He Mau Moʻolelo Kānāwai o ka ʻĀina
“Stories of the Law of the Land”

ACT 50:
THE PROTECTIONS, PITFALLS, AND POSSIBILITIES
OF THE NEW CULTURAL ASSESSMENT REQUIREMENT
FOR HAWAIʻI’S DIVERSE COMMUNITIES
Della Au Belatti

KA PAʻAKAI O KA ʻĀINA V. LAND USE COMMISSION:
FULFILLING THE STATE’S DUTY TO PROTECT
THE TRADITIONAL AND CUSTOMARY RIGHTS
OF NATIVE HAWAIANS?
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The Environmental Law Program (“ELP”) of the William S. Richardson School of Law is pleased to present the third issue of our occasional paper series, He Mau Moʻolelo Kānāwai o ka Āina (“Stories of the Law of the Land”). Established through the generous support of the Pōhaku Fund of the Tides Foundation, the Moʻolelo series allows us to share with our friends and colleagues in the Hawaiʻi, national, and international legal communities a selection of the best papers written by our law students on environmental, land use, and indigenous peoples’ law issues.

This issue includes papers written by two students on issues that intersect environmental law, land use law and Native Hawaiian Rights. The first paper, by Della Au Belatti, analyzes Act 50, a law passed by the 2000 Hawaiʻi state legislature that requires cultural impacts be analyzed during the state’s environmental review process. Della reviews the law and its history, putting it in the context of Hawaiʻi’s legal structure that protects Native Hawaiian traditional and customary practices. She then discusses the Hawaiʻi Supreme Court’s treatment of Act 50 in the Ka Paʻakai case. After identifying and exploring some of the problems inherent in implementing Act 50, such as how to define and assess culture in Hawaiʻi’s multi-cultural society, she concludes by recommending the courts adopt a broad definition of culture and that, when faced with competing cultural claims, Native Hawaiian claims be given first priority.

In the second paper, Ka Paʻakai o ka Āina v. Land Use Commission: Fulfilling the State’s Duty to Protect the Traditional and Customary Rights of Native Hawaiians?, Shirley Garcia reviews the impact of the Hawaiʻi Supreme Court’s landmark Ka Paʻakai decision on subsequent actions taken by the Hawaiʻi State Land Use Commission (“LUC”). In that case, the Hawaii Supreme Court reversed and remanded a decision by the LUC to reclassify over 1,000 acres from conservation and agriculture to urban for failure of the LUC to properly assess the impact of the development on legally protected rights of Native Hawaiians to practice their culture. In doing so, it laid out a three-part analytical framework that state agencies must apply when making a decision with potential impacts on Native Hawaiian traditional and customary practices. Following a brief discussion of the relationship of Native Hawaiian culture to the land, Ms. Garcia reviews the legal bases for protection of Native Hawaiian’s traditional and customary rights. She then summarizes and critiques the LUC’s decision on remand from the Court in Ka Paʻakai, as well as a subsequent LUC decision to grant a boundary reclassification petition on Kauaʻi that threatened to adversely impact Native Hawaiian rights. She concludes that, although the Court’s new analytical framework succeeded in raising “Hawaiian cultural values and resources to a higher level in official agency consciousness,” it nonetheless falls short of adequately protecting cultural practices. She recommends that to remedy the problem, at a minimum, the legislature should amend the state land use law to establish a permanent position on the LUC for a Native Hawaiian cultural practitioner. She asserts a better solution is to return a land base to Native Hawaiians to ensure Native Hawaiian self-governance over their lands.

We encourage you to take time to review these excellent student articles and share them with colleagues and friends. You can access the entire He Mau Moʻolelo series as well as other faculty and student scholarship on the ELP website at www.hawaii.edu/elp.

With warm regards,

Professor M. Casey Jarman
Professor Denise Antolini
Co-Directors, Environmental Law Program
ACT 50: THE PROTECTIONS, PITFALLS, AND POSSIBILITIES OF THE NEW CULTURAL ASSESSMENT REQUIREMENT FOR HAWAI’I’S DIVERSE COMMUNITIES

Della Au Belatti
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“We, the people of Hawai’i reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.”

I. INTRODUCTION

With the quiet passage of Act 50 into law in May 2000, Hawai’i distinguished itself as an innovative leader among states willing to anticipate and confront the problems and possibilities of multi-cultural communities. Act 50 requires state agencies and other developers to assess the effects of proposed land use or shoreline developments on the “cultural practices of the community and State” as part of the Hawai’i Revised Statutes (HRS) Chapter 343 environmental review process. Originally proposed by Native Hawaiian community organizations to protect and preserve Native Hawaiian customary and traditional practices, the language of this far-reaching yet simply worded Act evolved through the legislative process from 1995 to 2000 and was ultimately broadened “to promote and protect cultural beliefs, practices, and resources of native Hawaiians [and] other ethnic groups.”

This legislative evolution is predictable given the rich Native Hawaiian and immigrant histories and the current demographics of the Hawaiian Islands. According to the State’s Department of Health, Hawai’i’s population is 19.7% Japanese ancestry, 10.5% Filipino ancestry, 4.6% Chinese ancestry, 23.2% Caucasian, 19.3% Hawaiian, and 22.5% other or unknown. Another indicator of the diversity of the Islands is that 21.4% of Hawai’i’s population reported a background of two or more races in comparison to the national average of 2.4%. Alaska and California came in a distant second and third with 5.4% and 4.7% of their populations, respectively, reporting multi-racial heritages.

Against this backdrop of a diverse and multi-cultural society, Act 50 creates a “unique protective canopy” for all “cultural beliefs, practices, and resources.” But this far-reaching statute also raises important and difficult questions about culture in Hawai’i. These questions include: (1) What does “culture” mean? (2) How is culture defined, identified, and assessed? (3) If multiple cultural practices conflict or are implicated by proposed developments, how are these claims to be balanced to determine whether and how projects move forward? (4) What are the economic and practical effects of the new requirements? and (5) How will these new cultural requirements be implemented?

The Background section of this paper provides an overview of pre-Act 50 federal and state laws that protect and preserve history and culture in Hawai’i as related to proposed land developments. Next, this section discusses Hawai’i’s unique constitutional provisions, statutes, and case law that protect Native Hawaiian traditional and customary practices. Following the landmark 1995 Public Access Shoreline Hawai’i v. Hawai’i County Planning Commission decision, this part further explores how Act 50 evolved through multiple legislative sessions and the efforts that occurred at the legislative and administrative level to ensure passage and implementation of cultural assessments in Hawai’i. Finally, this section explores the Hawai’i Supreme Court’s 2000 judicial treatment of Act 50 in Ka Pa ʻakai O Ka ʻĀina v. Land Use
Commission\textsuperscript{16} and how a door has been left opened by the court for a broader discussion about culture and its meaning in Hawai‘i.

The Analysis section of this paper explores the problems and possibilities of implementing Act 50’s cultural assessment requirements. From the challenge of defining culture, to the procedural and practical challenges of analyzing cultural impacts, opportunities and hurdles confront the successful implementation of Act 50. The most difficult challenge of all may be resolving competing cultural claims. This article argues for a broad definition of culture and some means of limiting what can be identified as culture for Act 50’s purposes. Next, this Section proposes that Native Hawaiians should be afforded first priority in instances of competing claims. Finally, this section concludes with the idea that the overall inclusive nature of Act 50 has the possibility of encouraging greater public participation and, ultimately, leading to cooperation and cultural preservation for all.

I. BACKGROUND

A. Pre-Act-50 Legal Framework Protecting and Preserving Culture in Hawai‘i

Federal and state laws are the beginnings of a framework that protects and preserves culture. At the federal level, these laws “essentially create obligations that are chiefly procedural in nature and have the goal of generating information about the impact of federal actions on the environment.”\textsuperscript{17} One central feature to this process is governmental decision making enhanced by public participation. At the state level, the state Constitution, statutes, and regulations protect and preserve culture with special protections afforded to Native Hawaiian culture. This section reviews the National Historic Preservation Act and the National Environmental Policy Act, the primary federal laws protecting and preserving historical and cultural resources. Next, this section catalogues Hawai‘i laws that form a part of this legal framework.


A variety of federal statutes protect historic and cultural resources.\textsuperscript{18} The National Historic Preservation Act of 1966 (NHPA)\textsuperscript{19} is the primary authority for the federal government’s historic preservation activities. The major policy pursued by NHPA is the preservation of “the historical and cultural foundations of the Nation as a living part of our community life and development in order to give a sense of orientation to the American people.”\textsuperscript{20} To accomplish this preservation goal, NHPA relies on the Section 106 listing and review process.\textsuperscript{21} Historic sites that have been determined worthy of preservation for their historical, architectural, or cultural value are listed on the National Register of Historic Places.\textsuperscript{22} In Hawai‘i, these sites include traditional religious and culturally important areas to Native Hawaiians.\textsuperscript{23} The Section 106 review process is triggered when a project with federal involvement affects property that is on or is eligible for the National Register.\textsuperscript{24}

NHPA also requires that states appoint State Historic Preservation Officers\textsuperscript{25} who maintain inventories of listed sites in the state and exercise authority over the process of deciding which sites are nominated to the Register.\textsuperscript{26} In addition to protecting sites of cultural importance, Hawai‘i’s State Historic Preservation Officer is required to consult with Native Hawaiian organizations over the nomination of religious and culturally significant sites\textsuperscript{27} and over the development of the cultural components of preservation plans for such sites.\textsuperscript{28}
The National Environmental Policy Act (NEPA) seeks to protect and preserve historic and cultural resources through the environmental impact statement process. One of NEPA’s goals is to “preserve important historic, cultural, and natural aspects of our national heritage.” To accomplish this goal, NEPA requires federal agencies involved in major federal actions to prepare environmental impact statements before taking action. These impact statements must include a description of the environment affected by the proposed action, any adverse environmental effects, alternatives to the proposed action, the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity, and any irreversible commitments of resources involved in the proposed action.

2. Hawai‘i’s Preservation and Environmental Impact Statement Laws

The Hawai‘i Historic Preservation Act (HPA) and the Hawai‘i Environmental Impact Statement Law (HEPA), patterned after NHPA and NEPA at the federal level, illustrate Hawai‘i’s commitment to protecting and preserving cultures of the community. Codified at HRS § 6E, HPA creates a State Historic Preservation Office within the Department of Land and Natural Resources that is responsible for a comprehensive historic preservation program. The goals of this preservation program are the “research, protection, restoration, rehabilitation, and interpretation of buildings, structures, objects, districts, areas and sites significant to the history, architecture, archaeology, or culture of this State, its communities, or the nation.” Like NHPA, the central feature of Hawai‘i’s preservation law is the creation of a Hawai‘i Register of Historic Places that lists historic properties.

In addition to the Register, HPA also governs prehistoric and historic burial sites and the movement of human remains that are more than fifty years old. While HPA governs all remains and burial sites, HPA also establishes Burial Councils for each island to deal specifically with Native Hawaiian remains. When Native Hawaiian remains are identified, these Burial Councils “determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted.”

HEPA parallels NEPA and “establishes a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.” One goal of HEPA is to “integrate the review of environmental concerns with existing planning processes” to lead to better decision making given the “significant environmental effects which may result” from government actions. A second goal is to include “public participation during the review process.”

To accomplish these goals, HEPA requires the preparation of an Environmental Assessment (EA) for all actions utilizing state or county lands or funds and certain private actions that fall into specific administrative, geographic, or action criteria. An Environmental Impact Statement (EIS) is required if the agency determines after public review of the EA that the proposed action may have a significant effect on the environment. Among the factors constituting significant adverse effects are irrevocable loss or destruction of any natural or cultural resource and effects on the economic or social welfare and activities of the community.

3. State Constitutional and Statutory Protections for Native Hawaiian Customary Traditions and Practices

In addition to HPA and HEPA, Hawai‘i has a set of unique laws that protect and preserve the traditional and customary rights of Native Hawaiians. Hawai‘i’s Constitution places an affirmative duty on the State and its agencies to preserve, protect, and prevent interference with
these traditional and customary rights. Article XII, Section 7 requires the State to “protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua’a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778.”

This constitutional protection grew out of the 1978 Constitutional Convention, which recognized the need to “preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means. . . to recognize and reaffirm native Hawaiian rights.” Echoing this recognition, the Committee on Hawaiian Affairs, responsible for drafting Article XII, Section 7, acknowledged that “[s]ustenance, religious and cultural practices of native Hawaiians are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and value systems.”

Several statutes underscore and clarify Article XII’s constitutional mandate to protect Native Hawaiian cultural practices and properties. HRS, Chapter 1-1, Common Law and Hawaiian Usage, provides that:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai‘i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

Thus, in 1892, even before Hawai‘i had its State Constitution and when the common law of England was adopted as the governing law of Hawai‘i, legislators recognized that Hawaiian “usage” or Hawaiian customs and traditions are distinct from and should prevail over English common law.

Chapter 7-1 of the HRS is a second statute that protects Native Hawaiian customary and traditional gathering rights. Enacted in 1850 when the Kuleana Act granted private property to commoners, Chapter 7-1 explicitly provides:

Where the landlords have obtained . . . allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use . . . . The people shall also have the right to drinking water . . . and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

Thus, Chapter 7-1 is the basis for Native Hawaiian access rights to private property and waterways in order to gather specific natural resources for customary uses.

Hawai‘i’s Water Code, enacted at HRS, Chapter 174C-101, also ensures access to streams and waterways. Echoing the language of Chapter 7-1, the Water Code states that the traditional and customary rights of Native Hawaiians “shall not be abridged or denied . . . . [These] rights shall include, but not be limited to, the cultivation or propagation of taro on one’s own kuleana and the gathering of hihiwai, opae, o‘opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.”


Hawai‘i’s statutes protecting Native Hawaiian traditional and customary rights have provided a fertile ground for litigation. This section catalogues three landmark cases that have
shaped this area of the law, clarifying further the duties of the State and its agencies.

