Native Hawaiians Pre-Western Contact

- At the time of Western contact in about 1778, the Native Hawaiian people "lived in a highly organized, self-sufficient, subsistent society based on a system of communal land tenure with a highly sophisticated language, religion and culture."

  —Mary Kawena Puku‘i

Hawaiian usage is deeply rooted in the earliest written laws

- Historical usage incorporated into both the 1839 Declaration of Rights, and the 1840 Constitution
- 1847 Act to Organize the Judiciary authorized courts to adopt common law from other countries "founded in justice, and not in conflict with the laws of this kingdom"
- Reaffirmed in 1859 Civil Code, which required judges to consider "received usage"
The Mãhele: A Revised Model for Land Use in Hawai‘i

- Kamehameha III transformed communal land to a modern property regime
- Quiet Land Titles
- Law prohibited governments from selling undeveloped or vacant land

Continuing recognition of Native Hawaiian rights

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

Reservation in Laws and Original Deeds From the Mãhele

- Reservations in deeds "koe nae ke kuleana o na kanaka maloko"
  - The kuleana of the people therein are reserved
  - The rights of the tenants are reserved
Section 7 of the 1850 Kuleana Act.
HRS § 7-1

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

Hawai‘i Revised Statute § 1-1 (1892)

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

Article XII, § 7 of the Hawai‘i Constitution

- The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.
Reconciling Traditional and Modern Land Use Systems

Some Important Hawaii Case Law to discuss:
- State v. Raneget (1998)
- Ka Pu Ikaia o Ka 'Aina v. Land Use Comm'n (2000)
- State v. Pratt (2012)
- State v. Armitage (2014)
- Kokeka o Haleakula v. Board of Land and Natural Resources (2015)

Kalipi v. Hawaiian Trust Co.
(1982)

- Non-resident kuleana owner sought to gather ti leaf, bamboo, kukui nuts, kiawe, medicinal herbs, and ferns within ahupua'a

Why is Kalipi important?

- Tenants have right to gather products enumerated in Kuleana Act, HRS § 7-1 (firewood, house timber, aho cord, thatch, or ti)
- For personal use
- Must be resident/tenant within the ahupua'a
- Must balance right to gather with private property rights
- Right can be exercised on undeveloped land
- Left open the question of other customary practices under HRS § 1-1
Further context for Kalipi

- Case-by-case determination
- Absentee landlord who owned a ʻioi kalo in the ahupua‘a of Manawai along with an adjoining houselot in the ahupua‘a of East Ōhia; denied access to newly fenced-in lands where his family used to gather.
- Rejected argument that Oni v. Meek (1858) abrogated other traditional and customary rights
- Rejected argument that Territory v. Liliuokalani (1902) precludes claims by ahupua‘a tenants relying on reservations in the landowners deeds


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

Further context for PDF

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

- Landowner Nansay Hawaii, Inc.
- Community complex covering 450 acres of shoreline area
- PASH members who claimed the traditional and customary right to gather food and ‘opae (shrimp)

PASH/Kohanaiki

- The "western concept of exclusivity [in private property] is not universally applicable in Hawai‘i."
- November 25, 1892: the date Hawaiian usage must have been established in practice.

PASH/Kohanaiki Takeaways

- Hoa‘āina can gather anywhere that such rights have been customarily and traditionally exercised for traditional and customary subsistence, cultural and religious purposes
- Can gather on land that is less than fully developed
- Government cannot regulate traditional and customary rights out of existence
- Interests of the property owner and hoa‘āina must be balanced
- Balance weighs in favor of property owner if hoa‘āina exercise otherwise valid customary rights in an unreasonable manner
Further context for PASH/Kohanaiki

- Refused to overrule PDF v. Paty (1992)
- Customary law principles of tenancy do not limit native Hawaiian customary rights
- Customary rights were not extinguished sub silentio by the Māhele, notwithstanding contrary interpretations of Oni v. Meek (1858)
- May exclude those who exercise their practices unreasonably (time, place, manner of access); however, cannot extinguish practices merely because they may be inconsistent with modern property rights


- Private property owned by attorney Gary Galiher in the ahupa‘a of ‘Aha ino
- U.S. Army Corps of Engineers ordered Galiher to restore area near two fishponds that had been illegally graded and filled
- Alapai Hanapi claimed right and obligation to access the land to heal the land by performing religious and traditional ceremonies

Hanapi requirements

- Minimum requirements for asserting traditional and customary rights as a constitutional defense to trespass:
  1. "native Hawaiian" under PASH/Kohanaiki
  2. Expert or kama‘aina testimony providing an explanation of the history or origin of the claimed right or a description of the ceremonies involved
  3. Exercised on undeveloped [or less than fully developed?] property
Further context for Hanapi

- "fully developed" property includes, but is not limited to, "lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure"
- "it is always inconsistent to permit the practice of traditional and customary native Hawaiian rights on such property"

Ka Pa'akai o Ka 'Āina v. LUC (2000)

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

Ka Pa'akai Court Ruling

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

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

Further context for Ka Pa'akai

Government agencies may not delegate their obligation to consider the effect of a proposed action on traditional and customary rights to the developer or applicant.


