Thus by the Māhele... [the] right to

\begin{itemize}
  \item \textsuperscript{27} 11 Haw. 717 (1899).
  \item \textsuperscript{28} \textit{Id}. at 725 (citations omitted).
  \item \textsuperscript{29} \textit{See}, e.g., \textit{County of Hawai‘i v. Sotomura}, 55 Haw. 176, 183-84 (1973) ("Land below the high water mark... is a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights." (citation and internal quotation marks omitted)); \textit{In re Sanborn}, 57 Haw. 585, 593-94 (1977) (indicating that any attempts by the land court to register lands below the high water mark were ineffective under the public trust doctrine, since title to those lands was held by the State); \textit{State v. Zimring}, 58 Haw. 106, 121 (1977) (holding that lava extensions "vest when created in the people of Hawai‘i, held in public trust by the government for the benefit, use and enjoyment of all the people.").
  \item \textsuperscript{30} 504 P.2d 1330 (Haw. 1973).
  \item \textsuperscript{31} \textit{See} SAX ET AL., supra note 3, at 336.
  \item \textsuperscript{32} \textit{Id}.
  \item \textsuperscript{33} \textit{Id}.
  \item \textsuperscript{34} McBryde, 504 P.2d at 1338. "Usufruct" is defined as the civil law "right to use and enjoy property vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing." STEVEN H. GIFIS, LAW DICTIONARY 538 (1996) (quoting Schwartz \textit{v. Gerhardt}, 75 P. 698, 699 (Or. 1904)).
\end{itemize}
water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses and rivers remained in the people of Hawai'i for their common good.\(^{35}\)

Most significant, however, was the Court's redefinition of appurtenant, surplus, and prescriptive water rights, ultimately effecting a prohibition of out-of-watershed diversions by recognizing public ownership of water in the natural watercourses and rivers.\(^{36}\)

In 1982, the Hawai'i Supreme Court clarified McBryde in Robinson v. Ariyoshi,\(^{37}\) making it clear that the "sovereign rights" rule of McBryde stemmed from the PTD. The Court in Robinson held that the "State's ownership... is a retention of such authority to assure the continued existence and beneficial application of the resource (i.e., water) for the common good."\(^{38}\) Furthermore, the Court explained that this reservation was more than simply an affirmation of police powers, but instead indicated that the State had "retained on behalf of the people an interest in the waters of the kingdom which the State has an obligation to enforce and which necessarily limited the creation of certain private interests in waters."\(^{39}\) Robinson therefore confirmed the state's continuing duty under the PTD to protect the public interest in water resources.\(^{40}\)

36. Id. at 1346 ("Neither McBryde or Gay & Robinson has any right to divert water from the... Hanapepe river out of the Hanapepe Valley into other watersheds."). Regarding appurtenant rights, the Court held that "the right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant and any contrary indications in [Hawai'i] case law are overruled." Id. at 1341. Citing an important 1850 statute of the Hawaiian Kingdom, the Court ruled that surplus water is subject to the English rule of natural flow, holding that landholders adjacent to streams have "the riparian right to the natural flow of the stream without substantial diminution and in the shape and size given it by nature." Id. at 1344. However, the Court would later suggest in Reppun that "the continued satisfaction of the framers' intent requires that the [McBryde] doctrine of riparian rights to natural flow be permitted to evolve in accordance with changing needs and circumstances," compelling the incorporation of the reasonable use rule into Hawai'i law. See Reppun v. Board of Water Supply, 656 P.2d 57, 72 (Haw. 1982). Lastly, the Court held that prescriptive rights are invalid in Hawai'i, asserting that "the general law is that one may not claim title to or interest in state-owned property by adverse use." McBryde, 504 P.2d at 1345 (citations omitted).
37. 658 P.2d 287 (Haw. 1982).
38. Id. at 310.
39. Id. at 310 n.31.
40. It is important to note that McBryde and Robinson raise significant constitutional takings issues under the fourteenth amendment to the United States Constitution. See SAX ET AL., supra note 3, at 340-341; U.S. CONST. amend. XIV, § 1. Subsequent to the United States Supreme Court's denial of review of McBryde, the
In addition to Hawaiian caselaw, the state constitution also reflects the development of the PTD prior to *Waiahole*. In 1978, the people of Hawai‘i voted to add two provisions to Article XI of the state constitution that specifically relate to water resources.\(^{41}\) Section 1 of Article XI states that "[f]or the benefit of present and future generations the State . . . shall conserve and protect Hawai‘i’s natural beauty and all its natural resources, including . . . water . . . ."\(^{42}\) Furthermore, Section 1 states that "[a]ll public natural resources are held in trust by the State for the benefit of its people."\(^{43}\) Section 7 of Article XI declares that the "State has an obligation to protect, control, and regulate the use of Hawai‘i’s water resources for the benefit of the people," and also provides for the creation of a water resources agency.\(^{44}\)

Pursuant to this section of the constitution, the legislature enacted the State Water Code in 1987, further defining the scope of the PTD and also establishing the Commission on Water Resource Management to oversee water management.\(^{45}\) These state constitutional amendments, coupled with the landholders brought suit in federal court, seeking to enjoin state enforcement of the *McBryde* decision. See Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977). The district court granted the injunction, agreeing with the landholders’ argument that enforcement of the decision would result in an unconstitutional taking of their property, and the Ninth Circuit affirmed. See id; Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985). However, the United States Supreme Court vacated the Ninth Circuit’s decision, remanding the case to the Court of Appeals for further evaluation of whether the takings issue was appropriately ripe for judicial review. See Ariyoshi v. Robinson, 477 U.S. 902 (1986). The State of Hawai‘i successfully argued on remand that the *McBryde* decision had thus far not acted as a bar against the landholders’ access to water, and furthermore may never do so given that Hawai‘i courts could use equitable doctrines to mitigate the effects of *McBryde* on such landholders. See Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989). The Ninth Circuit therefore held that the landholders’ claim of unconstitutional takings were unripe and ordered the dismissal of the complaints. *Id.*

41. HAW. CONST. art. XI, §§ 1, 7
42. *Id.* §1
43. *Id.*
44. *Id.* art. XI, § 7
45. HAW. REV. STAT. § 174C (1988). For example, the State Water Code provides that "[i]t is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use." *Id.* at § 174C-2(a). Although the Code indicates that its provisions should be liberally construed to achieve maximum beneficial use of the state waters, the statute also declares that "adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest." *Id.* at § 174C-2(c).
aforementioned caselaw, ultimately formed the foundation upon which the State Supreme Court based its decision in *Waiahole.*

II

DESCRIPTION OF THE CASE

A. Facts

In spite of the relatively arid condition of the island’s leeward districts, the O‘ahu Sugar Company (OSCo) recognized the agricultural potential of O‘ahu’s central plain, building a ditch system in the early twentieth century to irrigate its plantation with water transported from the lush windward side. The Waiahole Ditch System collected both fresh surface water and dike-impounded ground water of the Ko‘olau Mountains, delivering approximately 27 million gallons a day (mgd) to the leeward side of the island. OSCo used a substantial amount of the ditch’s flow, along with a considerable quantity of additional ground water pumped from the Pearl Harbor aquifer, also on the leeward side of the Ko‘olau Mountains.