In 1982, in the first of these cases, Kalipi v. Hawaiian Trust Co.,\textsuperscript{58} plaintiff William Kalipi, a Moloka‘i taro farmer, sought access to private land in order to gather “tī leaf, bamboo, kukui nuts, kiawe, medicinal herbs and ferns.”\textsuperscript{59} In a groundbreaking decision, the Hawai‘i Supreme Court held that “lawful occupants of an ahupua‘a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua‘a to gather those items enumerated in HRS § 7-1.”\textsuperscript{60} The Court recognized that guiding its decision was an “obligation to preserve and enforce such traditional rights” pursuant to Article XII, Section 7.\textsuperscript{61} Finally, the court concluded that Kalipi’s gathering rights also existed under the “the Hawaiian usage exception to English common law found in HRS § 1-1 . . . as customary rights which continued to be practiced and worked no actual harm upon the recognized interests of others.”\textsuperscript{62}

In 1992, the Hawai‘i Supreme Court in Pele Defense Fund v. Paty\textsuperscript{63} reaffirmed and extended Hawaiian gathering rights under Chapters 1-1 and 7-1. In this case, plaintiff Pele Defense Fund challenged the exchange of more than 27,000 acres of public lands, including areas designated as Natural Area Reserve lands, between the State and a private landowner.\textsuperscript{64} As part of that challenge, plaintiff’s Native Hawaiian members asserted access rights into the undeveloped areas of the Natural Area Reserve lands for traditional subsistence, cultural, and religious purposes.\textsuperscript{65} Plaintiffs in Pele Defense Fund differed from the plaintiff in Kalipi because Pele Defense Fund claimed their access rights solely on traditional access and gathering rights instead of land ownership and tenancy.\textsuperscript{66} Looking to the history of the Constitutional Convention of 1978, the Court broadly interpreted Article XII, Section 7. The Court also built upon Kalipi and held that “native Hawaiian rights . . . may extend beyond the ahupua‘a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.”\textsuperscript{67}

Where Kalipi and Pele Defense Fund addressed gathering and access rights to undeveloped lands, the third case in this trilogy, Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission (PASH),\textsuperscript{68} addressed the issues of Native Hawaiian customary and traditional rights in the context of proposed developments and the degree of government protection afforded to those rights.\textsuperscript{69} In PASH, developer Nansay Hawaii, Inc. applied to the Hawai‘i County Planning Commission (HPC) for a Special Management Area permit to develop a resort community covering over 450 acres of shoreline area on the Big Island of Hawai‘i.\textsuperscript{70} Plaintiff Public Access Shoreline Hawai‘i, a community organization whose members asserted traditional Native Hawaiian gathering rights on the lands proposed for development,\textsuperscript{71} opposed the issuance of the permit and requested a contested case hearing before the HPC.\textsuperscript{72} The HPC denied these requests and issued the permit on the ground that Public Access Shoreline Hawai‘i lacked standing to participate in a contested case hearing because their interests were “not clearly distinguishable from that of the general public.”\textsuperscript{73}

The Hawai‘i Supreme Court remanded PASH to the HPC to conduct hearings and explicitly reaffirmed that Article XII, Section 7 “obligates the State to protect customary and traditional rights normally associated with tenancy in an ahupua‘a.”\textsuperscript{74} The Court noted that “the State’s power to regulate the exercise of customarily and traditionally exercised Hawaiian rights . . . necessarily allows the State to permit development that interferes with such rights in circumstances. Nevertheless, the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians.”\textsuperscript{75}
B. Legislating Greater Protections: The Road to Enactment of Act 50

With constitutional and statutory provisions laying the foundation for Native Hawaiian traditional and customary rights, and with over a decade of court decisions affirming them, these rights are part of the legal fabric of Hawai‘i property law. This section reviews the community legislative efforts following PASH that sought to solidify in the HRS the requirements imposed on state agencies. This section also reviews the efforts of the Office of Environmental Quality, the administrative agency charged with review of EAs and EISs, to develop guidelines for state agencies and preparers of EAs and EISs under Hawai‘i law. Finally, this section provides an overview of the resulting legislation that emerged in the 2000 Hawai‘i legislature, with its requirement to assess culture and the “practices of the community.”

1. Pre-Act 50 Legislative Efforts

In 1995, while waiting on the appellate decision in PASH, Native Hawaiian community groups organized the coalition Ka Pa‘akai O Ka ‘Āina and drafted House Bill 1563 for the 1995 legislative session. Initially, the broad purpose of this proposed bill was “to promote and to protect the specific rights of native Hawaiians and their culture and traditions.” House Bill 1563 called for all state agencies involved in permitting or approving development activities to consider the effects of development on Native Hawaiian rights and identify appropriate protective measures. The legislation proposed that a new, comprehensive chapter be added to the HRS that would define activities requiring a Native Hawaiian cultural impact statement, outline the content of and timetable for filing a Native Hawaiian cultural impact statement, and mandate review procedures by the accepting agency.

The legislation passed through its first reading in the Committee on Hawaiian Affairs and Housing with virtually no changes. In the second reading, however, House Bill 1563 was completely revised. Instead of a new Native Hawaiian cultural impact statement chapter, the new draft bill proposed amending HEPA with the requirement that EAs or EISs “include an assessment of or statement of the native Hawaiian cultural impact presented by the agency or applicant’s action.” Members of the House Committee on Water and Land Use Planning reasoned that the radical revision to the original bill was justified because “another land use disclosure statement may complicate Hawai‘i’s already involved land use approval process.”

Although numerous Native Hawaiian community organizations supported the original and revised bills, business interests and private landowners testified in opposition to the bill. Opponents included the Land Use Research Foundation and the Chamber of Commerce of Hawai‘i. After passing out of two committees and being stripped down to an amendment to HEPA, the bill ultimately failed in the House Finance Committee.

After this unsuccessful 1995 effort to pass legislation clarifying how Native Hawaiian traditional and customary rights were to be addressed by state agencies, the Hawai‘i Supreme Court in August 1995 upheld PASH. Returning to the 1996 legislature with this unanimous affirmation, community groups lobbied for House Bill 3081, proposed legislation that included the exact language that passed second reading the year before as House Bill 1563. The legislative effort received another boost in April 1996 when the United States Supreme Court denied certiorari to PASH, allowing to stand the legitimacy and constitutionality of Hawai‘i’s protections for Native Hawaiian traditional and customary rights, as well as confirming the State’s obligation to protect those rights.

Like its predecessor, House Bill 3081 required the preparation of a Native Hawaiian cultural impact statement for any development or project requiring approval from any state
agency. While several Native Hawaiian and environmental organizations supported the bill, several organizations, such as the Board of Land and Natural Resources and the Land Use Research Foundation “felt that there was no need to create a new chapter in the Hawai‘i Revised Statutes.” Instead, these organizations supported the expansion of “existing requirements of Chapter 343 . . . to include an assessment of or statement of the native Hawaiian cultural impact.” The Hawai‘i Association of Realtors opposed House Bill 3081 because it believed that the criteria and application of the new requirements were “unclear and potentially onerous.”

Despite an amendment to House Bill 3081, with clarifications detailing rights and cultural resources that warranted State protection, the bill failed to pass out of its third committee reading in the 1996 Legislature. Similar bills were proposed in the next three years from 1997 to 1999; each year, the proposed legislation failed to pass out of committee.

2. Rules and Guidelines: The Environmental Council’s Implementation of Cultural Assessments

With little success in the legislative arena, efforts to incorporate and implement cultural assessments into the environmental review process shifted to the administrative agency level. The Environmental Council, a fifteen-member citizen board appointed by the Governor, is charged with advising the State on environmental concerns and promulgating rules that govern the EIS process. In 1996, the Environmental Council drafted and submitted to then-Governor Benjamin Cayetano new rules that would have implemented cultural impact statement procedures. The Governor, however, did not approve the new rules on the ground that defining and requiring cultural impact disclosures “oversteps the Council’s authority;” instead, the Governor reasoned that “the Legislature is the proper body to address the cultural impact statement process.”

Although unsuccessful at adopting formal rules, the Council, in 1997, drafted and adopted Guidelines for Assessing Cultural Impacts that remain effective today. The detailed Guidelines, while only guidance and not having the force of law, “encourage preparers of EAs and EISs to analyze the impact of a proposed action on cultural practices and features associated with the project area.” The Guidelines further recommend a methodology and content protocol for identifying and assessing cultural impacts. This methodology includes gathering information through interviews, oral histories, document searches, and ethnographic studies.

3. 2000 Legislature and Passage of Act 50

The breakthrough in legislative efforts came in the 2000 Legislative session, but with a surprise twist. House Bill 2895 was remarkably different from the previous bills. It advanced two simple but powerful amendments to the definitional section of Chapter 343. First, “Environmental impact statement” or “statement” was re-defined as “an informational document . . . which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community.” Second, “Significant effect” was re-defined as “the sum of effects on the quality of the environment, including actions that are . . . contrary to the State’s environmental policies . . . or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.”

Unlike the previous bills, the purpose of House Bill 2895 was to “include the disclosure of the effects of a proposed action on the cultural practices of the community and State.” In its
final permutation, House Bill 2895 received support from the community organizations that had previously lobbied for creation of a separate process and from the government agencies that had wanted the process advanced by House Bill 2895. Unlike the fate of the previous bills, House Bill 2895 was approved by the Legislature and signed into law by the Governor in May 2000.

Through Act 50, the Legislature amended the process of preparing EISs by requiring project developers to “identify and address effects on Hawai‘i’s culture, and traditional and customary rights.” Accordingly, an EIS is today defined as an “informational document which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.”

C. Judicial Interpretation of Act 50: The Open Door on Culture

Section 1 of Act 50 broadly asserts that state agencies have a “duty to promote and protect cultural beliefs, practices, and resources of native Hawaiians as well as other ethnic groups.” Despite this inclusive language, Act 50 appears to afford Native Hawaiian culture greater protections. For example, the Legislature acknowledged “the past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture.”

The Legislature further found “that due consideration of the effects of human activities on native Hawaiian culture is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.” This section looks at how the Hawai‘i Supreme Court in September 2000 briefly touched on this tension between protecting and preserving Native Hawaiian and non-Native Hawaiian cultures in Ka Pa‘akai O Ka ‘Āina v. Land Use Commission (Ka Pa‘akai). In doing so, the Court opened the door to a number of questions concerning culture and implementation of Act 50.

In Ka Pa‘akai, the Court reaffirmed special protections for Native Hawaiian cultural practices when it ruled that the State Land Use Commission (LUC) failed to satisfy its statutory and constitutional obligations to preserve and protect customary and traditional rights of Native Hawaiians. In the dispute before the LUC, Native Hawaiian community organizations opposed the re-classification of over 1000 acres from conservation to urban lands for the Ka‘upulehu Resort Expansion, a luxury development project on the island of Hawai‘i. Within the reclassified lands, the Court noted that the the coastal point known as Kalaemano and the historic 1800-1801 Ka‘upulehu Lava Flow were two well-known physical features associated with native Hawaiian culture and history. The Court also noted the association of two historical figures to the petition area, Kame‘eiamoku and Kamanawa, two chiefs who served as advisers to Kamehameha I.

The Court reiterated that “the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.” The Court further cited Act 50’s amendments that altered definitions in Hawai‘i’s EIS process and broadened the State’s obligation to consider not just Native Hawaiian but “cultural practices of the community and State” in the EIS process. Ultimately, the Court held that the LUC’s determinations were “insufficient to determine whether [the LUC] fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians.”

The Court remanded the re-classification petition to the LUC for further fact-finding and
conclusions about the petition area. First, the LUC was directed to identify specific “valued cultural, historical, or natural resources including the extent to which traditional and customary native Hawaiian rights are exercised.”

Next, the LUC was directed to determine “the extent to which those resources – including traditional and customary native Hawaiian rights – [would] be affected or impaired” by the proposed luxury development. Finally, if Native Hawaiian rights were found to exist, then the LUC was directed to determine “the feasible action, if any, to be taken to reasonably protect native Hawaiian rights.”

In reaching its decision, the Court reaffirmed the State’s duty to protect Native Hawaiian customary and traditional rights. Act 50 and Ka Pa’akai are now part of the constitutional, statutory, and judicial case law protecting these rights. In Footnote 27, however, the Court explicitly declined to define the term “cultural resources.” The Court noted that “‘cultural resources’ is a broad category, of which native Hawaiian rights is only one subset. In other words, we do not suggest that the statutory term, ‘cultural resources’ is synonymous with the constitutional term, customary and traditional native Hawaiian rights.” Thus, this footnote presents the issue that culture and cultural resources are open and undefined terms that will need further clarification in the future.

III. PROBLEMS AND POSSIBILITIES: THE CHALLENGES OF IMPLEMENTING CULTURAL ASSESSMENTS

“Ownership and use of land have been the barometers of social change and justice. They are the primary arena of cultural interaction . . . .”

Combining the amended statutory language of Act 50 with the constitutional requirements of Article XII, the line of the Kalipi, Pele Defense Fund, and PASH cases, and the Guidelines developed by the Environmental Council, Hawai‘i now has in place a “unique protective canopy” for cultural beliefs, practices, and resources. But with this overarching, protective canopy, several challenges are presented with implementing Act 50’s cultural impact statement requirements. This section explores several of these challenges, suggests some ways to define and limit the term “culture,” and posits that the opportunity for greater public participation is a benefit of Act 50.

A. The Challenge of Defining Culture: Museum Exhibits vs. Living Phenomena

Many notions of culture embodied in existing law focus on the antiquated and object-based nature of culture. The Hague Convention of 1954 defines “cultural property” as:

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above[.]

Similarly, the 1970 UNESCO Convention defines culture in terms of tangible property or physical objects that include:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of
paleontological interest; (b) property relating to history, including the history of science and technology…; (c) products of archaeological excavations…; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest…; (h) rare manuscripts and incunabula, old books, documents…; (i) postage, revenue and similar stamps…; (k) articles of furniture more than one hundred years old and old musical instruments.127

This object-based definition of culture contrasts with broader definitions of culture that look beyond finite, tangible items. Anthropologist Clyde Kluckhohn defines culture as “patterned ways of thinking, feeling and reacting, acquired and transmitted mainly by symbols, constituting the distinctive achievements of human groups, including their embodiments in artifacts; the essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values.”128 The Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples129 expands the definition of culture and cultural heritage to include intangibles such as folklore and sacred rituals130 and all things that are the “creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks.”131

Echoing these broader, more encompassing definitions of culture, law professor Sarah Harding defines cultural heritage as:

an individual or group creation of either a tangible or intangible good which, by virtue of the creation process, customary use, historical event, or simply geographic proximity, becomes an important expression of human or cultural life. It is a mishmash of things, including songs, dances, stories, remedies, textile designs, sacred objects, drawings, works of art, sculpture and architectural structures.132

Harding stresses that beyond these cultural objects, culture also “provide[s] a context in which to coordinate and coadjust a multiplicity of emotions and interests.”133 With this understanding then, culture “is of fundamental significance to our identities and individual well-being,” because “it is through culture we find expression and give meaning to our lives.”134 Cultural heritage is also a link to the past and the future, “between the physical and metaphysical worlds,… provid[ing] an ongoing means of communication and direction within cultures.”135 Ultimately, the objects of culture are things that “provide the ties that help bind communities.”136 In contrast to the object-based definitions of culture, Harding views culture as an organic, living and evolving phenomenon, intensely experienced by individuals and groups of people.