- Identify and consult with:
  - Individuals and organizations with expertise concerning the types of cultural resources, practices, and beliefs found within the broad geographical area, such as a district or ahupua'a;
  - Individuals and organizations with knowledge of the area potentially affected by the proposed action;
- Receive information from or conduct ethnographic interviews and oral histories with persons having knowledge of the potentially affected area;
- Conduct ethnographic, historical, anthropological, sociological, and other culturally related documentary research;
- Identify and describe the cultural resources, practices, and beliefs located within the potentially affected area; and
- Assess the impact of the proposed action, alternatives to the proposed action, and mitigation measures on the cultural resources, practices, and beliefs identified.
**State v. Pratt (2012)**

- Undeveloped state land in Kalalau Valley, Kauai
- Defendant convicted of "camping" in a closed area
- Reiterated "totality of circumstances" test applied on a case-by-case basis
- After the three-part test in *Hanapi* is satisfied, the court must apply a balancing test that weighs the constitutional privilege for traditional and customary practices against the State's interest in regulating such rights.

**State v. Pratt (2012)**

- Defendant's interest as kahu and caretaker temporarily residing in the area to tend a heiau, perform cultural ceremonies, clear and repair ancient terraces, and replant native flora did not outweigh State's interest reflected in permit requirement whose purposes was to "limit visitors for health and safety reasons, and to protect park resources."

**State v. Armitage (2014)**

- The petitioners asserted a native Hawaiian privilege to access Kaho'olawe Reserve for the purpose of reestablishing the Reinstated Hawaiian Government, but failed to apply for authorization to enter the Reserve from the Kaho'olawe Island Reserve Commission (KIRC).
- Haw. Admin. R. § 13-261-11 details the process for obtaining approval from KIRC for entrance into and activities within the reserve, by applicants seeking to exercise traditional and customary rights and practices.
- The court held that "the balance weighs in favor of the State's interest in protecting the health and safety of those individuals who travel to Kaho'olawe."
Mauna Kea Anaina Hou v. BLNR (2015)

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

Mauna Kea concurring opinion, Pt. IV

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

Mauna Kea concurring opinion, Pts. I-III

- Pollack, J., joined by Wilson, J.
- Part I: violated affirmative duty under Haw. Const. Article XII, Section 7, to fully and carefully assess the evidence, then issue Findings of Fact and Conclusions of Law following the Ka Pa'akai framework;
- Part II: violated affirmative duty under Haw. Const. Article XII, Section 1, to make specific findings and conclusions on whether the proposed use satisfied all requisites of the public trust doctrine; and
- Part III: violated affirmative duty to provide due process under Article I, Section 5, by deciding the application on the merits without the benefit of a contested case hearing and not providing a vehicle to reverse the grant of a permit.
Kūkulu Walwal: Building Pono Water Management in Hawai‘i

D. Kapua Sproat
University of Hawai‘i
Board of Regents
March 23, 2017

Roadmap for today’s session

- Role and significance of water in Pre European contact Hawai‘i
- Legal and cultural framework for water resource management in Hawai‘i today
- What does this all mean for members of the University of Hawai‘i Board of Regents?
- Will do my best to save time for Q&A at the end

Kānaka Maoli worldview

- Creation story details the genesis of life in Hawai‘i: Papa & Wakea gave birth to the islands
- After all of the Hawaiian Islands were born, Wakea had a child with Ho‘ohokūkalani. It was stillborn, but a kalo plant grew from its grave
- Wakea & Ho‘ohokūkalani had a second child: the first Kanaka Maoli
- This relationship is a kuleana to care for our natural and cultural resources as a public trust for present and future generations
From Wai to Kānāwai

In 'Ōlelo Hawai'i:

- Wai = fresh water
- Waiwai means wealth
- Kānāwai is the law
- Both wealth and the law are defined by fresh water

Ola i ka wai: Water is life

- Provided drinking water
- Enabled kalo cultivation
- Recharged ground water
- Supported estuaries & fisheries
- For Kānaka Maoli, this was just common sense!
- Supported a population = Hawai'i's current population

Kānāwai: law developed around water

- Kānāwai = relating to water
- Fresh water was a kūnolau of Akua Kāne
- Could not be reduced to physical ownership
- Resource managed for the good of the larger community
Kingdom of Hawai'i 1840 Constitution

Declared that the land, along with its resources, "was not [the King's] private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head and had the management of landed property."