The ditch system diversions directly diminished flows in windward streams, adversely affecting native stream life and possibly contributing to the degradation of the larger Kane‘ohe Bay ecosystem, including offshore fisheries. Collectively, these effects were detrimental to both the natural environment and the human communities that depended on unimpaired and sufficient windward stream flow levels. The adverse results of stream diversions, however, were not widely recognized by governing bodies until the early 1990s.

In July 1992, the State Commission on Water Resource Management (Commission) designated the five aquifer systems of windward O‘ahu as “ground water management areas,” effectively requiring existing users of Waiahole Ditch water to

46. As the footnote above indicates, a large portion of the Hawai‘i Supreme Court’s decision in *Waiahole* is statutorily based, indicating that the PTD is really only dispositive after the State Water Code is applied. Nevertheless, the PTD’s role in *Waiahole* is significant, and demonstrates the broad reach of the doctrine as a final check on water appropriation that could run afoul of public values.

47. In re Water Use Permit Applications (Waiahole), 9 P.3d 409, 423 (Haw. 2000).

48. Id.

49. Id.

50. Id.

51. Id.

52. Id.
apply for water use permits within one year.\(^{53}\) Although the Waiahole Irrigation Company (WIC), which operated the ditch system, "filed a combined water use permit application for the existing users of ditch water," OSCo upset the status quo with its subsequent announcement that it would cease its operations.\(^{54}\)

The decline of the sugar industry, exemplified by OSCo's action, precipitated a conflict over the availability of water flowing through the ditch system.\(^{55}\) Various groups, including governmental, private, and community organizations, filed petitions to reserve ditch water.\(^{56}\) Some of the same parties also petitioned to increase the interim instream flow standards (WIIFS) of the affected windward streams.\(^{57}\) Additionally, some groups filed separate water use permit applications that called for the return of water drawn by the ditch to leeward lands they owned.\(^{58}\) Collectively, the amount of water requested by the permit applications and the petitions to amend the WIIFS exceeded the entire ditch flow.\(^{59}\)

By mid-1994, one year after OSCo ceased operations, parties complained to the Commission that WIC was expelling unused ditch water into various central O'ahu gulches.\(^{60}\) Subsequent investigation led to the Commission's request for mediation among interested parties, which ultimately resulted in an order that the WIC release all but 8 mgd back into the windward streams.\(^{61}\) This interim restoration had an immediate positive impact on the stream ecology.\(^{62}\)

In January 1995, the Commission mandated that a combined contested case hearing dispose of the permit applications, reservation petitions, and petitions to amend the WIIFS.\(^{63}\) Public hearings ensued and the Commission admitted a

---

\(^{53}\) See HAW. REV. STAT. §§174C-41(a), 174C-48(a), 174C-50(c) (1988).

\(^{54}\) Waiahole, 9 P.3d at 423.

\(^{55}\) Id.

\(^{56}\) Id. at 423-24. The Department of Agriculture (DOA), Office of Hawaiian Affairs (OHA), Waiahole-Waikane Community Association (WWCA), Kamehameha Schools Bernice Pauahi Bishop Estate (KSBE), and the Department of Hawaiian Homelands (DHHL) all filed petitions to reserve ditch water.

\(^{57}\) Id. at 424. WWCA and OHA petitioned to increase the affected windward streams' interim instream flow standards (WIIFS).

\(^{58}\) Id. KSBE and Dole Food Company/Castle & Cooke, Inc. (Castle) filed separate water use permit applications that called for the return of water drawn by the ditch to lands they owned.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id. at 425.
In late 1997, two years after the commencement of the hearing in November 1995, the Commission issued its proposed decision and accepted submissions of written and oral exceptions by the parties. While the Commission deliberated on its final decision, the governor and attorney general announced their criticisms of the proposed decision as inadequate in its provision of water for leeward interests. The Commission’s final decision, released in December 1997, differed from the proposed decision by increasing the quantity of water allocated to leeward permittees by 3.79 mgd.

The Commission declared that the protection of all fresh water resources, including ground water, is a primary duty of the state under the PTD. More specifically, the Commission found windward O‘ahu ground water and streams, as well as Kane‘ohe Bay, to be part of the public trust and therefore subject to review under the State’s public trust responsibility. Nevertheless, the Commission also stated that this does not always mean that offstream uses must cease, or that new offstream uses are not permissible. Instead, although the public trust duty remains primary, the particular level of protection may vary depending on the circumstances.

B. State Supreme Court Decision

On appeal, the Hawai‘i State Supreme Court upheld the Commission’s determination that the PTD applied to all water resources in Hawai‘i, despite previous limitations on the doctrine that were based on distinctions between surface and ground

---

64. Id.
65. Id.
66. Id.
67. Id.
68. Id. ("Under the State Constitution and the public trust doctrine, the State’s first duty is to protect the fresh water resources [surface and ground] which are part of the public trust res.") (citing the Commission’s Conclusions of Law (COLs) at 11; other citations omitted).
69. Waiāhole, 9 P.3d at 425 (citing COLs at 31).
70. Waiāhole, 9 P.3d at 425-26 ("[T]he duty to protect [public water resources] does not necessarily or in every case mean that all offstream uses must cease, that no new uses may be made, or that all waters must be returned to a state of nature before even the first Hawaiians arrived in these islands and diverted stream water to grow taro.") (citing COLs at 11).
71. Waiāhole, 9 P.3d at 426 ("The particular level of protection may vary with circumstances and from time to time; but the primary duty itself remains.") (citing COLs at 11).
The Court first found that its past precedent supported the notion that the scope of the PTD includes all water resources in Hawai‘i. The Court then looked to the state constitution, which confirmed that the PTD "applies to all water resources without exception or distinction." According to the Court, both the plain meaning of the relevant constitutional provisions and records from the constitutional convention reflected that the framers understood "'water resources' as includ[ing] 'ground water, surface water, and all other water.'"

The Waiāhole Court articulated three valid purposes for the public trust: 1) the protection of water resources, including maintenance of waters in their natural state as a distinct trust use; 2) the protection of domestic uses, particularly the provision of drinking water; and 3) the protection of Native Hawaiian and traditional and customary uses. The Court justified resource protection as a valid trust use by citing the Hawai‘i constitution and Hawaiian caselaw. The Court also supported this holding by citing the California Supreme Court decision in National Audubon Society v. Superior Court of Alpine County.

However, the Court based its recognition of the maintenance of water in its

---

72. Waiāhole, 9 P.3d at 447 ("Based on the plain language of our constitution and a reasoned modern view of the sovereign reservation, we confirm that the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction.").

73. Waiāhole, 9 P.3d at 445 (citing Robinson v. Ariyoshi, 658 P.2d 287, 310 (Haw. 1982)).

74. Waiāhole, 9 P.3d at 445 (citing HAW. CONST. art. XI, §§ 1, 7).

75. Waiāhole, 9 P.3d at 445 (citing Debates in Committee of the Whole on Conservation, Control and Development of Resources, in 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 861 (statement by Delegate Fukunaga)).