In protecting and preserving cultural resources, national and state historic preservation laws employ both object-based and organic definitions of culture. One goal of historic preservation laws is to protect tangible properties or buildings.137 Accordingly, at the national level, National Register Bulletin 38 (Bulletin 38) articulates “Guidelines for Evaluating and Documenting Traditional Cultural Properties”138 for the process of listing historic sites, such as buildings, to the National Register.139

Bulletin 38, however, adopts a more expansive definition by recognizing that culture is “the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community.”140 Bulletin 38 also adopts defines traditional cultural property as “eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”141


B. Procedural Challenges: The Practical Problems of Conducting a Cultural Impact Statement

1. The Taboo of Telling Secrets: What is Culturally Appropriate for One May Be Inappropriate for Another

While the national and state EA and EIS processes have generally focused on assessments of environmental risks and natural resources, there are very few legal guidelines for the appropriate methodologies for cultural assessments. For example, questions like “How many times have you visited a site? What do you do at those sites? Do you know the significance of the site? How do you know about this significance?” are valid and assist in documenting cultural actions or practices that may occur at a particular site. But these direct questions may not generate the answers being sought, because in many communities, especially indigenous communities, certain cultural objects or cultural knowledge must be kept confidential and cannot be shared “without a corresponding loss in power, significance, and meaning.”

Thus, the need to identify and catalogue cultural practices is often in direct conflict with the notion of secrecy within certain cultures. One such conflict arose in *Pueblo of Sandia v. United States* where the Tenth Circuit discussed this reluctance to divulge cultural practices. Pueblo Indian plaintiffs in *Pueblo of Sandia* sued the United States National Forest Service supervisor for failure to comply with the National Historic Preservation Act. The Court concluded “that the information the tribes did communicate to the agency was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought.”

Among these regulations, the Court cited to *Bulletin 38*, which “warns that ‘knowledge of traditional cultural values may not be shared readily with outsiders’ as such information is ‘regarded as powerful, even dangerous’ in some societies.” The Court noted that the Pueblo plaintiffs had indicated certain cultural activities would be affected even though the plaintiffs had not explicitly articulated those effects. The Court concluded there was “a sufficient likelihood that the canyon contains traditional cultural properties to warrant further investigation” and that the “Forest Service did not make a reasonable effort to identify historic properties.” *Pueblo of Sandia* powerfully illustrates Harding’s idea that courts may respect secrecy, even though the principles of “freedom of information” and “secrecy” seem to be in conflict, because “other principles that are equally important in a liberal democracy . . . [including] religious tolerance… encourage the recognition and tolerance of different cultural practices.”

2. What is Authentic and Who is the Expert?

Assuming that cultural practices are identified, two related questions emerge about what is authentic cultural information and who are the experts qualified to identify cultural practices or properties. The concern about authenticity is one raised by professional archaeologists who often call for criteria that identify authentic cultural practices. Developers who are required to conduct assessments also echo this concern about authenticity. For example, in written comments on the Environmental Council’s *Guidelines*, a consulting firm stated that problems would arise with “verifying the information provided by one informant versus that which may be provided by another. This can only lead to self-serving statements, confusion and a denigration of all of the information.”

Groups requesting completion of an EA or EIS often respond to concerns about experts with the suggestion that experts not be limited to those who are academically qualified. In
other written comments to the Environmental Council’s Guidelines, concerns were expressed about the source of cultural and historical information with strong recommendations that preparers look to literature surveys, local oral histories, and interviews with special emphasis on identifying “people with cultural knowledge” of the area. Another commenter suggested that archival materials encompass more than documents and include photographs, videos, and audio recordings.

The issues of authenticity and expertise can be resolved through the recommended process outlined in the Environmental Council’s Guidelines. Through the combined use of methodologies like extensive documentary research, oral histories, and interviews with individuals and organizations knowledgeable about an area, information can be verified while broadening the pool of experts.

3. Money and Time Constraints to Cultural Assessments

A third set of challenges, related to the ethnographic techniques recommended for completing a thorough cultural assessment, concerns money and time. In the public comments to the Environmental Council’s Guidelines, recurring themes in opposition to the addition of cultural impact statements were the fears of increased costs and the huge investment of time required in an already complex EIS process.

Although there is no separate cultural impact statement required at the federal level, similar comments and statistics compiled for NEPA’s EA and EIS process are instructive of the potential costs of cultural impact statements. For example, before a United States House Committee examining problems and issues with NEPA, the general counsel of an Alabama gas company testified that, for one project, “the EIS originally was scheduled to be completed in 13 months, before June 1st of 1995, within a $200,000 budget. It was completed in May 1997, almost two years late. We paid $1.3 million for the effort, $1.1 million over budget.”

Since NEPA’s inception in 1970, over 20,000 EISs have been prepared. Between 1990 and 1996, 500 to 600 EISs have been prepared annually. This is few in comparison to the 30,000 to 50,000 EAs prepared annually. Statistics on the completion of EISs and EAs pursuant to HEPA mirror national statistics and reflect the declining number of EISs and the rising number of EAs prepared. Between 1996 and 2001, the Office of Environmental Quality Control (OEQC) reviewed and processed 59 EISs in comparison to 863 EAs.

Typically, the cost of an EIS at the federal level ranges from several hundred thousand to several million dollars. For project-specific EISs conducted by the Department of Energy (DOE) between July 1994 to March 1997, the average cost for preparation was $2.3 million, with costs ranging from $.02 to 4.2 million. For larger programmatic or sitewide EISs, the costs were larger, with an average cost of $9 million and a range of costs from $.01 to 20.9 million.

The cost of preparing an EA, while cheaper than preparing an EIS, is high nonetheless. In a survey conducted by the Council on Environmental Quality (CEQ), 30 percent of responding agencies reported that the average cost of preparing an EA ranged from $0 to $1,500. Nearly one quarter of the agencies reported that an EA could cost as much as $50,000 and $100,000 “in extreme cases.”

While the costs for preparing EISs and EAs appear high, three cautions should be noted. First, the costly DOE projects at the national level involve large areas and significant effects, thereby requiring extensive EISs. Second, controversial developments tend to be more expensive. For example, one corporation reported that nearly $1 million, from a projected budget of $2.7 million for construction of a 45-mile fiber optic cable, was spent on environmental
Third, and most responsive to allaying fears of costs, the DOE also reported that the costs of NEPA compliance are only a small fraction of total project costs. For example, the cost of NEPA compliance is nearly always less than one percent of total project cost and is typically less than 0.1 percent.

In addition to the expense of preparing EAs and EISs, the process, from preparation to approval, involves time and lengthy study and review procedures. 1998 statistics from the DOE reveal that the average time to complete an EA was nine months. In a longer-range study of EISs tracked from 1994 to 1997, the DOE found the average completion time for a programmatic sitewide EIS was 18.5 months, while a project-specific EIS was completed in an average of 13 months. The programmatic sitewide EISs ranged from 12 to 26 months, while the project-specific EISs ranged from 9 to 19 months.

While there are suggestions to set maximum time limits on the federal EIS process, these ideas will likely defeat the purpose of soliciting broad public input in order to make the best possible decisions. Instead, the problem of time should be viewed from the perspective of NEPA litigation and the time and money saved by avoiding litigation. The total number of cases actually involving NEPA has been small in comparison to the number of suits filed against the federal government. However, NEPA litigation is a significant proportion of the environmentally based litigation brought against the United States government. In 1981, for example, NEPA cases accounted for approximately 70 percent of environmental litigation brought against government agencies.

Environmental groups, individuals, and citizen groups are the most active litigants bringing suits involving NEPA. In 1994, these three groups accounted for 66 percent of suits brought involving NEPA, while businesses, property owners or residents, state and local governments, and Native American tribes accounted for 34 percent of NEPA lawsuits. Another 1994 study revealed that the leading causes for NEPA litigation were inadequate EISs, failure to prepare an EIS, inadequate EAs, and failure to prepare an EA. These statistics point to the importance of taking the NEPA compliance process seriously and engaging in the review process early in order to build relationships, gain trust, identify issues, and search for mutually agreeable solutions with those groups that are the likely litigants if an adequate EIS is not conducted.

D. Balancing Competing Claims: What to Do with Multiple Cultural Claims?

1. Competing Claims

Given the litigation surrounding land use development projects, it is conceivable that multiple and conflicting cultural claims will arise in a development project that triggers Hawai‘i environmental and cultural impact statements. At the national level, this type of intercultural conflict has occurred, albeit over competing uses and not over land development. One prominent example is the 1995 controversy between Native American tribes and members of the recreational rock climbing community over the use and management plan for Bear’s Lodge or the Devils Tower at the Devils Tower National Monument in Wyoming.

Under direction of the National Park Service (NPS), the regional director of Devils Tower National Monument was charged with developing a climbing management plan. The NPS engaged in a process that maximized input from conflicting factions by creating a collaborative work group of different stakeholders from the climbing community, environmental organizations, government, and Native American tribes. In February of 1995, after a period of education,
negotiation, and compromise within the work group, NPS issued a Final Climbing Management Plan that called for voluntary closure during the month of June “out of respect for American Indian cultural values.”

Despite efforts of the work group, the owner of a commercial guide service and other recreational users expressed dissatisfaction with the Plan in subsequent litigation in *Bear Lodge Multiple Use Ass’n v. Babbitt.* These plaintiffs in *Bear Lodge* challenged the voluntary climbing ban as wrongfully promoting religion in violation of the Establishment Clause of the First Amendment. In reaching its conclusion, the District Court described the conflicting uses and views of Bear’s Lodge. For several Native American tribes, Bear’s Lodge is a “sacred site” and qualified as a traditional cultural property to be included on the National Register of Historic Places. For recreational rock climbers, Devils Tower is a popular site with increasing numbers of climbers—from 312 in 1973 to over 6,000 annually attempting to climb the challenging rock face.

In response to the Establishment Clause challenge mounted by plaintiffs, the District Court concluded that the voluntary climbing ban is permissible accommodation, and not promotion or coercion, by the government in favor of Native American religious practices. The District Court reasoned that “the purposes underlying the ban are really to remove barriers to religious worship” especially where “impediments to worship arise because a group’s sacred place of worship is found on the property of the United States.”

The District Court also concluded that the voluntary climbing ban “passes muster when measured against the excessive entanglement test.” According to this analysis, the District Court explained that “the organizations benefited by the voluntary climbing ban, namely Native American tribes, are not solely religious organizations, but also represent a common heritage and culture.” The District Court characterized the voluntary climbing ban as “a policy that has been carefully crafted to balance the competing needs of individuals using Devils Tower National Monument.”

The conflict over Bear’s Lodge or Devils Tower is instructive because it illustrates the types of conflicts that may arise under Hawai‘i’s amended HEPA law. In *Bear Lodge,* recreational users described their climbing “as a legitimate recreational and historic activity.” In Hawai‘i, surfing can easily be designated as a legitimate recreational and historic activity. Thus, the question arises whether surfing and the “surf culture” that surrounds it is the type of culture or cultural activity that requires Act 50 identification, study, and consideration when determining if and how projects involving the State can move forward.

### 2. Limits on Culture and Native Hawaiians First

Act 50 affords greater protection to culture by requiring cultural impact statements. Language in the State Constitution supports this effort to protect cultures in Hawai‘i’s and the unique qualities of Hawai‘i. In the Preamble, aspirational language asserts the right of “the people of Hawai‘i . . . to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.” Article IX, section 7 also mandates that “the State shall have the power to conserve and develop objects and places of historic or cultural interest.”

While Article IX, Section 7 echoes an object-based definition of culture, Hawai‘i’s caselaw and, now, Act 50 incorporates and protects a broader definition of cultures. General agreement over the notion that culture is a living and evolving phenomenon has also been expressed in legislative and regulatory history to Hawai‘i’s cultural assessment requirement.
County of Hawai‘i Planning Director Virginia Goldstein notes “an analysis of cultural beliefs and practices should not be limited to its historical description, but also include how it has evolved to the present day.”¹⁹⁴

After adopting a broad definition of culture that includes both objects and practices, or the tangible and intangible, the next difficult question is how broadly should the definition of culture be expanded? Judicial guidance on this question is so far limited to Ka Pa‘akai’s pronouncement that Native Hawaiian customary and traditional practices are but “one subset of culture that is protected by Act 50.”¹⁹⁵ One limiting factor, ethnicity, can be found in the Environmental Council’s Guidelines. The Guidelines state that “Articles IX and XII of the State Constitution, other state laws, and the courts of the state require government agencies to promote and preserve cultural beliefs, practices, and resources of native Hawaiians and other ethnic groups.”¹⁹⁶ Evidence in the regulatory history also suggests that ethnicity is a proper limiting factor. Planning Director Goldstein’s comments to the Guidelines are again insightful. Goldstein noted that, “culture is always a dynamic element of any ethnic group. Plantation camp lifestyles can also be viewed as a continuing cultural evolution which responds to the various influences of modern life.”¹⁹⁷

Bulletin 38 is also instructive and provides that a traditional cultural property is “eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”¹⁹⁸ Thus, a second limiting criterion to culture can be to look to the community’s history.

Under these criteria in the Guidelines and in Bulletin 38, a stronger case can be made for protecting the cultural practices and resources of descendants of Hawai‘i’s immigrant laborers. The period between 1835 and 1920 is widely recognized as an important historical era that has left a deep imprint on the history and demographics of Hawai‘i as a state. With the waves of immigrant laborers seeking work on pineapple and sugar cane fields, Hawai‘i was transformed into a multi-ethnic community of Chinese, Japanese, and Filipino with their families becoming a part of the wider community.¹⁹⁹

Recognizing that ethnic immigrant cultures are deserving of assessment, Hawai‘i’s Thousand Friends suggested in their comments to the Guidelines that “a case could be made for placing most of Kaimukī into a protected category, simply because it played such a critical role for immigrant Chinese and Japanese as they left the plantations for more urban life. It is because we recognize this part of our history that we have a Chinatown Special Design District downtown.”²⁰⁰ Where cultural claims conflict as they did in Bear Lodge and where claims need to be balanced or prioritized, Native Hawaiian culture and cultural practices should be afforded greater protection. First, there are greater constitutional protections already embodied in Article XII, Section 7 of the state constitution, HRS, Chapters 1-1 and 7-1, and as interpreted by Kalipi, Pele Defense Fund, and Public Access Shoreline Hawai‘i.

Second, the Legislature’s recognition that past failures in protecting Native Hawaiian culture have already “resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture”²⁰¹ strongly supports the State’s putting Native Hawaiian culture and cultural practices at the top of the endangered cultures list. This sense of loss and destruction is described in the work of anthropologist Jonathan Friedman who notes that, “from the modernist point of view Hawaiian culture is already defined academically as the social order that predated contact with the British . . . . The Hawaiian
movement harbors its own constructions of the past which are fundamentally at odds with those of official representations.” Friedman also observes that, “for Hawaiians, whose official identity was demolished . . . cultural identity is something that has to be re-established, and it is thus organized, as in the West, as a search for roots.”

3. **Post-Act 50: Nānākuli Reservoir 242**

While ethnicity and history may limit whether certain resources and practices fall into the category of culture that is to be assessed in the environmental review process, organizations preparing EAs and EISs can look to the Environmental Council’s Guidelines and some of the EISs that have incorporated cultural assessments of Native Hawaiian and non-Hawaiian cultures.

One such example of an EIS adhering to Act 50’s mandate is the *Final Environmental Impact Statement for the Nānākuli 242 Reservoir (Nānākuli 242)* completed for the Hawai‘i Board of Water Supply in June 2000. The proposed action in this project was the construction of a two million-gallon concrete reservoir, transmission line, and access road in Nānākuli, on the island of O‘ahu. This final EIS is exemplar of the type of methodologies to be used in conducting a cultural impact statement. In two reports commissioned by the Board of Water Supply, researchers used a variety of methodologies to assess the cultural impacts of the proposed projects. These methodologies included documentary research, ground surveys, and in-depth, oral history interviews of community informants.

In “Archaeological Inventory Survey of the Proposed Nānākuli 242 Reservoir Site,” the reporters chronicle the history of Nānākuli from pre-European contact, through the early 1800s, to the 20th century. This report touched on the Native Hawaiian cultural aspects of Nānākuli, but also examined economic developments such as: the experimentation with ranching; the building of the O‘ahu Railway that connected sugar plantations in Ewa, Waianae, Waialua and Kahuku; and the selling of homestead lots prompted by the passage of the Hawaiian Homes Commission Act in 1920. Two local informant interviews were also conducted with long-time residents of Nānākuli. One interviewee, Mr. Walter Kamana, was born and raised in Nānākuli, tracing his family roots to Nānākuli for at least seven generations. This interview revealed the likelihood of finding Hawaiian remains in one section of the project.

4. **Act 50: Promoting Cooperation and Cultural Preservation for All**

“NEPA is a seminal statute because it is that one place that ensures a democratization of decisionmaking. It is that one instrument through which the public and state and local governments have a seat at the table as decisions are made which affect them in a very real way.”

Just as NEPA has evolved from an environmental awareness statute into one promoting public participation and better decision making, so too is HEPA an open invitation to public participation in better government decision making. In Hawai‘i, government decision making is diffused among the legislative and executive branches. In the arenas of land use development and the preservation of natural and cultural resources, there are multiple government bodies responsible for decision making exist. On one hand, this reflects Hawai‘i’s commitment to public participation. Public participation and opportunities are greater in a system with a diffusion of responsibility where “there are more agencies, boards, and departments holding public hearings and meetings; and because the process itself takes longer [so that] proponents
and opponents have the necessary time to hold meetings, prepare testimony, and mobilize opinion and action.”

On the other hand, dangers lurk in a diffused, decentralized system, especially when a process of public participation does not meaningfully incorporate the comments and concerns of the public. When taken for granted, public participation can be perfunctory and frustrating for all involved. It can become perfunctory for “government officials who receive masses of letters on a controversial project knowing that they lack the authority to make changes in the project based on the concerns expressed in the letters. And it is frustrating for the people who write, because they feel their letters are paid no attention.”

To avoid this meaningless generation of reports and comments, a “consensus-building approach” has developed and been advanced by participants in environmental planning processes over the past 30 years since the inception of NEPA. Professor of Urban and Environmental Planning Lawrence Susskind describes consensus-building as an approach that “seeks to supplement the basic system of representative democracy with an ad hoc process of dialogue. It is designed to build agreements that truly take account of all of the interests held by all of the people affected by decisions...a way of dealing with the complex dynamics that arise when people disagree.” In Hawai‘i’s diverse society, this type of process would not only lead to better decision-making, but potentially to inter-cultural understanding and cooperation. Another benefit to the EIS process generally is that it identifies problems early and allows for addressing concerns through the EIS.

In response to the criticism about time and costs, the process, if begun early, can lead to a more cost-effective and less expensive process with better decision-making. Susskind’s response to this criticism is that, “[w]hatever action the government wishes to undertake, if it moves deliberately in the beginning—letting people know what will happen and giving people a chance to understand and comment—it has a better chance of being able to speed up later.”

In contrast, the process can become more expensive and, hence, more contentious “[i]f the government moves too quickly in the beginning [and loses] people’s trust and any opportunity to hasten the process.”

IV. CONCLUSION

Hawai‘i’s laws protect the traditional and customary practices of Native Hawaiians. As a reflection of its rich history and multi-cultural society, Hawai‘i’s laws also embody a commitment to preserving all cultures. With the passage of Act 50 and the Hawai‘i Supreme Court’s open-ended comment on the definition of “cultural resources,” Hawai‘i can continue on its path of recognizing and protecting a broader range of cultures and valuable cultural resources, while continuing to protect Native Hawaiian traditional and customary practices. The new law is an opportunity for greater involvement in public decision making. In the end, by going out into the community and embracing cultural assessments, this process can become a means to building relationships, trust, and a stronger sense of community within a diverse society.
1 Della Au Belatti is a May 2003 graduate of the William S. Richardson School of Law where she earned the Environmental Law Program Certificate.


4 Id. § 2.

5 HAW. REV. STAT. § 343 (2001).

6 See infra Part II.B.1.

7 See infra Part II.B.


10 See generally United States Census Bureau, State and County QuickFacts, Hawai’i, at http://quickfacts.census.gov/qfd/states/15000.html (last visited April 16, 2002).


13 Id.

14 DENISE ANTOLINI, HAWAI’I STATE BAR ASSOCIATION HOT TOPICS IN ENVIRONMENTAL LAW (Legal Video Inc., Nov. 30, 2000).


18 In addition to the National Historic Preservation Act and National Environmental Policy Act described in this paper, other federal statutes protecting historic and cultural resources include the Archaeological Resources Protection Act, the Archaeological and Historic Preservation Act, and the National Graves Repatriation and Protection Act.


24 NHPA, 16 U.S.C. 470(f) (2002). This review process consists of three steps: (1) identifying historic properties; (2) determining the effect of the agency’s proposed actions on the historic properties; and (3) preparing a memorandum of agreement between the agency, the council, and the state historic preservation officer about ways to mitigate the effects. See also Boyd v. Roland, 789 F.2d 347, 349 (5th Cir. 1986) (holding that eligible property is that property that meets National Register criteria and is not restricted to property that has been officially determined to be eligible for inclusion).


35 A third statute protecting cultural resources is Hawai‘i’s Coastal Zone Management Act, enacted at Haw. Rev. Stat. § 205A. This statute is intended to protect and preserve “those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian . . . history and culture.” Haw. Rev. Stat. § 205A-2(b)(2).
43 Id.
44 Id.
45 Id.
46 Haw. Rev. Stat. § 343-5(a) (2001) states that:
   an environmental assessment shall be required for actions which:
   (1) Propose the use of state or county lands or the use of state or county funds . . .
   (2) Propose any use within any land classified as conservation district by the state land use commission under chapter 205;
   (3) Propose any use within the shoreline area as defined in section 205A-41;
   (4) Propose any use within any historic site as designated in the National Register or Hawai‘i Register . . .
   (5) Propose any use within the Waikīkī area of O‘ahu, . . . establishing the ‘Waikīkī Special District’;
   (6) Propose any amendments to existing county general plans where such amendment would result in designations other than agriculture, conservation, or preservation . . . ;
   (7) Propose any reclassification of any land classified as conservation district by the state land use commission under chapter 205; and
   (8) Propose the construction of new, or the expansion or modification of existing helicopter facilities . . . .”
49 Haw. Const. art. XII, § 7 (2000). See also Ka Pu‘akai O Ka ‘Āina v. Land Use Comm’n, 94 Haw. 31, 35 (2001) (stating that “the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible”).
50 An ahupua‘a is a division of land in ancient Hawai‘i that runs from the sea to the mountains.
51 Haw. Const. art. XII, § 7 (2000).
54 HAW. REV. STAT. § 1-1 (2001) (emphasis added).
55 Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1 (1982) (stating that a “statutory exception . . . is thus akin to the English doctrine of custom whereby practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law”). Id. at 10.
56 HAW. REV. STAT. § 7-1 (2001).
57 HAW. REV. STAT. § 174C-101(c) (2001).
59 Id. at 3.
60 Id. at 7-8.
61 Id. at 4.
62 Id. at 11-12.
64 Id. at 584.
65 Id. at 585.
66 Id. at 578, 590.
67 Id. at 620.
69 Id.
70 Id. at 429.
71 Id. at 430 n.6.
72 Id. at 429.
73 Id. (quoting Hawai’i Planning Commission Rule 4-2(6)(B)).
74 Id. at 448.
75 Id. at 450 n.43 (emphasis added).
76 E-mail from Kohanaiki ‘Ohana to Joshua Stanbro (Oct. 11, 2000) (on file with author). The member organizations of Ka Pa’akai O ka ‘Āina were Kohanaiki ‘Ohana, Ka Lahui Hawai’i, and Kona Hawaiian Civic Club. Id.
78 Id. at § 1.
79 Id.
80 Id. at §§ 1-2.

Id.

Id.

Id.

Id.

H.B. 3081, 18th Leg., Reg. Sess., H. Doc. No. 2, § 2 (Haw. 1996) (stating that historic and cultural resources include “mo‘o ku‘auhau (genealogy), mo‘olelo (oral and written history; traditions), wahi pana (notable places), wao akua (the upland dominion of the gods), wao kanaka (the residential and occupational dominion of man), the shoreline and ocean, and other applicable non-tangible resources”).


HAW. REV. STAT. § 343-6 (2001).

Letter from Benjamin Cayetano, then-Governor of Hawai‘i, to Kenneth K. Fukunaga, Chairperson, Environmental Council (May 10, 1996) (on file at Office of Environmental Quality Control and with author).


107 Id.

108 Id.

109 Ka Pa’akai, 94 Haw. 31 (2000).

110 Id. at 35. See generally M. Casey Jarman, Dissenting Commissioner Analyzes Legal, Environmental Failings of Project, 7 ENVIRONMENT HAW. 1 (July 1996), available at http://www.planet-hawai’i.com/environment/796dissenting.htm (last visited April 21, 2002). Jarman and Lloyd F. Kawakami were the only dissenting Land Use Commission members to vote against re-classification. Jarman noted that “[t]estimony was presented and the [Decision and Order] makes a finding that the ahupua’a of Ka‘upulehu is a ‘wahi pana’ . . . the storied, legendary places of significance in native Hawaiian culture.”

111 Ka Pa’akai, 94 Haw. 31, 35 (2000). The luxury project consisted of “530 single family homes, 500 low-rise multi-family units, a 36-hole golf course, an 11-acre commercial center, a 3-acre recreation club, a golf clubhouse, and other amenities.” Id. at 36.

112 Id. at 35.

113 Id. at 36.

114 Id. (citing PASH, 79 Haw. 425, 450 n.43 (1995) ).


116 Id. at 53.

117 Id. at 53.

118 Id.

119 Id. at 35.

120 Id.

121 Id. at 47 n.27.

122 Id.


124 DENISE ANTOLINI, HAWAI’I STATE BAR ASSOCIATION HOT TOPICS IN ENVIRONMENTAL LAW (Legal Video Inc., Nov. 30, 2000).

125 See Catherine Berryman, Toward More Universal Protection of Intangible Cultural Property, 1 J. INTELL. PROP. L. 293, 295 (1994) (stating that measures protecting cultural property are “limited in scope by the definition of cultural property...[that] include only physical forms of property”).


130 Id. at 8

131 Id.


133 Id. at 334.
Harding, supra note 132, at 313. Within Native Hawaiian communities, this notion of secrecy is echoed by *Kumu Hula* Vicky Holt Takamine. *Vicky Holt Takamine, Hawai‘i State Bar Association Hot Topics in Environmental Law* (Legal Video Inc., Nov. 30, 2000) (hereinafter *Takamine*).

*Takamine*, supra note 142.

Problem of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

Id. at 857.

Id. at 860.

Id. at 861 (citations omitted).

Id.

Harding, supra note 132, at 314.

Paul Rosendahl, Hawai‘i State Bar Association Hot Topics in Environmental Law (Legal Video Inc., Nov. 30, 2000).


Letter to OEQC from Donna Wong, Hawai‘i’s Thousand Friends, April 28, 1997 (on file with OEQC and author) (hereinafter Wong Letter).


In public comments on the Guidelines, one especially detailed ethnographic process recommended was from Jon Matsuoka, Davianna Pōmaika‘i McGregor, and Luciano Minerbi, Professors at the University of Hawai‘i, Mānoa, representing Social Work, Ethnic Studies, and the Department of Urban and Regional Planning respectively. In addition to suggesting a variety of methodologies, an important part of [their] methodology is the identification of key indices of Hawaiian subsistence, cultural, and religious customs, beliefs, and practices. These indicate the aspects of Hawaiian custom and practice that should be assessed for potential impact. Letter to OEQC from Matsuoka, McGregor, & Minerbi, May 1, 1997 (on file with OEQC and author). See also DAVIANNA PÔMAIKA‘I Mc Gregor, JON MATSUOKA, & LUCIANO MINERBI, NATIVE HAWAIIAN CULTURAL IMPACT ASSESSMENT WORKBOOK, July 1997.

Chapman Letter, supra note 151; Letter to Environmental Council from Harold Edwards, Vice President, Moloka‘i Ranch, October 6, 1997 (on file with OEQC and author); Letter to Environmental Council from Virginia Goldstein, Planning Director, County of Hawai‘i, October 20, 1997 (on file with OEQC and author) (hereinafter Goldstein Letter).


158 Id. at 373-374.

159 Id. at 374.


161 Id.

162 Eccleston, supra note 157, at 376.

163 Id. at 376-77.

164 Id. at 377.

165 Id. at 375.

166 Id.

167 Id.

168 Id. at 374.

169 Id. at 379.

170 Id.

171 Id.

172 Problems and Issues with the National Environmental Policy Act of 1969: Hearing before the Comm. on Resources House of Rep., 105th Cong. 85-86 (1998) (written testimony of Randy Allen, General Counsel, River Gas Corporation, Alabama) (suggesting that “public scoping must last at least 30 days, and comments received after the 30th day will not be considered. It would also help to state that no EIS would take longer than 18 months to complete.”)