76. Waiāhole, 9 P.3d at 448-49.

77. Id. (citing Robinson, 658 P.2d at 310-11; HAW. CONST. art. XI, §§ 1, 7; Reppun v. Board of Water Supply, 656 P.2d 57, 76 n. 200 (Haw. 1982)).

78. Waiāhole, 9 P.3d at 448. See National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983) (quoting Marks v. Whitney, 6 Cal. 3d 251 (1971)). In Marks, the California Supreme Court held that "one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." Marks, 6 Cal. 3d at 259-60 (emphasis added).
natural state as a valid PTD "use" on Hawai'i law alone.  The second purpose, domestic uses, also has its primary basis in Hawaiian law, although the Court suggested that other jurisdictions have also treated domestic uses in a manner approaching a PTD purpose. The final purpose articulated by the Court, Native Hawaiian and traditional and customary uses, is supported solely by Hawai'i state law. The Court also made clear that private commercial use is not, in itself, a valid trust purpose, again citing both extrajurisdictional and Hawai'i authority to support its conclusion.

Given these trust purposes, the Court held that the PTD creates a dual mandate for the State, requiring it to balance resource protection against maximum reasonable and beneficial use of water. Relying on both extrajurisdictional caselaw and Hawaiian authority, the Court reasoned that the protection mandate is consistent with the traditional PTD's application to navigable and tidal waters, and properly requires the state "to ensure the continued availability and existence of its water..."
resources for present and future generations." The Court found support for the second mandate, maximum reasonable and beneficial allocation of water resources, in both state judicial precedent and the Hawai‘i state Constitution. Other states' constitutions and statutes similarly provide for the maximum reasonable and beneficial use of water resources. Nevertheless, the Waiāhole Court distinguished the Hawai‘i constitution from "traditional systems of water rights governed by such provisions," explaining that the intent of the PTD as codified in Hawai‘i is not to achieve maximum consumptive use but instead to strive towards the most equitable, reasonable, and beneficial allocation of state water resources, while bearing in mind that resource protection also constitutes a valid trust use.

In discussing the balance of these mandates, the Court recognized that "[t]he public has a definite interest in the development and use of water resources . . . [such that] the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection." The Court thus overturned the Commission's conclusion that resource protection is a categorical imperative, maintaining that the Commission must analyze each case involving competing public and private water uses individually. Nevertheless, the Court indicated that "any balancing of public and private uses [must] begin with a presumption in favor of public use, access, and enjoyment." The Court therefore affirmed the Commission's conclusion that private commercial water uses warrant a higher level of scrutiny than other uses, and held that the burden to justify commercial uses should ultimately lie with a party

84. Waiāhole, 9 P.3d at 451 (citing Illinois Central, 146 U.S. 387; State v. Public Service Commission, 275 Wis. 112 (1957); McBryde, 504 P.2d 1330, HAW. CONST. art. XI. §§ 1, 7).
85. Waiāhole, 9 P.3d at 451 (citing Reppun v. Board of Water Supply, 656 P.2d 57, 63-69 (Hawai‘i, 1982); HAW. CONST. art. XI, § 1 cl. 2).
86. Waiāhole, 9 P.3d at 451 (comparing HAW. CONST. art. XI, § 1 cl. 2 with CAL. CONST. art. X § 2; N.M. CONST. art. 16 § 3; N.D. CENT. CODE § 61-04-01.1.1 (Supp. 1999)).
87. Waiāhole, 9 P.3d at 451 ("Unlike many of the traditional water rights systems governed by such [state constitutional] provisions, however, article XI, section 1's mandate of 'conservation'-minded use recognizes 'protection' as a valid purpose consonant with assuring the 'highest economic and social benefits' of the resource."); see also HAW. CONST. art. XI § 7; Robinson, 658 P.2d at 310-11; Reppun, 656 P.2d at 76 n. 20.
88. Waiāhole, 9 P.3d at 453.
89. Id. at 454 (citing Robinson, 658 P.2d at 312; Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So. 2d 1152 (1984)).
90. Waiāhole, 9 P.3d at 454 (citations omitted).
seeking to engage in such a use.\(^91\) In sum, the Court found that the state's duty amounts to due consideration of "the cumulative impact of existing and proposed diversions on trust purposes" and implementation of "reasonable measures to mitigate this impact."\(^92\)

III

ANALYSIS

This section first evaluates the \textit{Waiāhole} decision, discussing the tension between the various trust purposes set forth by the Court, and explaining the practical difficulties inherent in balancing the PTD's dual mandate. The analysis then considers the Court's application of the PTD in \textit{Waiāhole} in the context of Hawai'i's legal history, finding that the Court did not enlarge the scope of the doctrine in Hawai'i law, and that the Court's balancing test is a reasonable accommodation of the PTD's dual mandate. Finally, this section compares and contrasts the \textit{Waiāhole} Court's articulation of the PTD to the doctrine's status in other jurisdictions. This casenote concludes that, although the \textit{Waiāhole} decision is distinct as a result of Hawai'i's unique legal history, the holding may encourage other jurisdictions to extend the scope of the PTD to ground water, and to incorporate domestic and traditional native uses into the trust.

A. Waiāhole's Articulation of the PTD

1. Conflicting PTD purposes

The \textit{Waiāhole} Court did not adequately explain how to balance the three purposes of the PTD. While resource protection values instream flow maintenance, domestic and Native Hawaiian uses, such as \textit{kalo} cultivation, are consumptive and require offstream diversions.\(^93\) Although the \textit{Waiāhole} Court


\(^92\) \textit{Waiāhole}, 9 P.3d at 455 (citations omitted).

\(^93\) It is important to note that not all Native Hawaiian uses are offstream, appropriative, and consumptive. Instream gathering of native stream life, such as \textit{hihiwai} (mollusk), \textit{'opae} (shrimp), and \textit{'opu} (goby fish), also qualifies as a Native Hawaiian use. See generally Martin et al., \textit{supra} note 22, at 161. Also note that among the native custom purists, \textit{kalo} cultivation is distinguishable from other offstream uses, such as commercial sugar cane irrigation, because the use of water is
explained in detail how to balance the PTD’s dual mandate, the majority seemed only to consider the tension between offstream private or commercial uses and instream public trust uses, and did not expressly state how the three PTD purposes comport with the dual mandate.\textsuperscript{94} Thus, although the majority was explicit in announcing that the PTD places a burden of justification on offstream commercial users,\textsuperscript{95} the Court did not indicate how offstream consumptive PTD uses, such as providing drinking water and cultivating \textit{kalo}, are reconciled with resource protection and stream flow maintenance.\textsuperscript{96}

2. \textit{Practical difficulties with the PTD’s dual mandate}

A second dilemma left unresolved after \textit{Wai\u0101hole} concerns the amount of instream flow required by the PTD. Because there are

\begin{itemize}
  \item carefully monitored so as not to harm both stream life and the rights of downstream tenants. In ancient Native Hawaiian times, as is the case today.
  \item Iklapu (codes of behavior) ensured that all community members would avoid polluting the streams. Konohiki (low ranking chiefs who regulated land and water use) ensured that all tenants of the ahupua‘a (Native Hawaiian land division) enjoyed equal access to water. Disputes over water were rare. Hawaiians’ use of water was accompanied by correlative responsibilities to maintain the 'auwai (ditch or canal) systems and lo‘a‘i (taro pond fields). . . . No 'auwai was permitted to take more water than continued to flow in the stream below the dam. It was generally less, for there were those living makai or below the same stream, and drawing water from it, whose rights had to be regarded. Any dam made regardless of this well recognized rule, were [sic] levelled to the bed rock by the water right holders below, and at any rebuilding, delegates from each dam below were required to be present to see that a due proportion of water was left in the stream.
\end{itemize}

\textit{Id.} at 87-89 (citations omitted).

\textsuperscript{94} \textit{See Wai\u0101hole}, 9 P.3d at 452-56; \textit{see also infra} Part III.B.2 (discussing the process of balancing the dual mandate and assessing its reasonableness).

\textsuperscript{95} \textit{See Wai\u0101hole}, 9 P.3d at 454 (affirming the Commission’s conclusion that PTD effectively prescribes a “higher level of scrutiny” for private commercial uses.”).

\textsuperscript{96} Kenneth R. Kupchak, \textit{Managing the Public Trust in Hawai'i: Key Questions Remain Unanswered}, from \textit{Managing Hawai'i’s Public Trust Doctrine: A Symposium for Government Policy-Makers, Decision-Makers and Regulators, Hawai'i's Public and Private Water Management and Natural Resources Communities, and Others Interested in Water and Natural Resource Issues} (Symposium) at 5 (October 6, 2001). Kupchak asked:

Are instream uses superior to offstream public trust uses identified by the court? For example, are instream values, such as the procreation of fish, superior to Hawaiian rights, which arguably might call for offstream irrigation of taro? Furthermore, are instream values superior to the need for an adequate supply of potable water? Or are these issues trumped by necessity under the health, welfare, and police powers of the government? These questions remain unanswered.

\textit{Id.} The Court most likely overlooked this tension because balancing the three PTD purposes set forth by the Court was not at issue in \textit{Wai\u0101hole}. 

\textit{Id.}
no pre-diversion measures of healthy streamflow (such gauges would have to pre-date ancient Hawaiian irrigation), interested parties face a fundamental question: "[H]ow does one adequately balance competing public and private uses of water, factoring in a 'presumption in favor of public use, access, and enjoyment,'... when one is not sure how much water is needed for public trust uses/purposes/values?" This indeterminacy creates uncertainty for potential consumptive users.

The Waiāhole Court admitted that "the uncertainty regarding actual instream flow requirements prevented any determination [by the Commission] as to the adequacy of the present water supply." The majority went on to state, however, that:

[t]he Commission may still act when public benefits and risks are not capable of exact quantification... [and that] the Commission should not hide behind scientific uncertainty, but should confront it as systematically and judiciously as possible – considering every offstream use in view of the full cumulative potential harm to instream uses and values and

97. Paul Achitoff, counsel for the Waiāhole-Waikāne Community Association, Hakipu’u ‘Ohana, and Ka Lāhui Hawai‘i, however, argues that taro irrigation in Waiāhole is "a complex topic and a red herring in this context," asserting that the appropriate "measures would just have to pre-date the Ditch." E-mail from Paul Achitoff, Counsel for Waiāhole-Waikāne Community Association, Hakipu’u ‘Ohana, & Ka Lāhui Hawai‘i, to Author, Apr. 25, 2002. Achitoff notes that "[t]here were, in fact, pre-diversion measures of streamflow (by the Russ Smith Corp.), admitted into evidence in the contested case... [and that] the existence or nonexistence of such measures does not create the 'fundamental question' posed: that question is posed regardless of whether we know pre-diversion flow levels." Id.

98. Kupchak, supra note 96, at 3 (citing Waiāhole, 9 P.3d at 454).
99. Irrigators and developers are adversely affected by the lack of streamflow measures, since they cannot "tell if the proposed private use impairs rather than enhances public trust uses/purposes/values if... the amount of water necessary to sustain such uses/purposes/values is unknown." Kupchak, supra note 96, at 4. However, it is important to note that the Waiāhole Court’s declaration of a precautionary principle with regard to instream flow levels does not comport with Kupchak’s "suggest[ion] that a proposed private use might enhance public trust values (as opposed to merely not undermining them too much)." Achitoff, supra note 97. Responding to the claim that inadequate streamflow measures can unduly burden private commercial users, Achitoff argues that the use of the term "burden" for private commercial users is only appropriate in the context [that] 'permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource;' Waiāhole, 9 P.3d at 472. The PTD and Water Code suggest that, until the commercial users meet this burden, they have no right to water, so they are not being 'unduly burdened' by the lack of data.

Id.

100. Waiāhole, 9 P.3d at 472.
the need for meaningful studies of stream flow requirements.\textsuperscript{101}

The Court acknowledged that it "does not expect [evaluating stream flow requirements] to be an easy task," and declared that "the Commission may decide that the foregoing balance supports postponing certain uses, or holding them to a higher standard of proof, pending more conclusive evidence of instream flow requirements."\textsuperscript{102} Despite the fact that the Court encouraged the Commission to move forward without adequate information, and admonished the Commission for its "permissive view towards stream diversion, particularly while the instream flow standards remained in limbo," the Commission's limited access to information regarding healthy stream flows may delay realization of the PTD goal of resource protection.\textsuperscript{103}

The Commission's decision on remand regarding interim instream flow standards reflects this difficulty.\textsuperscript{104} Although the \textit{Waiahole} Court declared that several factors indicated "that the interim standard should, at least for the time being, incorporate much of the total present stream flow,"\textsuperscript{105} the Commission "agree[d] that some of [the] factors (discussed by the Court) are at work, but respectfully disagree[d] with the Court's conclusion on the others."\textsuperscript{106} The Commission thus asserted that "what the Court characterizes as 'the lack of proper studies and adequate information on the streams' does not inevitably lead to the conclusion that 'the interim standard should, at least for the time being, incorporate much of the present stream flow.'"\textsuperscript{107}

The conflict between the Commission's decision on remand and the \textit{Waiahole} Court's holding exemplifies the logistical obstacles to applying the PTD.\textsuperscript{108} Other jurisdictions should

\textsuperscript{101. Id. at 471.}
\textsuperscript{102. Id.}
\textsuperscript{103. Id. at 472.}
\textsuperscript{105. Waiahole, 9 P.3d at 468-69.}
\textsuperscript{106. See Decision on Remand, supra note 104, at 100.}
\textsuperscript{107. Id. at 101 (citing Waiahole, 9 P.3d at 468-69).}
\textsuperscript{108. Counsel for the Waiahole-Waikehe Community Association, Hakipu'u 'Ohana, and Ka Lähui Hawai'i, however, asserts that this conflict exemplifies... the unwillingness of the Commission to accept its mandate to protect streams, apply the precautionary principle, and hold offstream users to their burdens of proof. The Commission can talk about logistical}
recognize these practical difficulties in implementing the PTD in a manner similar to that announced in Waiāhole. Without adequate resources to determine what is necessary for resource protection, and given discrepancies in the interpretation of available data, effective judicial intervention to enforce the PTD will remain elusive. However, such problems are common to many regulatory regimes that require consideration of public uses, even those that lack the breadth of the PTD in Hawai‘i. Thus, while deficiencies of data are potential obstacles to implementing the Waiāhole Court's formulation of the PTD, such problems are not necessarily unique to the doctrine's application in Hawai‘i.