173 Eccleston, supra note 157, at 381.

174 Id.

175 Id. at 382.

176 Id. at 383.

177 Id. at 381-382.

178 Lloyd Burton & David Ruppert, Bear’s Lodge or Devils Tower: Inter-cultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands, 8 CORNELL J.L. & PUB. POL’Y 201, 212 (1999). The two different names illustrate the competing cultural understandings of this natural resource, the first national monument to be protected by the Antiquities Act. Native Americans identify the landmark as Bear’s Lodge, a reference to legends and beliefs that the rock structure had grown skyward in order to save seven young girls from hungry bears. Today those girls are said to be memorialized in the sky as the seven stars known as the Pleiades. Id. at 201-204. (hereinafter Burton & Ruppert).

179 Directive from U.S. Dept. of the Interior, National Park Service, to All Regional Directors (1991) (stating that “each park area with climbing activities should develop a climbing management plan based on Chapter 8.3 of the NPS Management Policies”).

180 Burton & Ruppert, supra note 178, at 212.


182 Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448 (1998), aff’d, 175 F.3d 814 (10th Cir. 1999).

183 Id. at 1451.

184 Id. at 1450.
185 Id.
186 Id. at 1454-56.
187 Id.
188 Id. at 1456.
189 Id.
190 Id.
191 Bear Lodge Multiple Use Ass’n v. Babbitt, 175 F.3d 814, 818 (10th Cir. 1999).
193 HAW. CONST. art. IX, § 7 (2000).
194 Goldstein Letter, supra note 155.
195 Ka Paʻakai, 94 Haw. 31, 47 n.27 (2000).
197 Goldstein Letter, supra note 155 (emphasis added).
198 PARKER & KING, supra note 138, at 1.
199 See generally Takaki, supra note 9.
200 Wong Letter, supra note 152.
202 JONATHAN FRIEDMAN, CULTURAL IDENTITY AND GLOBAL PROCESS 126 (1994).
203 Id. at 186.
204 Shimabukuro, Endo & Yoshizaki, Inc., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE NÄÄKULI 242 RESERVOIR (June 2000) (hereinafter NÄÄKULI 242 RESERVOIR).
205 McDermott & Hammat, supra note 206, at 17.
206 Matt McDermott & Hallet H. Hammat, “Archaeological Inventory Survey of the Proposed NÄÄKULI 242 Reservoir Site, with Archaeological Assessment of the Proposed 20th Transmission Main Along NÄÄKULI Avenue, NÄÄKULI, Wai‘anae District, Island of O‘ahu,” 15-17 (Cultural Surveys Hawai‘i, August 1999) (hereinafter McDermott & Hammat). See also NÄÄKULI 242 RESERVOIR, supra note 204 at Appendix D.
207 McDermott & Hammat, supra note 206, at 17.
208 Id. at 19.
209 Id. at 25.
210 Id. at 25.
211 Problems and Issues with the National Environmental Policy Act: Hearing Before the House Comm. on Resources, 105th Cong. 105-102, 12 (1998) (statement of Hon. James Geringer, Governor of Wyoming, Chairman, Interstate Oil and Gas Compact Commission, Oklahoma City, Oklahoma, Vice Chairman of the Western Governors’ Association).
212 Muckleshoot Indian Tribe v. U. S. Forest Service, 177 F.3d 800, 812, 814 (1999) (stating that NEPA provides for a process ensuring that federal agencies take a “hard look” at the environmental consequences of their actions and “consider a range of appropriate alternatives”). See also NICHOLAS C. YOST, The National Environmental Policy Act, PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING 36 (American Bar Association 1994) (stating “NEPA has evolved into a public involvement statute: the public learned that, through NEPA, they could participate in determining the scope of environmental problems to be studied, and they could force the government to respond to their concerns.”) (hereinafter YOST).
For example, government agencies responsible for land use development and preservation include the Land Use Commission, the County Commissions, the Board of Land and Natural Resources, divisions of the Department of Land and Natural Resources, and the Office of Environmental Quality Control, a division of the Department of Health.


Id. See also Kathleen McGinty, Chair, Council on Environmental Quality, D.C. at 13, (stating one NEPA shortcoming as “rather than giving the public an opportunity to feel effectively engaged in decisionmaking, the public often feels that the public hearings that are provided are pro forma, that we are going through the motions, but that, in fact and in reality, the decision has already been made.”).


Yost, supra note 212, at 43 (describing the benefits of public participation in the EIS process: “For the proponents, the process identifies problems early so that they can be addressed. It allows opponents to express their concerns and have them addressed and, one hopes, answered or alleviated in the EIS. Members of the general public are informed of potential problems and actions that may affect them.”).

Susskind, supra note 217, at 44.

Id.
KA PAʻAKAI O KA ʻĀINA V. LAND USE COMMISSION: FULFILLING THE STATE’S DUTY TO PROTECT THE TRADITIONAL AND CUSTOMARY RIGHTS OF NATIVE HAWAIIANS?

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“[T]he historical displacement of Native Hawaiians from their land [was]…accomplished primarily through legal mechanisms rather than military actions . . . [T]heir problems accordingly require special legal solutions.”²

I. INTRODUCTION

For a people who trace their genealogy to the land – ka ʻāina, who recognize their gods and ancestors in the various forms of nature – the loss of this land through the use of legal mechanisms is tragic, yet ironic. It is ironic in that today Native Hawaiians³ are utilizing the same legal tools to fight for the recognition of their traditional and customary rights and the preservation of these lands. In crafting the Mahele,⁴ Kauikekaouli (King Kamehameha III) attempted to ensure that the granting of title to Hawaiian lands would forever be subject to the rights of native tenants. The King’s intent is reflected in the Principles Adopted by the Board of Commissioners to Quiet Land Title in Their Adjudication of Claims Presented to Them,⁵ as well as in certain Mahele awards and royal patents.⁶

Since 1848, Native Hawaiians have battled with various incarnations of government over the recognition and enforcement of their rights.⁷ Over the years, Hawai‘i’s courts have issued numerous decisions recognizing Native Hawaiian traditions and customs. These legal decisions have met with limited success because, ultimately, the state agencies charged with enforcing Native Hawaiian rights fail to view Native Hawaiian cultural resources and practices in the same manner as would a Native Hawaiian. As a consequence, Native Hawaiian cultural resources and practices oftentimes receive less consideration when weighed against private interests and economic gain.

In 1995, the Hawai‘i Supreme Court issued a landmark decision, Public Access Shoreline Hawai‘i v. Hawai‘i Planning Commission (“PASH”).⁸ In PASH, the court reaffirmed that the Hawai‘i State Constitution, along with Hawai‘i Revised Statutes (“HRS”), obligates the State to “‘preserve and protect’ native Hawaiian rights to the extent feasible.”⁹ The court, however, was silent as to the manner by which state agencies are to enforce this mandate. As a result, Native Hawaiians continue to find themselves embroiled in conflicts with state agencies and private parties over the enforcement of their recognized rights.

In Ka Pa‘akai O Ka ʻĀina v. Land Use Commission (“Ka Pa‘akai”)¹⁰, the Hawai‘i Supreme Court, in 2000, addressed the continuing failure of state agencies to properly identify and consider cultural resources by prescribing a three-pronged, analytical framework “to effectuate the State’s obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests . . . .”¹¹ The court recognized as undisputed the Land Use Commission’s (“LUC”) duty to consider and protect traditional and customary practices of Native Hawaiians in making its decisions to amend the State’s land use district boundaries.¹² The court, however, found the LUC failed its duty by granting
the developer’s petition for a district boundary reclassification without first giving specific consideration to “the extent of customary and traditional practices and the impairment and feasible protection of those uses” and by delegating its duty to protect these customary and traditional practices to the developer, Ka’upulehu Developments.

Since Ka Pa‘akai, the LUC has had two opportunities to apply the court’s analytical framework in its boundary amendment process: (1) in the remanded Decision and Order from Ka Pa‘akai for Ka’upulehu Developments, and (2) in the petition of Destination Villages Kaua‘i to reclassify 154 acres on Kaua‘i from the State Land Use “Agricultural District” to an “Urban District.” To comply with Ka Pa‘akai, the LUC placed conditions on the granting of these petitions. It is questionable, though, whether these conditions will adequately protect the interests of Native Hawaiians. Former LUC Commissioner, Casey Jarman, raised this concern at an LUC meeting for the Destination Kaua‘i petition, noting how the LUC has little power to enforce such conditions if petitioners choose to ignore them. The threat of the LUC reverting an amended boundary reclassification if a condition is violated holds little weight to ensure compliance as the LUC has never used this remedy in its 27-year history.

While the Ka Pa‘akai decision is significant in its reemphasis of the State’s constitutional mandate to protect Native Hawaiian traditional and customary rights and in its prescription of a framework for agencies to follow in enforcing these rights, in the end, the analytical framework may fail to live up to the court’s expectations. To protect the traditional and customary practices of Native Hawaiians, the State must protect the cultural and natural resources upon which these practices depend. Native Hawaiian identity is located in the ‘āina, the land. Identifying cultural resources, and giving them and their attendant practices proper consideration, is the first and perhaps most important step that state agencies must master in order to adequately fulfill their constitutional and statutory duty to Native Hawaiians.

For agencies to fulfill their constitutional mandate, judicial guidance is needed. Cultural sensitivity and understanding, however, cannot be judicially mandated through the application of a three-pronged test, no matter how well intentionally crafted to “accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other.” To better ensure Native Hawaiian traditional and customary rights are adequately protected, what is needed is meaningful, consistent, and permanent representation of Native Hawaiian cultural practitioners in decision-making that affects how land use and development proceeds in the state.

Part II provides a brief overview of the traditional relationship of Native Hawaiians to the ‘āina and the events that led to their alienation from these lands. Part III highlights the sources of legal protections afforded Native Hawaiian traditional and customary practices. A brief overview of the Ka Pa‘akai o Ka ‘Āina decision is provided in Part IV, as well as a synopsis of the LUC’s new remanded Ka‘upulehu Decision and Order and the LUC’s Decision and Order granting Destination Villages Kaua‘i’s petition to amend district boundaries. Part V examines these two Decisions and Orders in light of the analytical framework provided by the Ka Pa‘akai court to determine whether the framework served its purpose. Part VI concludes that the framework failed to adequately protect traditional and customary rights because the individuals enforcing these rights are unable or unwilling to give them, and the cultural and natural resources upon which they depend, sufficient and due consideration.
II. THE NATURE OF “VALUED CULTURAL RESOURCES”

A. Loss of Hawaiian Lands: The Need for Legal Protection of Traditional Customs and Practices

The 18th century brought dramatic cultural, social, and economic change to the Hawaiian Islands, ultimately resulting in the illegal overthrow of the Hawaiian Kingdom on January 17, 1893. With Captain Cook’s arrival in 1778, the wealth of the Hawaiian Islands was introduced to the world, thus beginning the rapid process by which Western influences would soon come to dominate a communal culture whose essence is grounded in its spiritual and physical connection to the land. Within half a century from Western contact, the islands of Hawai‘i were reorganized under a monarchy, the old polytheistic religion was replaced at the state level by Christianity, a subsistence economy was converted into a cash-based, export economy, and the Native Hawaiian population teetered on the verge of extinction. Despite these facts, at the level of the maka‘āina, or commoner, traditional “beliefs, customs, and practices . . . have continued to be practiced, honored, and transmitted to the present.”

B. Persistence of Native Hawaiian Customs and Practices

The truth is, there is man and there is environment. One does not supersede the other. The breath in man is the breath of Papa (the earth). Man is merely the caretaker of the land that maintains his life and nourishes his soul. Therefore, “āina is sacred. The church of life is not in a building, it is the open sky, the surrounding ocean, the beautiful soil.

These words illustrate how many Native Hawaiians continue to view their relationship to the ‘Āina. ‘Āina is sacred. ‘Āina is provider. ‘Āina is ancestor. ‘Āina is self, “He Hawai‘i wau” (I am Hawai‘i), the source of physical, cultural, and spiritual sustenance.

Land is inextricably tied to Native Hawaiian customs and practices. Hula practitioners must have access to forests where ‘ōhi‘a lehua trees and palapalai ferns, kino lau of the hula deities, are found. Pele worshippers must access those places of import to Pele, her lava flows, so that prayers and offerings can be given. Lā‘au lapa‘au, herbal healers, must gather the plants of the forests and seas to practice their craft. Native Hawaiians continue to participate in subsistence practices such as growing kalo or gathering ‘ōpae and ‘o‘opu from the streams. Without access to the land and its resources, these practices cannot exist. Over-development of the land diminishes the quality of its resources and of Native Hawaiian practices.

In Ka Pa‘akai, the developer’s environmental impact statement contained a one-page description of the petition area, characterizing it as a “barren . . . wasteland.” The developer, while admitting that the 1,000-acre petition area involved significant historical and cultural concerns, stated only that a “concentrated area of about 25% of the land can be considered culturally valued.” Herein lies the conflict. The perspective of Native Hawaiian cultural practitioners imbues the land with meaning beyond that which can be accounted for in a biological or archaeological survey. To a developer, Hawai‘i’s landscapes and vistas may be beautiful, even captivating, but the developer’s connection to the land seldom goes beyond the surface. The developer more likely views an open coastline as an ideal location for “a luxury development consisting of 530 single family homes.” Because land in Hawai‘i is oftentimes seen from two diametrically opposed perspectives, the State stands in the unenviable position of creating procedures to protect the rights of Native Hawaiians, on the one hand, while reasonably accommodating private and state interests in economic development and security, on the other.
III. A GENERAL OVERVIEW OF LEGAL PROTECTIONS AFFORDED NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY RIGHTS

A. Early Protections Afforded Native Tenants

The 1848 Mahele resulted in a mass redistribution of land that left seventy-two percent of the Native Hawaiian people “landless.”41 In an effort to parcel out lands to the commoners, the legislature passed the 1850 Kuleana Act, allowing for each native tenant to apply for his or her own kuleana, or land parcel and house lot.32 The Kuleana Act, however, failed to provide Native Hawaiians with a secure land base, with maka‘āinana receiving title to fewer than 30,000 acres or less than one percent of the land.43 What the Kuleana Act did accomplish was to provide for the continuation of native gathering, access, and water rights on private lands for ahupua‘a tenants.44 In 1851, the Kuleana Act was amended to eliminate the requirement that native tenants obtain permission first from the landlord before exercising their rights.45

Two early Kingdom of Hawai‘i cases addressed the rights of ahupua‘a tenants resulting from section 7 of the Kuleana Act,46 but the court did not address the scope of these rights until the late 1960s.