Both the conflicting PTD purposes and the Commission’s decision on remand may result in further litigation to clarify the most effective means of applying the PTD as articulated in Waiāhole. Indeed, three of the parties to the original contested case hearing have filed notices of appeal with the Commission based on the decision on remand, once again bringing the dispute to the State Supreme Court.

Achitoff, supra note 97.

109. For example, similar to the Waiāhole Court, the California Supreme Court in National Audubon confronted the difficult task of determining how much water was sufficient to satisfy the PTD requirements for Mono Lake. See generally National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (1983). Eleven years after the California Supreme Court’s decision in National Audubon, the California State Water Resources Control Board, by means of a lake level determination, was finally able to resolve the question of how much water should remain in the hydrological system for instream public trust purposes. See Cal. Water Resources Control Board Decision 1631, available at http://www.monobasinresearch.org/images/legal/d1631text.htm; see also SAX ET AL., supra note 3, at 553 (describing the aftermath of National Audubon). In 1998, the State Water Resources Control Board supplemented Decision 1631 by ordering Los Angeles to prepare a plan to restore tributary streams and associated waterfowl habitat based on damages caused by the city. See Cal. Water Resources Control Board Order No. 98-05, available at http://www.swrcb.ca.gov/resdec/wrorders/1998/wro98-05.htm; see also SAX ET AL., supra note 3, at 553 (describing the aftermath of National Audubon).

B. Waiʻāhole's Articulation of the PTD in the Context of Hawaiʻi's Legal History

1. Waiʻāhole and Hawaiʻi precedent

Waiʻāhole's articulation of the PTD does not drastically diverge from Hawaiʻi jurisprudence. In holding that the PTD encompasses ground water, the Waiʻāhole Court merely affirms Robinson, where the Court unequivocally stated that, as a result of the King's reservation of all surface waters after the Māhele, "a public trust was imposed upon all waters of the kingdom."111 Two of the parties to Waiʻāhole contested this statement of the law, citing City Mill Co., Ltd. v. Honolulu Sewer & Water Commission,112 which held that "all mineral or metallic mines' were reserved to the Hawaiian government, but there was no reservation whatever of the subterranean waters."113 However, the Waiʻāhole Court overturned City Mill, noting that the decision did not "address the reservation of sovereign prerogatives and its surrounding historical and legal context . . . [which] discounts the precedential value of City Mill concerning the public trust."114 The Court's invalidation of City Mill is reasonable and in line with McBryde and Robinson, which both indicated that the City Mill Court used flawed reasoning in reaching its conclusion.115

Regardless of whether the Waiʻāhole decision comports with Hawaiian precedent, in establishing that ground water is subject to the PTD the Court correctly acknowledged that "[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."116 Since both surface water and ground water "represent no more than a single integrated source of water with each element dependent upon the other for its existence,"117 the fact that "[t]here was no ancient law or usage in Hawaiʻi relating to artesian waters"118 does not require a ground water exception to the water resources trust.119 In refusing to distinguish between surface water and

112. 30 Haw. 912 (1929).
113. Id. at 934.
114. Waiʻāhole, 9 P.3d at 446.
115. Id. at 446 n.32.
116. Id. at 447 (citing Reppun v. Bd. of Water Supply, 656 P.2d 57, 72 (Haw. 1982) (The doctrine must "evolve in accordance with changing needs and circumstances.")).
118. City Mill, 30 Haw. at 938; see also Territory v. Gay, 31 Haw. 376, 403 (1930).
119. See Waiʻāhole, 9 P.3d at 446-47.
ground water, the Court formulated a PTD that acknowledges the reality of hydrological integration and refuses to adhere to a system of water management based on "artificial distinctions."\textsuperscript{120}

Like the Court's application of the PTD to both surface water and ground water, the Court's articulation of PTD purposes also does not drastically alter the doctrine as it has historically existed in Hawai'i. That resource protection is an integral aspect of the PTD is well established in Hawai'i.\textsuperscript{121} The PTD purpose of protecting domestic uses, particularly the provision of drinking water, also has a substantial foundation in the law and politics of Hawai'i, beginning with the 1850 Kuleana Act, where the Hawaiian Kingdom guaranteed that "[t]he people shall . . . have a right to drinking water, and running water."\textsuperscript{122} Several Hawai'i cases also provide a valid basis for the recognition of protecting domestic uses as a PTD purpose.\textsuperscript{123} The Court acknowledged that the Kuleana Act "and others, including the reservation of sovereign prerogatives, evidently originated out of concern for the rights of native tenants in particular."\textsuperscript{124} Nevertheless, the Waiahole Court concluded that the elements of the Kuleana Act "apply today, in a broader sense, to the vital domestic uses of the general public."\textsuperscript{125} Since the PTD must accommodate the changing needs of the public,\textsuperscript{126} the inclusion of all citizens as beneficiaries of the protection of domestic uses under the PTD is a logical interpretation of Hawai'i law and does not significantly diverge from the PTD jurisprudence of Hawai'i.

Finally, given the Kuleana Act, the protection of Native Hawaiian uses as a PTD purpose is also consistent with the historical treatment of the doctrine in Hawai'i. The Waiahole Court noted that, while interpreting the Kuleana Act's mandate to protect domestic uses of water as applicable to all Hawaiian

\textsuperscript{120} Id.
\textsuperscript{121} See generally McBryde Sugar Co. v. Robinson, 504 P.2d 1330 (Haw. 1973); see also Robinson v. Ariyoshi, 656 P.2d 287, 310-11 (Haw. 1982) (upholding the public interest in the "purity and flow," "continued existence," and "preservation" of the waters of the state).
\textsuperscript{122} See Enactment of Further Principles of 1850 (Kuleana Act) §7, LAWS OF 1850 202 (codified at HAW. REV. STAT. § 7-1 (1993)).
\textsuperscript{123} See McBryde, 504 P.2d at 1341-44 (comparing § 7 of the Kuleana Act with authority in other jurisdictions recognizing riparian rights to water for domestic uses); Carter v. Territory, 24 Haw. 47, 66 (1917) (granting priority to domestic use based on riparian principles and §7 of the Kuleana Act).
\textsuperscript{124} Waiahole, 9 P.3d at 449.
\textsuperscript{125} Id.
\textsuperscript{126} See id. at 447 (citing Reppun v. Bd. of Water Supply, 656 P.2d 57, 72 (Haw. 1982) (The doctrine must "evolve in accordance with changing needs and circumstances.").
citizens, the Court has "not lost sight of the trust's 'original intent.'" Even prior to the Kuleana Act and the 1848 Māhele, "the law 'Respecting Water for Irrigation' assured native tenants 'their equal proportion' of water." In addition to this statutory history, both Hawaiian caselaw and the Hawai‘i state Constitution confirm that the Waiāhole Court did not substantially enlarge the PTD in Hawai‘i by protecting Native Hawaiian water uses.

In sum, while the Waiāhole decision was widely characterized as a major reformulation of the Hawaiian PTD, when viewed in the context of the jurisprudential and political history of Hawai‘i, the decision did not substantially expand on the PTD in Hawai‘i.

2. The Waiāhole Court's balancing test and the PTD's dual mandate

By holding that a balance must exist between private offstream uses and PTD instream uses, the Hawai‘i Supreme Court rebutted criticism that the PTD is too restrictive on commercial irrigators. The majority in Waiāhole actually prevented the Commission from adopting a position that would have been even more adverse to developmental uses:

Contrary to the Commission's conclusion that the trust establishes resource protection as a 'categorical imperative and the precondition to all subsequent considerations,' we hold that the Commission inevitably must weigh competing

127. Waiāhole, 9 P.3d at 449.
128. Id. (quoting Laws of 1842, reprinted in THE FUNDAMENTAL LAW OF HAWAI‘I 29 (Lorrin A. Thurston ed., 1904)).
129. See Waiāhole, 9 P.3d at 449 (citing Kailpi v. Hawaiian Trust Co., 656 P.2d 745 (Haw. 1982); Public Access Shoreline Hawai‘i v. Hawai‘i Planning Comm’n (PASH), 903 P.2d 1246, 1259-1268 (Haw. 1995); HAW. CONST. art. XII, § 7 (stating that the "State has an obligation to protect, control, and regulate the use of Hawai‘i’s water resources for the benefit of the people.")].
130. During the Commission's deliberation on its final decision, the governor and attorney general announced their criticisms of the Commission's proposed decision as inadequate in its provision of water for commercial interests on the leeward side of the island. See Waiāhole, 9 P.3d at 425. Commentators have criticized public management of water resources based on their view that such a regime will too greatly restrict the free transferability of water, leading to "economic stagnation." MacDougal, supra note 20, at 69. However, the decision is not as drastic or restrictive on private commercial users as it may seem. At the time that Waiāhole was decided, the sugar industry had already folded, and resource reallocation was necessary anyway. See Waiāhole, 9 P.3d at 424. The financial impact of the holding therefore was not nearly as dramatic as it would have been if the State had exercised its "authority . . . to revisit prior diversions and allocations" to the commercial parties that were still actively using the water. Id. at 453.
public and private uses on a case-by-case basis, according to any appropriate standards provided by law.\textsuperscript{131}

Although the Court held that "any balancing of public and private uses [must] begin with a presumption in favor of public use, access, and enjoyment,"\textsuperscript{132} it clearly does not intend to end all commercial water uses. In fact, the majority explicitly states that

[B]y conditioning use and development on resource 'conservation,' article XI, section 1 does not preclude offstream use, but merely requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of [Hawai'i]. In the words of another court, 'the result . . . is a controlled development of resources rather than no development.'\textsuperscript{133}

To paraphrase, the Waiāhole PTD balancing test asks, "How much water is needed for trust uses?" After this query is appropriately resolved, the Commission needs to determine exactly how much water remains. If the remaining water is not enough for commercial development, then the government may reduce the amount allocated for trust uses, although this course of action is a last resort. Balancing only occurs after all reasonable efforts to protect trust uses are made – protection of trust uses being the overarching goal. The PTD is not unyielding to development. It simply requires that, in the course of assessing developmental water uses, the Commission give first consideration to state trust duties.\textsuperscript{134}

\footnotesize

\textsuperscript{131} \textit{Id.} at 454 (citing Robinson v. Ariyoshi, 658 P.2d 287, 312 (Haw. 1982); Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So. 2d 1152 (1984)).

\textsuperscript{132} \textit{Waiāhole,} 9 P.3d at 454 (citations omitted).

\textsuperscript{133} \textit{Id.} at 453 (citing Payne v. Kassab, 312 A.2d 86, 94 (Penn. 1973)) (emphasis added).

\textsuperscript{134} \textit{See Waiāhole,} 9 P.3d at 455 ("[T]he state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under [Hawai'i state law]."); \textit{Id.} at 472 ("Under no circumstances . . . do the constitution or the Code allow the Commission to grant permit applications with minimal scrutiny."). Achitoff, however, asserts that the term "[f]irst consideration' understates the State's obligation," and argues that the State must seriously consider the heavy burden it carries with regard to its trust duties before it can allocate water to private development. Achitoff, \textit{supra} note 97.
C. Waiahole's Articulation of the PTD as Compared with Other Jurisdictions

1. Waiahole's unique extension of the PTD

Although Waiahole comports with Hawaiian PTD jurisprudence, the Waiahole Court's holdings concerning the scope of the PTD are unprecedented when compared with other jurisdictions. Prior to Waiahole's affirmation of ground water as a part of the PTD, no state had recognized ground water as within the scope of the doctrine, although in some states the PTD had encompassed nonnavigable tributaries feeding navigable waters and some waters with recreational value. The extension of the PTD to ground water therefore represents a growth of the doctrine relative to other states.

Although resource protection is a well-established purpose of the PTD in other jurisdictions, the Waiahole Court's articulation of the two other PTD purposes far surpasses the breadth of the doctrine in other states. The protection of domestic uses, particularly the provision of drinking water, and Native Hawaiian uses, such as kalo cultivation, are particularly difficult to reconcile with other jurisdictions, since these uses are offstream as opposed to instream, and consumptive rather than

---

135. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 721 (1983) ("The public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by nonnavigable tributaries."); People ex rel. Baker v. Mack, 97 Cal. Rptr. 448, 451 (1971) ("It is extremely important that the public not be denied use of recreational water by applying the narrow and outmoded interpretation of 'navigability.'"); Marks v. Whitney, 6 Cal. 3d 251, 380 (1971) ("Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.").

136. See Marks, 6 Cal. 3d at 380. The Marks Court held that the public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. Id. (emphasis added; citations omitted); see also National Audubon, 658 P.2d at 719 (quoting Marks, 6 Cal. 3d at 380).
The PTD is typically understood to encompass instream, resource-protective uses, accommodating appropriative offstream uses only as is feasible given the mandates of the trust. For example, the California Supreme Court's decision in *National Audubon* balanced resource protection against appropriations of water for the domestic uses of the City of Los Angeles. The *Waiahole* Court's inclusion of the protection of domestic and Native Hawaiian uses as valid PTD purposes therefore stands in striking contrast to other jurisdictions, which would consider such uses as appropriative and outside of the scope of the PTD.