B. Pre-1978 Judicial Interpretation and Enforcement of Traditional and Customary Rights

The issue of traditional and customary rights did not arise again for judicial review until 1968, when the Hawai‘i Supreme Court revisited these rights in Palama v. Sheehan47 and In re Ashford.48 In Palama, the court affirmed Palama’s access across Sheehan’s property based upon “ancient [Hawaiian] tradition, custom and usage,” as well as on the doctrine of necessity.49 In Ashford, the court allowed the State to set the seaward boundary of beachfront properties at the vegetation line based upon “tradition, custom, and usage in old Hawaii.”50 In 1977, the court in State v. Zimring51 reiterated the validity of judicial consideration of traditional and customary practices.52

C. 1978 Constitutional Protections for Native Hawaiian Traditional and Customary Rights

In 1978, the State convened a historic constitutional convention that reaffirmed its commitment to Native Hawaiian interests and values.53 Then-Governor Ariyoshi, in his opening address, set the tone and spirit of the Convention by stating: “[T]he Preamble to our present Constitution notes that the people of Hawaii are ‘mindful of our Hawaiian heritage,’ ”54 and urging delegates to “adopt Hawaiian solutions to Hawaiian problems.”55 As a result, the 1978 Constitutional Convention produced numerous landmark amendments: (1) affirming the State’s duty to protect Native Hawaiian traditional and customary rights;56 (2) creating the Office of Hawaiian Affairs;57 (3) promoting the study of Hawaiian culture, history, and language;58 (4) and recognizing Hawaiian and English as the official languages of the state.59

The Committee on Hawaiian Affairs drafted what is now Article XII, section 7 of the Hawai‘i Constitution in “aware[ness] of the courts’ unwillingness and inability to define native rights.”60 By amending the State Constitution to include an amendment obligating the State to preserve and protect Native Hawaiian rights, the Committee believed it was providing “badly needed judicial guidance . . . and enforcement . . . of these rights.”61 Nearly a quarter century later, the hopes of the 1978 Constitutional delegates – as well as of those Hawai‘i citizens who
overwhelmingly ratified these amendments at the November 1978 General Election – remain unfulfilled. The State continues to struggle to define Native Hawaiian rights, and Hawai‘i’s courts continue to be called upon to provide judicial guidance and protection, as well as validation, of these rights.

D. Statutory Protections for Native Hawaiian Traditional and Customary Rights

Hawai‘i’s statutes afford Native Hawaiian traditions, practices, and “valued cultural, historical or natural resources” various forms of protection. Most applicable are HRS § 7-1, pertaining to the rights of native ahupua’a tenants,62 and HRS § 1-1, recognizing the common law of England and Hawaiian usage as the common law of the State of Hawai‘i.63 Under its own authorizing statute, when considering petitions to amend a land use district boundary, the LUC is required to specifically consider, upon clear preponderance of the evidence,64 “[t]he impact of the proposed reclassification on . . . the [m]aintenance of valued cultural, historical, or natural resources.”65 Additionally, section 205A-4 of the Hawai‘i Revised Statutes requires the LUC to “give full consideration to . . . cultural [and] historic . . . values . . . as well as to needs for economic development.”66

More recently, the 2000 Hawai‘i State Legislature passed Act 50, amending Hawai‘i’s environmental impact laws to require developers to disclose the impacts of a proposed action on cultural practices as part of the Environmental Impact Statement.67 In enacting this provision, the Legislature recognized the Hawaiian culture’s “vital role in preserving and advancing the unique quality of life and the ‘aloha spirit’ in Hawai‘i,”68 and the State’s “duty to promote and protect cultural beliefs, practices, and resources of native Hawaiians as well as other ethnic groups.”69 In the past, the State has failed to require cultural impact assessments for Native Hawaiians, thus resulting in “the loss and destruction of many important cultural resources and the interference with the exercise of native Hawaiian culture.”70

E. Post-1978 Judicial Interpretation and Enforcement of Traditional and Customary Rights

In 1995, the Hawai‘i Supreme Court in PASH recognized over 150 years of court decisions validating the existence of Native Hawaiian traditional and customary rights as part of the state’s common law.71 In PASH, the court reaffirmed the State’s affirmative duty to protect customary rights as it regulates the development of land “previously undeveloped or not yet fully developed” in Hawai‘i.72 The court admonished State agencies, stating that they “[do] not have the unfettered discretion to regulate the rights of ahupua’a tenants out of existence,”73 but rather they must find ways to resolve conflicts between developers and native tenants, giving full consideration to their statutory and constitutional obligations to Native Hawaiians.

In the fall of 2000, the Hawai‘i Supreme Court issued two new decisions further clarifying the State’s obligation to “protect customary and traditional rights [of Native Hawaiians] to the extent feasible.”74 In In re the Water Use Permit Applications,75 the court held that the scope of Hawai‘i’s public trust purposes includes “the exercise of Native Hawaiian and traditional and customary rights.”76 One month later, the court issued the Ka Pa’akai77 decision. In Ka Pa’akai, after reviewing the LUC’s Findings of Fact (“FOF”), Conclusions of Law (“COL”), and Decision and Order (“D&O”) for Ka‘upulehu Developments,78 the court found that the LUC had failed to discharge its statutory and constitutional obligations to preserve and protect Native Hawaiian rights. To assist the LUC in making the requisite specific consideration of traditional and customary rights that may exist within a petition area,79 the court provided the
LUC, as well as other State agencies, with an analytical framework to properly consider Native Hawaiian rights.\textsuperscript{80}

IV. The Ka Pa‘akai Court’s Provision of an Analytical Framework to Enforce the Traditional and Customary Rights of Native Hawaiians

In Ka Pa‘akai, the court recognized the “powerful historical basis for ensuring the protection of traditional and customary Hawaiian rights.”\textsuperscript{81} In furtherance of this historical tradition, the court found that the LUC had failed in its duty to protect Native Hawaiian rights in its granting of a boundary amendment petition reclassifying over 1,000 acres of land in the ahupua‘a\textsuperscript{82} of Ka‘upulehu.\textsuperscript{83} The court held, in part, that: (1) the LUC’s FOF and COL were insufficient to determine whether it had fulfilled its constitutional obligations to Native Hawaiian interests;\textsuperscript{84} and (2) the LUC had improperly delegated its duty to make sufficient FOF, regarding the identification of valued cultural resources and the exercise of Native Hawaiian rights in the petition area, to the developer, Ka‘upulehu Developments, and the landowner, Kamehameha Schools/Bishop Estate (“KSBE”).\textsuperscript{85}

The court found that the LUC had acted upon an “insufficient”\textsuperscript{86} record and in reliance on the developer’s “conceptual”\textsuperscript{87} resource management plan and the landowner’s unseen ahupua‘a management plan.\textsuperscript{88} Hawai‘i law requires the LUC to independently\textsuperscript{89} make specific findings\textsuperscript{90} on the adverse effects of a proposed development on valued cultural resources, which include, after \textit{PASH}, the traditional and customary rights of Native Hawaiians. The court held that, based upon these findings, the LUC must provide for the reasonable preservation and protection of Native Hawaiian traditional and customary rights, if these rights are found to exist.\textsuperscript{91} Recognizing the historical inability of the State to adequately protect and enforce the rights of Native Hawaiians, the Ka Pa‘akai court issued an analytical framework for the LUC to apply in its remanded review of Ka‘upulehu Developments’ boundary amendment petition.

The court remanded back to the LUC its D&O, granting Ka‘upulehu Developments’ petition, for:

the limited purpose of entering \textit{specific findings and conclusions}, with further hearings if necessary, regarding:

(1) the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;

(2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and

(3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.\textsuperscript{92}

A. The LUC’s Remanded Decision and Order for Ka‘upulehu Developments

In response to the Ka Pa‘akai decision, the LUC revised its FOF and COL to comply with the prescribed analytical framework.\textsuperscript{93} The parties and the LUC mutually agreed to hold no new hearings in the reconsideration of Ka‘upulehu Developments’ petition.\textsuperscript{94} Rather, the
LUC instructed the parties and Commission staff to review the record upon which the June 17, 1996 D&O was based and apply the court’s framework to the evidence thus submitted. After a lengthy review process, the LUC adopted on August 23, 2001, its new Proposed FOF, COL, and D&O, granting petitioner’s boundary amendment.

The new FOF differed from those adopted in 1996 in that “valued cultural resources” and the exercise of traditional and customary practices are described with more specificity, as was requested by the Ka Pa’akai court. The LUC’s new FOF, however, failed again to address important concerns raised by the court, such as the petitioner’s and the LUC’s failure to sufficiently identify cultural resources and practices occurring outside of the petitioner’s Resource Management Area. The State also delegated, again, to the petitioner the duty to fully identify and protect Native Hawaiian cultural resources and practices through the establishment of the Ka’upulehu Development Monitoring Committee (“KDMC”).

Establishment of the KDMC, to be supported annually through revenues generated from the project is, arguably, a positive action taken on the part of the LUC. The KDMC consists of:

(1) a person of Native Hawaiian ancestry who is knowledgeable regarding the type of cultural resources and practices within the Petition Area, as selected by the Land Use Commission from a list of three names submitted by each of the parties . . . ; and

(2) a management member knowledgeable regarding the type of cultural resources and practices within the Petition Area, as selected by Petitioner and landowner.

Commissioner Stanley Roehrig, the drafter of the new D&O, characterized the formation of the cultural monitoring committee as a process by which the developer and the Native Hawaiian community can come to an agreement if and when conflicts over resources arise. Whether the two sides will be on “equal” footing when an actual dispute arises and resolution entails a change in the developer’s plans remains to be seen. In the event of a deadlock, the D&O directs the KDMC to “jointly select a third person to break the tie.” If the choice of the third person becomes an additional issue of dispute within the KDMC, will the LUC step in to resolve the dispute in favor of protecting the cultural resources and practices of Native Hawaiians? Experience answers in the negative. In the final analysis, however, determinations to be made by the Committee, at some future date, are those same decisions the Ka Pa’akai court required the LUC to make before a decision is made either granting or denying a petition. In this vital respect, the LUC failed to comply with the Ka Pa’akai decision.

B. The LUC’s Decision and Order for Destination Villages Kaua‘i

On April 10, 2000, Destination Villages Kaua‘i (“DVK”) filed a petition to amend approximately 154 acres on the island of Kaua‘i from the State Land Use “Agricultural District” to the “Urban District.” DVK petitioned for the boundary amendment to develop “a resort and accessory uses” for Kapalawai Resort, consisting of 250 visitor cottages, two restaurants, a snack bar, and a museum, among other amenities. The petition area is located in the ahupua‘a of Makaweli, an area which retains a distinctly rural, undeveloped character.

DVK’s request for a boundary amendment involved issues of valued cultural resources and the exercise of Native Hawaiian traditional and customary practices within the petition area – issues similar to those raised in the Ka’upulehu petition. The property contains numerous
sites of cultural significance, including a six-acre ancient Hawaiian fishpond, prehistoric burial sites, walled terraces, and surveyed cultural layers indicating the presence of ancient Hawaiian habitation sites.\textsuperscript{106}

Kekupua fishpond\textsuperscript{107} is of particular importance because it is one of the focal points of the proposed resort development.\textsuperscript{108} Core samples confirm the ancient origin of the fishpond, estimating its original date of construction around AD 895 to 1225.\textsuperscript{109} Located in a central portion of the petition area, the fishpond’s renovation, preservation, and maintenance will serve as a cultural resource for resort guests and the community.\textsuperscript{110} According to the developer, the fishpond’s operation will be consistent with traditional practices and will “include procedures for sharing fish harvested from the pond.”\textsuperscript{111} More significant is that the fishpond is the only cultural resource within the petition area where the LUC found traditional and customary practices to exist.\textsuperscript{112}

In its consideration of the developer’s petition, the LUC received numerous oral and written testimonies in favor of the reclassification, primarily founded upon the community’s desire to see new jobs and economic growth in the economically depressed area.\textsuperscript{113} The bulk of the opposition came from a single organization, KAHEA: The Hawaiian Environmental Alliance. KAHEA members submitted over 150 letters opposing the reclassification. These letters questioned the adequacy of the developer’s Final Environmental Impact Statement’s (“FEIS”) findings regarding the existence of traditional and customary rights.\textsuperscript{114} The non-KAHEA opposition letters raised additional issues, such as: (1) the availability of a more suitable site for the project; (2) the possible presence of a heiau; (3) other cultural layers not yet discovered by the consultant’s archaeological survey; and (4) the suitability of a comparatively large resort development in rural West Kaua‘i.\textsuperscript{115}

On April 6, 2001, the LUC issued its FOF, COL, and D&O granting the boundary reclassification.\textsuperscript{116} In its D&O, the LUC provided for the creation of a “fishpond management entity composed of a representative from the Petitioner and a representative from the West Kaua‘i Hawaiian community to be selected by the Hawaiian community.”\textsuperscript{117}

V. \textbf{APPLICATION OF THE KA PA‘AKAI FRAMEWORK: SUCCESS OR FAILURE?}

Upon review of the new FOF, COL, and D&O for Ka‘upulehu Developments’ and Destination Villages Kaua‘i’s boundary amendment petitions, it is clear that the LUC failed to properly apply the \textit{Ka Pa‘akai} framework. As a result, Native Hawaiian rights and practices did not receive the consideration and protection mandated by the \textit{Ka Pa‘akai} court, the \textit{PASH} decision, and Article XII, section 7 of the Hawai‘i State Constitution.

A. \textbf{LUC Failed to Make Specific Findings on the Existence of Cultural Resources and Rights and the Extent to Which These Would Be Impaired by the Proposed Action}

In \textit{Ka Pa‘akai}, the court criticized the LUC for failing to make specific findings as to the presence of protected cultural resources and practices occurring outside of the developer’s 235-acre Resource Management Plan (“RMP”) Area.\textsuperscript{118} In its new FOF, the LUC again failed to address, with specificity, the impact of this development upon cultural resources outside of the resource management area.\textsuperscript{119} Upon remand, the LUC was not required to hold new hearings; no new hearings were held. Because no additional fact-finding took place, the over 770 acres outside of the resource management area again failed to receive the attention required by law. The entire \textit{ahupua‘a} of Ka‘upulehu is a \textit{wahi pana}, a storied place of significant historical and
cultural value. Protection of cultural resources and practices, however, are again confined to the resource management area. Protection for the 1800-1801 lava flow, for example, identified by the LUC as a “valued historical and cultural resource,” will be protected and preserved only within the resource management area. According to the LUC, “[f]urther protection or preservation of some portions of the 1800-1801 lava flow is not feasible without unreasonably interfering with Petitioner’s common law property rights.” The LUC also acknowledged that the development will impact the collection of Pele’s Tears and recognized that collection of Pele’s Tears will only be possible along the makai, or seaward, portion of the lava flow, within the resource management area. As for the impact of the development upon Pele worshippers, this practice was not addressed in the remanded D&O, other than in COL No. 10, concluding that, “Pele Worship is a customary and traditional native Hawaiian right.”

Similarly, in DVK, the LUC failed to make specific findings as to the full scope of cultural resources and practices within the petition area. In particular, with regards to the “recently discovered cultural layer,” LUC’s FOF No. 86 found that it “is recommended for preservation for future archaeological research. The preservation plan will outline the short-term and long-term preservation measures that will safeguard the feature from damage during Project construction and subsequent land use.” FOF No. 88 states that “[s]ubsurface testing results indicate that two sites or feature types will potentially be found during ground disturbances: human-burials and subsurface prehistoric cultural layers.” “Before construction begins, a monitoring plan will be written, approved by SHPD, and implemented.” These provisions read much the same as the LUC’s findings in the original Ka’upulehu D&O – that “resources” existed within the petition area and that those resources would be preserved as part of the developer’s resource management plan. Once again, the LUC delegated its duties to protect traditional and customary rights to the developers. Commissioners Jarman and Catalani raised these concerns at the LUC action meeting on DVK – that the D&O did not comport with the Ka Pa’akai decision – and voted against approving the developer’s petition. Yet, despite their reservations, the LUC approved the DVK petition. In Ka Pa’akai, the court clearly stated that these types of findings and conclusions are “insufficient” to allow a determination as to whether valued cultural resources would be protected.

With regard to the exercise of Native Hawaiian rights within DVK’s petition area, the LUC’s FOF Nos. 100-103 found, based upon the developer’s assessment, “no evidence of traditional customs and practices presently being exercised on the Property.” A consulting firm, Cultural Surveys Hawai‘i, prepared a “Traditional Customs and Practices Report” for the project, which primarily entailed interviews with long-time employees of the petition area’s landowner, the Robinson Family. Based upon the memories of the interviewees, the developer concluded:

[I]f any traditional customs and practices had been carried out at Kapalawai prior to the [Robinson] family’s arrival, these may not have been possible during the 135 years of the family’s ownership. Anyone who might have been pursuing these customs and practices has long since passed away...[N]one of the interviewees could recall being told by their elders of any significant or documented cultural practices in the project area... As a result, it is not likely that Hawaiian traditional customs and practices will be significantly affected by the proposed development.

In PASH, the court stated that traditional and customary practices are not extinguished by non-use. The LUC, therefore, erred in adopting the developer’s conclusion that traditional and customary rights and practices did not exist within the petition area, particularly where the LUC had knowledge of the landowner’s renown for keeping uninvited guests off the property.
The developer’s “Traditional Customs and Practices Report” noted in its summary that, “Native Hawaiians traditionally accessed the coastal areas for gathering and subsistence and for trade,” and that “it is likely that native Hawaiians did practice traditional gathering and use rights in the project area.”

Opposition letters submitted to the LUC also referenced various cultural sites neither included on the developer’s historical site plan, nor in the LUC’s FOF, COL, and D&O, such as taro lo‘i located between the fishpond and Mahaikona Stream, a heiau, and ancient rock walls. The cultural history of the area, as well as the evidence of ancient habitation sites within the petition area, should have informed the LUC of the possibility that other traditional and customary practices existed beyond the fishpond. In the end, the LUC focused its attention on the fishpond and did not consider the full scope of cultural resources and rights that may later be found to exist in the petition area. In doing so, the LUC again failed to follow the instructions laid out by the Ka Pa‘akai court to make specific findings and conclusions as to the existence of Native Hawaiian traditional and customary practices in the petition area, the extent to which these practices will be impacted by the proposed development, and any action, if feasible, the LUC can take to protect these rights.

B. Provisions Made by the LUC are Questionable as to Whether They Will Reasonably Protect Native Hawaiian Cultural Resources and Practices

In Ka‘upulehu Developments and DVK, the LUC required the developers to establish advisory committees to monitor the development of the respective projects and to settle any disputes that may arise in the future with respect to traditional and customary rights. Both monitoring committees call for one of the two members to be of Hawaiian ancestry and knowledgeable of the cultural resources and practices of each petition area.

Once again, the LUC is delegating its duty to identify and protect cultural resources and practices to a third party, with their identification and protection left to another group, at some future date. The Ka Pa‘akai court was clear in requiring that “[s]pecific considerations regarding the extent of customary and traditional practices and the impairment and feasible protection of those uses must first be made before a petition for a land use boundary change is granted.”

The fact that each committee is required to have a person of Hawaiian ancestry – knowledgeable of the cultural resources of each petition area – as one of its two members does not remedy the fact that the LUC failed to make all the proper findings and determinations it was charged to make by the Ka Pa‘akai court before it granted the district boundary reclassifications.

While the formation of monitoring committees that give voice to Native Hawaiian concerns in the development process is a positive move, it is questionable how much influence this process will have in protecting cultural practices. It is unlikely that a project will be significantly altered to accommodate Native Hawaiian interests. Once a boundary petition is granted and a major development is given the green light to proceed, what little protection is afforded traditional and customary rights is greatly diminished. Nevertheless, through the creation of these committees, the LUC took an important step towards giving oversight power and, potentially, veto power to Native Hawaiians that was previously lacking.
VI. CONCLUSION

“Unless we can breathe life into the existing laws already on the books and into the persons who administer those laws, new laws will not change the process much. Hawaiian cultural resources and values reflected in those existing laws must be raised to a higher level in the official consciousness of government agencies.”

Such was the plea of Leimana Damate of the Kona Hawaiian Civic Club during the first administrative proceedings of Ka‘upulehu Developments’ boundary reclassification petition. The Ka Pa‘akai court believed their analytical framework would raise Hawaiian cultural values and resources to a higher level in official agency consciousness, and in an important sense, it did. The transcripts of the LUC action meeting for DVK clearly evidence that the Commissioners are aware of what the Ka Pa‘akai court had instructed. What is not so clear, however, is whether the LUC succeeded at the task placed before them.

With the formation of the monitoring committees, the LUC afforded Native Hawaiians some decision-making power to oversee the development of culturally important lands, but this power was granted after approving the developers’ petitions to reclassify lands into State Land Use “Urban Districts.” Providing after-the-fact opportunities for Native Hawaiians to be involved in the decision-making process fails to give full weight to the Ka Pa‘akai court’s mandate that issues significant to Native Hawaiian cultural practices be fully addressed before a boundary amendment petition is granted. The Ka Pa‘akai court correctly warned that, “[a]fter all, once a project begins, the pre-project cultural resources and practices become a thing of the past.”

A. What Should the LUC Have Done?

Clearly, for the remanded Ka‘upulehu Developments’ Decision and Order, the LUC should have required more information from the developer regarding cultural resources and practices existing outside of the resource management area. While not required to hold new hearings, the LUC had the authority to request additional information from the developer, such as an expanded cultural survey of the petition area or the landowner’s ahupua‘a plan. For an area as large (over 1,000 acres) and undisturbed as that involved in the Ka‘upulehu decision, the LUC should have been more vigilant and denied the petition until the developer could fully answer the many unanswered questions affecting approximately seventy-five percent of the petition area.

In DVK, questions remained unanswered as to the exact identity and scope of Native Hawaiian rights in the petition area as a whole, as well as in the fishpond. Here again, the LUC, however, approved the petition six votes to two. The LUC, however, approved the petition six votes to two. Here again, the LUC should have required more information from the developer and not relied exclusively on the developer’s conclusion that no Native Hawaiian rights existed beyond the fishpond because of the landowner’s reputation of keeping people off the property. As for FOF No. 88 and the “recently discovered cultural layer,” it was a dereliction of duty for the LUC to once again rely on the developer’s “preservation and monitoring plan” to protect the site from damage during project construction. The reclassification of conservation and agricultural lands into urban uses requires diligence on the part of the LUC to ascertain what cultural resources and practices exist in a petition area and how these will be affected by development before a decision is made.
B. What is Needed to Protect Native Hawaiian Cultural Resources?

Until Native Hawaiians, dedicated to preserving the culture and the natural resources to which the culture is attached, are able to participate effectively in the land use decision-making process, Native Hawaiian traditional and customary practices will slowly be redistricted or rezoned into non-existence. The *PASH* court warned that “the State does not have the unfettered discretion to regulate the rights of ahupua’a tenants out of existence.”\(^{150}\) The *Ka Pa’akai* court goes on to state that the LUC cannot, through its granting of petitions to amend land use district boundaries, regulate these rights out of existence by allowing for the loss of cultural resources through development.\(^{151}\) As *PASH* rights only apply to “undeveloped” or “not fully developed” lands,\(^{152}\) the LUC has the heightened duty to ensure these rights are fully protected, in both scope and quality of practice, before decisions to reclassify district boundaries are made – particularly when the result is a dramatic change from conservation to urban land uses, as was the case in Ka‘upulehu’s petition.

To remedy the problem of after-the-fact involvement of Native Hawaiians, a permanent position should be established on the LUC for a Native Hawaiian cultural practitioner, similar in form to what was established for the Commission on Water Resource Management by Act 184, recently passed by the 22nd Hawaii Legislature during the 2003 session.\(^{153}\) Introduced by Senator Colleen Hanabusa on January 24, 2003, the Act “adds a member with substantial experience and expertise in traditional Hawaiian water resource management techniques and in traditional riparian usage such as those preserved by section 174C-101 [of the State Water Code].”\(^{154}\) A similar seat on the LUC will contribute not only towards identifying the scope of cultural resources present within a boundary petition area, but also towards achieving commentary on how the proposed action will affect the quality of a practice associated with those resources. Issues of identifying cultural resources and practices cannot be separated from concerns relating to the quality of practice. Gathering sea salt from a pristine, undeveloped coastline holds value far beyond what is obtained from the same practice conducted in an area next to a luxury home development or a 36-hole golf course. For someone not personally, emotionally, or spiritually vested in the culture, this distinction may be hard to comprehend and even harder to account for in the balancing of interests called for by the *Ka Pa’akai* court.

Until Native Hawaiian cultural practitioners have a seat at the decision-making table – before dramatic land use decisions are made – protection and enforcement of Native Hawaiian rights will continue to be illusory. After-the-fact remedies, such as establishing the cultural advisory committees, will only mitigate the harms wrought by development, not prevent them in those situations when denying a boundary reclassification petition would be the preferable course of action. Once lands are districted for urban development, it is only a matter of time before the rights protected by *PASH* and article XII, section 7 of the Hawai‘i State Constitution will become remnants of the past. On this point, the *Ka Pa’akai* court was clear.

Ultimately, what is needed is Native Hawaiian self-governance over Hawaiian lands. One proposal to achieve Native Hawaiian self-governance, though not wholly supported by the Hawaiian community, is Senate Bill 344 (“The Akaka-Stevens Bill”).\(^{155}\) The Akaka-Stevens Bill establishes a process for United States’ recognition of a Native Hawaiian governing entity.\(^{156}\) Currently held up in the U.S. Senate, the Akaka-Stevens Bill provides, in section 8, that upon federal recognition, the United States and the State of Hawai‘i may enter into negotiations regarding “the transfer of lands, natural resources, and other assets” and “the exercise of governmental authority over those lands, natural resources, and other assets.”\(^{157}\)
In whatever form self-governance is achieved, a land base under Native Hawaiian control will provide the best assurance that Native Hawaiian customs and practices will be properly valued and protected. Until that time, preserving and protecting the cultural resources and practices presently existing on Hawai‘i’s undeveloped lands is the duty of all state agencies involved in the land use process. Hawaiian history, genealogy, and spirituality are tied to every inch of land comprising the archipelago of Hawai‘i. The gods and goddesses of Hawai‘i traveled from Kahiki up through the island chain, imbuing every coastline, mountain ridge, and forest grove with a story that is a part of Hawai‘i’s (the Hawaiian’s) past. In recognition of this history, the State must continue to strive to find meaningful mechanisms by which Native Hawaiian rights will truly be on par with the interests of private land owners and economic growth.

(Endnotes)

1 Shirley Garcia is a December 2002 graduate of the William S. Richardson School of Law.

2 Neil M. Levy, Native Hawaiian Land Rights, 63 CAL. L. REV. 848 (1975) [hereinafter Levy]; Levy concludes, “without a concomitant commitment by the legal system to preserve a land base for Native Hawaiians, their future on the very Islands that nurtured their culture is bleak.” Id. at 885.

3 The term “Native Hawaiian” is used in this paper to refer to individuals who trace their ancestry to the indigenous people who inhabited the Hawaiian Islands prior to 1778, regardless of blood quantum. Both the “N” and the “H” are capitalized (similar to “Native American”) in recognition that the term “Hawaiian” has become highly politicized in recent years. See, e.g., Keith Haugen, Editorial, Cayetano’s Sentiment on Feeling Hawaiian is Understandable, HONOLULU STAR-BULLETIN, Sept. 27, 2000, available at http://www.starbulletin.com/2000/09/27/editorial/letters.html; Lee Cataluna, Who’s More Hawaiian is Now a Question of Power, HONOLULU ADVERTISER, Special Report: The State of the Hawaiian, Jan. 7, 2001, available at http://www.honoluluadvertiser.com/specials/stateofthehawaiians/8cataluna.html.

4 The Mahele of 1848 divided all of the land of the kingdom between the chiefs, the Hawaiian government, and the King. Prior to this division, the King held title to all land in the islands. This event signaled the end of the feudal land system and the beginning of fee simple ownership in Hawai‘i. J.J. CHINEN, THE GREAT MAHELE 15 (1958).

5 Principles Adopted by the Board of Commissioners to Quiet Land Titles, In Their Adjudication Of Claims Presented To Them, 2 Statute Laws of His Majesty Kamehameha III (SLH) 81, 82-83 (1847), reprinted in 2 Revised Laws of Hawaii (RLH) 2124, 2125-126 (1925).

But even when such lord shall have received an allodial title from the King by purchase or otherwise, the rights of the tenants and sub-tenants must still remain unaffected, for no purchase, even from the sovereign himself, can vitiate the rights of third parties. The lord, therefore, who purchases the allodim, can no more seize upon the rights of the tenants and dispossess them . . .