To a certain extent, *Waiahole*'s formulation of the PTD is unique because of its foundation in the unique legal history of Hawai‘i. Hawai‘i is one of the few states that have a strain of common law deriving from the legislative acts and judicial opinions of a country other than England and the United States. The State inherited a body of law developed by the Kingdom of Hawai‘i prior to its annexation in 1898. Thus, when the *Waiahole* Court stated that “[t]he public trust in the water resources of [Hawai‘i], like the navigable waters trust, has its genesis in the common law,” it cited authority recognizing that “[t]he common law... includes the entire wealth of received tradition and usage.” Additionally, the Court has previously pronounced that Western concepts of property law and common law are not necessarily applicable in Hawai‘i. Commentators

137. See supra note 93.
138. See *National Audubon*, 658 P.2d at 724 (“[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”); see also id. at 728 (“The state has 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.”).
139. Id.
140. See id. at 711.
142. *Waiahole*, 9 P.3d at 442.
144. See Public Access Shoreline Hawai‘i v. Hawai‘i Planning Comm’n [*PASH*], 903 P.2d 1246, 1263 (Haw. 1995) (“Traditional and customary rights are properly examined against the law of property as it has developed in this state. Thus, the regulatory power provided in article XII, §7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of ‘property.’”).
have specifically noted that "Hawai`i's modern water law emerged as an uneasy amalgam of aboriginal law, riparian rights, certain notions of appropriative rights under the guise of prescriptive rights and public management." As a result, "Hawaiian water rights... became utterly unique in the West." Since the foundation of Waiahole therefore includes ancient Hawaiian traditional practices as well as Kingdom jurisprudence and legislation, opportunities to generalize the decision to other jurisdictions are somewhat limited.

The Court's holding in Waiahole is also distinguishable from other states' conceptualization of the PTD because of the role that the Hawai`i constitution plays in the majority's reasoning. The underlying question in many PTD cases is whether the legislature can statutorily revise the PTD. In Hawai`i, the legislature cannot limit the PTD because "the people of [Hawai`i] have elevated the public trust doctrine to the level of a constitutional mandate." The codification of the PTD in Article XI, sections 1 and 7, is unique given that the PTD is a common law doctrine that most states have not incorporated into their constitutions. The Waiahole Court cited liberally to the PTD provisions of the Hawai`i state Constitution in establishing the scope of the PTD in Hawai`i, which partially accounts for the exceptional nature of the decision and its substantial enlargement of the PTD relative to other states.

2. Waiahole's influence outside Hawai`i

In spite of the unique factors that shaped the Waiahole decision, aspects of the Court's holding may influence the future of the PTD in other states. Although the Waiahole Court's inclusion of ground water in the scope of the trust is unprecedented, the Court's articulation of the PTD may serve as the next logical step for the development of the doctrine in

146. Id.
148. Waiahole, 9 P.3d at 443 (referring to HAW. CONST. art. XI, §§ 1, 7).
149. Waiahole, 9 P.3d at 445-56.
150. See Reppun v. Board of Water Supply, 656 P.2d 57, 73 (Haw. 1982) (citing Haase, Interrelationship of Ground and Surface Water: An Enigma to Western Water Law, 10 S.W.U.L.Rev. 2069 (1978)) ("The common law in treating surface and groundwater as distinct failed to recognize that both categories represent no more than a single integrated source of water with each element dependent upon the other for its existence.").
other states. States other than Hawai‘i have recognized that the PTD is flexible and responsive to shifting public needs. In discussing the incorporation of ground water into the PTD, the Waiāhole Court cites Reppun, which states that “[t]he trend in many states has been to recognize the interrelationship between surface and groundwater sources and to combine the control and management of both under a unified statutory scheme . . . . [T]his acknowledgment of the unity of the hydrological cycle has been characterized as the ‘modern scientific approach.’” Courts in other jurisdictions have also recognized that surface and ground water are interdependent. Thus, given that other states have recognized the flexible nature of the PTD, growing recognition of the increasing reliance upon ground water and the corresponding effects of such ground water use on the hydrological cycle could lead to widespread judicial inclusion of ground water within the scope of the PTD.

The Waiāhole Court’s articulation of PTD purposes also could influence other states. Resource protection is well recognized in other jurisdictions as a PTD purpose. Although the majority’s extension of the PTD to domestic uses is unique, the Court cited extrajurisdictional authority to support its holding, indicating that some states may have already taken steps towards a broader understanding of the PTD through alternate legal

151. See Matthews v. Bay Head Improvement Ass’n, 471 A.2d 355, 365 (N.J. 1984) (extending the trust to privately owned beaches, in recognition of the “the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine.”); People ex rel. Baker v. Mack, 97 Cal. Rptr. 448, 451-53 (1971) (expanding the “narrow and outmoded” definition of “navigability” in recognition of modern recreational uses); Marks v. Whitney, 6 Cal. 3d 251, 380 (1971) (“The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.”); Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 720-21 (Cal. 1983) (holding that, although no other court had determined “whether the public trust limits conduct affecting nonnavigable tributaries to navigable waterways,” “the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries.”).

152. Waiāhole, 9 P.3d at 445.

153. Reppun, 656 P.2d at 73 (citing 5 CLARK, WATERS AND WATER RIGHTS 70, § 441 at 415 (1967), and statutes cited therein; quoting Trelease, Alaska’s New Water Use Act, 2 LAND & WATER L. REV. 1, 15 (1967)).

154. City of Colorado Springs v. Bender, 366 P.2d 552, 555 (Colo. 1961) (“It is a well-established principle in this jurisdiction that all waters are part of a natural water course, whether visible or not, constituting a part of the whole body of moving water.”) (citations omitted).

155. National Audubon, which extended PTD to nonnavigable tributaries that feed navigable waters, is a good example of how recognition of the interrelatedness of water systems has led to growth in the doctrine. See supra note 151.

156. See supra Part III.C.1.
Furthermore, the Native Hawaiian uses included in Waiāhole's explanation of the PTD are analogous to reservations of water to Native American tribes. Such reservations of water for Native Americans rest upon a theory of federal reserved water rights, as opposed to the PTD. Nevertheless, the Waiāhole majority cited Reppun as "analogizing riparian rights under section 7 of the Kuleana Act to water rights of Indian reservations in Winters v. United States," and based its holding that "the exercise of Native Hawaiian and traditional and customary rights . . . [are] a public trust purpose" on Reppun and other Hawaiian precedent. The Court's explicit mention of the Reppun analogy to the Winters Doctrine indicates that the concept of Indian reserved water rights, although distinct from the PTD protection of Native Hawaiian water uses, is related to the Court's upholding of Native Hawaiian water rights as a PTD purpose. Thus, the Waiāhole Court effectively used the PTD to


158. See generally Winters v. United States, 207 U.S. 564 (1908). In Winters, the United States Supreme Court "held that when [Indian] reservations were established, the tribes and the United States implicitly reserved sufficient water to fulfill the purposes of the reservations." Jana L. Walker & Susan M. Williams, Indian Reserved Water Rights, NAT. RESOURCES & ENV'T, Spring 1991, at 6.