Id. (emphasis added). See also In re the Water Use Permit Applications, 94 Haw. 97, 128-29 (2000). “[I]n granting land ownership interests in the Mahele, the Hawaiian Kingdom expressly reserved its sovereign prerogatives ‘[t]o encourage and even to enforce the usufruct of lands for the common good.’” Id. (citations omitted).

6 Denise Antolini, Law Related to the PASH/KOHANAIKI Ruling (prepared from materials provided at the “Life after PASH” conference sponsored by the Native Hawaiian Bar Association, Dec. 9, 1997) [on file with author].

[K]oe wale no na kuleana o na kanaka e noho ana ma ua mau ‘āina lā.

[R]eserving only the right of the people who live on the aforementioned lands.

Id. (quoting from the 1848 Mahele Awards).


9 Id. at 452 (quoting the Coastal Zone Management Act (CZMA), Haw. Const. art. XII, § 7, and Haw. Rev. Stat. § 1-1).

10 Ka Pa‘akai O Ka ‘Āina v. Land Use Commission, 94 Haw. 31 (2000) [hereinafter Ka Pa‘akai].

11 Id. at 46-47.

12 Id. at 46.

13 Id. at 52.

14 Id.

15 In re Destination Villages Kaua‘i, Transcript of Proceedings, Land Use Comm’n, Haw., in Land Use Comm’n Record, Honolulu, Haw., Docket No. A00-731, at 24 (Mar. 8, 2001); At the Mar. 8, 2001 LUC meeting, Commissioners Jarman and Catalani voted against the petition to reclassify the district boundary. Id. at 44.

16 Interview with Casey Jarman, Professor of Administrative Law, Univ. of Haw. at Mānoa, William S. Richardson Sch. of Law, and State of Hawai‘i Land Use Commissioner, in Honolulu, Haw. (Feb. 26, 2002). Upon a showing that the petitioner has failed “to perform according to the conditions imposed, or the representations or commitments made by the petitioner,” the LUC may revert the petition area back to its former land use classification. State of Haw. Land Use Comm’n Rules and Procedures, Haw. Admin. Rules § 15-15-93(b) (amended May 8, 2000).

17 Ka Pa‘akai, 94 Haw. 31, 46 (2000). “[T]he LUC’s duty to protect the traditional and customary practices asserted by the native Hawaiian members of Ka Pa‘akai . . . is undisputed.” Id.

18 Id. at 47. The court bound the LUC, in its review of a petition to reclassify a district boundary, to make specific findings and conclusions as to the presence of cultural resources within the petition area, how these resources will be impacted by amending the district boundaries, and any steps, if necessary, that must be taken in order to protect these resources. See id.

19 Id. at 46.

20 The Apology Bill, Pub. L. No. 103-150 (Nov. 23, 1993) [hereinafter The Apology Bill] (outlining the events leading up to the overthrow of the Hawaiian Kingdom and acknowledging the United State’s complicity in those events).

21 The Apology Bill recognized that “the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.” Id. at Preamble.

22 It is estimated that by 1866, the Native Hawaiian population had fallen to 57,000 from an estimated pre-contact population range of 300,000 to 1,000,000. See S. Rep. No. 107-66 (2001) (providing an extensive history of the impact on Native Hawaiians stemming from Western contact in 1778 and the loss of nationhood in 1893 as justification for Federal recognition and the provision of a mechanism for the reorganization of a Native Hawaiian government); see also David E. Stannard, Before the Horror: The Population of Hawai‘i on the Eve of Western Contact 59-80 (1989) (estimating the pre-contact population of Native Hawaiians to be closer to 1,000,000). See generally Lilikalā Kame‘eleihiwa, Native Land and Foreign Desires: Pehea Lā’e Pono At? (1992), for detailed discussions of influences affecting a change in Native ownership of land; Davianna Pōmai‘a‘a McGregor, An Introduction to the Ho‘a‘aina and Their Rights, 30 Haw. J. Hist. 1, 1996 [hereinafter McGregor]; Sproat, supra note 7; Levy, supra note 2.

23 McGregor, supra note 22, at 9.

The Native Hawaiian belief system recognized a multitude of gods and goddesses inhabiting every aspect of nature. See Dr. Kenneth Emory, Religion in Ancient Hawai‘i, in KAMEHAMEHA SCHOOLS 75TH ANNIVERSARY LECTURE SERIES 86 (1965) [on file with author]; JUNE GUTMANIS, NA PULE KAHIKO: ANCIENT HAWAIIAN PRAYERS (1983).

‘Aina is also understood as “that which feeds.” E.S. CRAIGHILL HANDY AND ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAI‘I: THEIR LIFE, LORE, AND ENVIRONMENT 45 (1991) [hereinafter HANDY & HANDY]

See id. at 74 (retelling the story of Ha-loa naka, the taro plant, viewed as the elder brother of the Hawaiian people); MARTHA W. BECKWITH, THE KUMULIPO: A HAWAIIAN CREATION CHANT (1951) (discussing the Kumulipo, a Hawaiian genealogy chant written to honor the birth of a high chief and link his lineal descent to all the forms of nature, back to the time when there was only night, ka po).

See e.g., HANDY & HANDY, supra note 26; The Apology Bill, supra note 20, at 4 (finding that “the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land”); JON K. MATSUOKA, ET AL., U.S. DEPT. OF ENERGY, NATIVE HAWAIIAN ETHNOGRAPHIC STUDY FOR THE HAWAI‘I GEOTHERMAL PROJECT PROPOSED FOR PUNA AND SOUTHEAST MAUI 17-23 (1996) [hereinafter MATSUOKA] (discussing land and nature as the foundation of Hawaiian customs, beliefs, and practices) [on file with the author].


See MATSUOKA, supra note 28, at 151-210 (explaining Pele beliefs, customs, and practices).

See ABBOTT, supra note 29.

The kalo plant (Colocasia esculenta) plays a significant role in the lore, mythology, and identity of the Native Hawaiian people. Kalo continues to be the staple food of a traditional Hawaiian diet. See HANDY & HANDY, supra note 26, at 71-118. Taro is described as the “staff of life” in Hawaiian culture. Id. at 77; Leslie Lang, Kalo Culture: Tapping Into the Roots of Hawai‘i’s Life-Giving Ancestral Plant, HANA HOU! THE MAGAZINE OF HAWAIIAN AIRLINES, Feb./Mar. 2002, at 24 [hereinafter Lang].

‘Opa‘e generally refers to both fresh and saltwater shrimp. See MARY KAWENA PUKUI AND SAMUEL H. ELBERT, HAWAIIAN DICTIONARY (HAWAIIAN-ENGLISH/ENGLISH-HAWAIIAN) 291 (1986); Hawai‘i is home to several species of ‘ōpa‘e that are endemic, or unique, to the Hawaiian Islands. Id.

‘O‘opu generally describes several species of fish found in both the freshwater and saltwater reaches of Hawai‘i’s streams. See id. at 290-91.


McGregor, supra note 22, at 21.


Id. (reporting on statements made by Alexander Kinzler, executive vice president of Barnwell Industries, Ka‘upulehu Developments’ business partner).


Id. at 51.

McGregor, supra note 22, at 9. See also, Levy, supra note 2.

Levy, supra note 2, at 855.

Id. at 856 (questioning the drafters’ of the Kuleana Act beneficent intent to put the maka‘āinana back on the land).

Section 7 of the Kuleana Act is codified at Haw. Rev. Stat. § 7-1.
See *Kukiiahu v. Gill*, 1 Haw. 54 (1851) (holding that the exercise of *hoa`ai*na access rights does not require permission of the landlord). In 1851, section 7 of the Kuleana Act was amended to reflect the court’s holding in *Kukiiahu*. McGregor, *supra* note 22, at 11.

See *Kukiiahu*, 1 Haw. 54 (1851); *Oni v. Meek*, 2 Haw. 87 (1858).


50 Haw. at 300-301.

50 Haw. at 316-17.


*Id.* at 118 (finding that Hawaiian usage prior to 1892 did not give title to new lands created by volcanic eruptions to owners of land along the seashore).


*Id.*

HAW. CONST. art. XII, § 7.

HAW. CONST. art. XII, § 5.

HAW. CONST. art. X, § 4.

HAW. CONST. art. XV, § 4.


*Id.*

HAW. CONST. art. XII, § 7.

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

*Id.*

HAW. REV. STAT. § 1-1 (2001).

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai`i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or *established by Hawaiian usage*; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

*Id.* (emphasis added).


Haw. Rev. Stat. § 205A-4; see also Ka Pa’akai, 94 Haw. 31, 45 n.23 (2000).


Id.

Id.


Id. at 451 (stating that, “the State is authorized to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed”). Id.

Id.

Id. at 437. In a highly controversial statement, the PASH court found that, “our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai‘i.” Id. at 447. Native Hawaiian cultural practitioners viewed this statement as both a victory and a validation of their unique position in these islands. To many private property owners, developers, and legal theorists, the court’s decision was tantamount to “heresy.” McGregor, supra note 22, at 2 (quoting Janice Otaguro, Islander of the Year, HONOLULU MAGAZINE, Jan. 1996, 32-34, 662, 69-70).

In re the Water Use Permit Applications, 94 Haw. 97 (2000).

Id. at 137.

Ka Pa’akai, 94 Haw. 31 (2000).


Id. at 46.

An ahupua’a is an economically self-sufficient land division that ranges from 100 to 100,000 acres and usually extends from the uplands to the sea. NATIVE HAWAIIAN RIGHTS HANDBOOK 3 (Melody K. MacKenzie ed., 1991).


Id. at 53.

Id. at 52.

Id. at 48.

Id. at 50-52.

Interview with Casey Jarman, Professor of Administrative Law, Univ. of Haw. at Mānoa, William S. Richardson Sch. of Law, and State of Haw. Land Use Commissioner, in Honolulu, Haw. (Feb. 26, 2002).

Ka Pa’akai, 94 Haw. 31, 52 (2000). “The power and responsibility to determine the effects on customary and traditional native Hawaiian practices and the means to protect such practices may not validly be delegated by the LUC to a private petitioner…” Id.


45
92 Id. (emphasis added).
94 Interview with Casey Jarman, Professor of Administrative Law, Univ. of Haw. at Mānoa, William S. Richardson Sch. of Law, and State of Haw. Land Use Commissioner, in Honolulu, Haw. (Feb. 26, 2002).
95 Id.
96 See Remanded Ka’upulehu FOF, COL, D&O, supra note 93, at FOF 117-125 (Salt Gathering), FOF 126-128 (Cultural Archaeological Resources), FOF 132-134 (Kupe’e), FOF 135-136 (Pele’s Tears), FOF 137-138 (Wahi Pana), FOF 139-143 1800-1801 (Lava Flow), FOF 144-146 (Historical Archaeological Resources), FOF 147-150 (Historical Trails).
97 Ka Pa’akai, 94 Haw. 31, 49 (2000). Ka’upulehu Developments’ petition for a boundary amendment encompassed over 1,000 acres. The developer’s “planned” Resource Management Area accounts for only 235 acres. Id. at 48-49.
98 Remanded Ka’upulehu FOF, COL, D&O, supra note 93, at 46.
99 Id. at 47.
101 Id.
102 See In re Destination Villages Kaua’i, Findings of Fact, Conclusions of Law, and Decision and Order, Land Use Comm’n, Haw., in Land Use Comm’n Record, Honolulu, Haw., Docket No. A00-731, at 2 (Apr. 6, 2001) [hereinafter Destination Villages Kaua’i FOF, COL, D&O].
104 Id.
105 Id. at 2-1 (describing the economy and community life in the project area as primarily agricultural). See also Letters from E. Kalani Flores and Bruce Pleas, submitted into evidence Sept. 14, 2000, Destination Villages Kaua’i, Land Use Comm’n, Haw., in Land Use Comm’n Record, Honolulu, Haw., Docket No. A00-731, (July – Nov. 2000) (opposing the reclassification of the petition area).
106 See Kapalawai Resort FEIS, supra note 103, at Appendix D: Archaeological Inventory Survey.
107 See Destination Villages Kaua’i FOF, COL, D&O, supra note 102 at 37 (referring to the Kekupua fishpond as the Kapalawai fishpond); See Kapalawai Resort FEIS, supra note 103 at Appendix G: Traditional Customs and Practices Report (identifying the fishpond, from consulted informants, as the Kekupua fishpond).
108 Destination Villages Kaua’i FOF, COL, D&O, supra note 102, at 17.
109 See Kapalawai Resort FEIS, supra note 103, at Appendix D: Archaeological Inventory Survey 61.
110 Id. at 52-53.
111 Id. at 53.
112 Id. at 101-102.

Destination Villages Kaua‘i FOF, COL, D&O, supra note 102, at 95.

Id. at 103-104.


See Remanded Ka‘upulehu FOF, COL, D&O, supra note 93.

Id. at 24.

Id. at 48.

Id. at 45.

Id.

Id.

See Matsuoka, supra note 28, at 151-210 (for an introduction to Pele beliefs, customs, and practices).

Remanded Ka‘upulehu FOF, COL, D&O, supra note 93, at 46.

Destination Villages Kaua‘i FOF, COL, D&O, supra note 102, at 39.

Id.

Id. at 40 (emphasis added).

Id. (emphasis added).


Destination Villages Kaua‘i FOF, COL, D&O, supra note 102, at 47-50.

See Kapalwai Resort FEIS, supra note 103, at Appendix G: Traditional Customs and Practices Report

Kapalawai Resort FEIS, supra note 103, at 1-15 (emphasis added).


Id.


Destination Villages Kaua‘i FOF, COL, D&O, supra note 102, at 101-105.

See Remanded Ka‘upulehu FOF, COL, D&O, supra note 93, at 46-48 (establishing a Ka‘upulehu Development Monitoring Committee to be composed of a person of Hawaiian ancestry and a management member both knowledgeable of the cultural resources and practices within the petition area); Destination Villages Kaua‘i FOF, COL, D&O, supra note 102, at 103-105 (establishing a fishpond management committee composed of a representative from the Native Hawaiian community of West Kaua‘i and a representative of Destination Villages Kaua‘i).


145 Id.


147 Ka Pa’akai, 94 Haw. 31, 52 (2000).


149 Id. at 44.


151 Ka Pa’akai, 94 Haw. 31, 52 (2000).

152 PASH, 79 Haw. 425, 451 (1995). The PASH court determined that “[f]or the purposes of this opinion, we choose not to scrutinize the various gradations in property use that fall between the terms ‘undeveloped’ and ‘fully developed,’ ” noting that to do so “would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai’i which can also be successfully incorporated in the context of our current culture.” Id. at 450 (citation omitted).


154 Id.


156 Id.

157 Id. at § 8(b)(1)(A) & (B).
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