159. Waiāhole, 9 P.3d at 449 (citing Reppun v. Board of Water Supply, 656 P.2d 57, 69-70 (Hawa‘i, 1982) and Winters, 207 U.S. 564)). In Reppun, the Hawai‘i Supreme Court discussed the history of riparian water rights under the Kuleana Act. The Court indicated that section seven of the Act "was drafted at the behest of the King and was reported to reflect his concern 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."" Reppun, 656 P.2d at 69 (quoting Privy Council Minutes, July 13, 1850). From this statement, the Court reasoned that the rights promulgated in the Kuleana Act "were established to enable tenants of ahupua‘as (Native Hawaiian land divisions) to make productive use of their lands," and concluded that "[r]iparian rights in Hawaii are thus analogous to the federally reserved water rights accruing to Indian reservations pursuant to Winters v. United States." Reppun, 656 P.2d at 69.

160. See Jon Van Dyke et al., Water Rights in Hawai‘i, in LAND AND WATER RESOURCE MANAGEMENT IN HAWAI‘I 258 (Hawai‘i Institute for Management and Analysis in Government 1977) (presented to State Dept. of Budget & Finance). In that report, commentators assert that in both Winters and in Hawai‘i, the native had originally held water rights to a generalized area. Most of the area was later ceded to the United States. In both cases, certain lands were reserved by Congress for the benefit of the natives. The clear intention of the Congress in reserving the lands was to create stable, civilized, agriculturally-based communities. In both Hawai‘i and Montana, lands not so reserved became part of the public domain. The only substantive difference between the two situations is that in Montana the land
accomplish the same types of protection achieved by alternate legal doctrines in other jurisdictions. Perhaps those other jurisdictions can similarly incorporate Native American water uses into their articulations of the PTD based on the Winters Doctrine.

With regard to the Hawai‘i state Constitution, the Court noted that, although Article XI sections 1 and 7 are somewhat exceptional, California, New Mexico, and North Dakota all have similar constitutional or statutory provisions. Indeed, the Court explained that “the second clause of article XI, section 1 . . . resembles laws in other states mandating the maximum beneficial or highest and best use of water resources.” Furthermore, the majority indicated that “[o]ther state courts, without the benefit of such constitutional provisions, have decided that the public trust doctrine exists independently of any statutory protections supplied by the legislature.” Thus, Waiahole could potentially wield influence in other jurisdictions.

reservation was an integral part of the same instrument that ceded the lands to the United States – the 1888 treaty. In Hawai‘i, the reservation of the lands occurred through a special act of Congress in 1921, over twenty years after the formal transfer of sovereignty from the Republic of Hawai‘i to the United States (1898) and the establishment of the territory of Hawai‘i by the Organic Act in 1900.

Id. at 259. Based on these observations, the report concluded that “the water rights provisions of the Hawaiian Homes Commission Act itself are consistent with the implied-reservation-of-water-rights doctrine, and the doctrine itself would appear to confer these rights (to Native Hawaiians) in the absence of such provisions.” Since Reppun’s analogy is based on statutes like Hawaiian Homes Commission Act and the Kuleana Act, and the Waiahole Court based its recognition of Native Hawaiian uses in the PTD on Reppun’s analogy to Winters, the Waiahole holding supports the claim that the Winters Doctrine is related to the PTD protection of Native Hawaiian water rights.

See Hawaiian Homes Commission Act, ch. 42, 42 Stat. 108 (1921), reprinted in Haw. REV. STAT. § 167-14 (1985); Enactment of Further Principles of 1850 (Kuleana Act) § 7, LAWS OF 1850 202 (codified at Haw. REV. STAT. §7-1 (1993)). Other scholars of Hawaiian water law have cited these and similar arguments with approval. See Martin et al., supra note 22, at 103 n.81 (citing Van Dyke et al., supra; Interview with Alan Murakami, Litigation Director, Native Hawaiian Legal Corporation, in Honolulu, Haw. (July 1, 1993) (similarly arguing that the Winters Doctrine applies to Native Hawaiian water rights)).

161. Waiahole, 9 P.3d at 451 (citing CAL. CONST. art. X § 2; N.M. CONST. art. 16 § 3; N.D. CENT. CODE § 61-04-01.1.1 (Supp. 1999)).

162. Waiahole, 9 P.3d at 451.

163. Id. at 444 (citing Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 728 n. 27 (1983) (“Aside from the possibility that statutory protections can be repealed, the noncodified public trust doctrine remains important both to confirm the state’s sovereign supervision an to require consideration of public trust uses in cases filed directly in the courts.”); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho, 1983) (“The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.”).
including those that do not have a constitutional or legislative mandate to enforce the PTD.

3. Consistencies with other jurisdictions

Although the scope of the PTD defined by the Waiāhole Court is broader than the doctrine in other jurisdictions, the majority indicated that the powers and duties of the state under the trust are fairly consistent with those of other states. While noting some differences between California's application of the PTD and the treatment of the PTD in Hawai'i, the Waiāhole Court still stated that "the dichotomy between the public trust and appropriative system in California roughly approximates the dual nature of the public trust in the water resources of [Hawai'i]." The Court declared that the California Supreme Court's decision in National Audubon "provides useful guidance on the manner in which this state may balance the potentially conflicting mandates of the trust." Waiāhole therefore draws from National Audubon to "define the trust's essential parameters in light of this state's legal and practical requirements and its historical and present circumstances."

CONCLUSION

Although the Waiāhole opinion rests substantially upon law that is unique to Hawai'i, the decision may prompt an expansion of PTD applications, at least in the western United States, where the doctrine has already begun to adjust to shifting public interest and a growing recognition that prior appropriation may not result in an optimal management scheme. As the Waiāhole

164. Waiāhole, 9 P.3d at 452. The Court noted that [National Audubon and Waiāhole] differ in important respects. First, National Audubon involved diversions for a public purpose... [no comparable offstream public needs are advanced here. Second, the National Audubon Court sought to assert the public trust against a water rights system long equating nonconsumptive use with 'waste.' Our common law riparian system does not share such a view; moreover, the mandate of 'conservation'-minded use subsumed in our state's water resources trust contemplates 'protection' of waters in their natural state as a beneficial use. Finally, unlike California, this state bears an additional duty under Article XII, section 7 of its constitution to protect traditional and customary Native Hawaiian rights. If one must distinguish the two cases, therefore, National Audubon appears to provide less, rather than more, protection than arguably justified in this case.

Id. (citations omitted).

165. Id. (citations omitted)

166. Id. at 452.

167. Id. at 453.
Court expressed, "the 'purposes' or 'uses' of the public trust have evolved with changing public values and needs." Thus, despite the apparently limited applicability of *Waiahole* to other states due to the exceptional legal history of Hawai`i, there is in fact great potential for the decision to influence other jurisdictions to broaden the doctrine to include protection of ground water, and also to incorporate domestic and native water uses into the trust.

168. *Id.* at 448.