Gifts from the West

- 1778: beginning of the end; physical & cultural genocide
- Native Hawaiians decimated by disease: population of 1 million collapsed to <40,000 within 1st century of contact
- Foreign demands for goods fueled political instability

The impacts of sugar plantations
From Kalo to Sugar and "Hard Crackers"

DESPAIR! WAILUKU IS BEING DESTROYED BY THE SUGAR PLANTATION—A letter by S. D. Hakolole of Kula, Maui, read at our office, he was declaring that the land of Wailuku is being lost due to the cultivation of sugarcane. Furthermore, he states the current condition of once cultivated taro patches being dried up by the foreigners, where they are now planting sugarcane. Also, he fears that Hawaiians of that place will no longer be able to eat poi, and that there will probably only be hard crackers which hurt the teeth when eaten, a cracker to snack on but does not satisfy the hunger of the Hawaiian people. Although, let it be known that the Hawaiian people are accustomed to eating poi.

Hawaii's Democratic Revolution of 1954

1978 Constitutional Convention

- 1978 Constitutional Convention facilitated progressive changes in education, workers' rights, natural resource protection, & other areas.
- State Constitution amended to protect and preserve Native Hawaiian culture and practices.
- Established the framework for water law and management in Hawaii today.
Water Law in Hawai'i today

- Constitution of the State of Hawai'i
- State Water Code
  Hawai'i Revised Statutes chapter 174C
- Hawai'i Admin. Rules
  Chapters 13.167 to 13.171
- Court decisions
  interpreting the laws listed above

Hawai'i Constitution Article XI § 1

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Hawai'i Constitution Article XI § 1

"All public natural resources are held in trust by the State for the benefit of the people."
Hawai‘i Constitution Article XI § 7

"The State has an obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of its people."

Waiahole, 94 Haw. 97 (2000)

“article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i”

Public Trust Doctrine

- Imposes a dual mandate of
  (1) protection
  (2) maximum reasonable & beneficial use
- Establishes an “affirmative duty to take the public trust into account in planning and allocation of water resources, and to protect public trust uses whenever feasible”
Hawai'i Constitution Article XI § 7

- Article XI, section 7 also lays the groundwork for the Water Commission & Code
- Commission is comprised of 7 members, all of whom need "substantial experience in the area of water resource management"

Hawai'i Constitution Article XII § 7

The legislature shall provide for a water resources agency which, at provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawai'i's water resources.

Hawai'i Constitution Article XII § 7

"The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes"
**State Water Code, HRS ch. 174C**

- Commission has dual mandates to promote "reasonable beneficial use," and protect the public's interest in the resources
- Regulates ground water through Sustainable Yields, and well construction and pump installation permits
- Manages surface water through Interim Instream Flow Standards; some permits as well
- Issues Water Use Permits in designated Water Management Areas only

**Water Code: Designation**

- Designation is a legal process under the Water Code that identifies areas where water resources are currently or may become threatened
- Designation imposes additional permitting requirements on almost all consumptive uses of water
- Initially conceived as a way to phase-in water management; was a political compromise to appease Maui County and enable passage of the Water Code
- Ground or Surface Water Management Areas may be designated
Water Code: Ground v. Surface Water

Stream Protection: IFS/IIFS

- Commission manages surface water through Instream Flow Standards ("IFSs") and Interim Instream Flow Standards ("IIFSs")
- An IFS is the amount of stream flow required in a particular stream to protect beneficial instream uses (fish, wildlife, recreational, scenic, aesthetic, etc.)
- IIFSs were required to have been set by 1988; Commission adopted the status quo
- Currently, the only IIFSs based on any actual science were or are being established through litigation
Instream Needs & Offstream Uses

Ground Water & Sustainable Yields

Just as IFS/IIFS implement Stream Protection & Management, Sustainable Yields are the Commission's principal mechanism to ensure adequate management of ground water supplies.

A "sustainable yield" is the maximum amount of water that may be taken from an aquifer over a given period of time while still maintaining the integrity of that water source.
Native Hawaiian Rights: T & C

- The "traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians . . . shall not be abridged or denied by this chapter." Such rights include growing kalo and gathering resources in the streams & marine areas for subsistence, cultural & religious purposes.

Appurtenant Rights

- Water Code recognizes the "appurtenant water rights of kuleana and tano lands."
Appurtenant Rights: A Contradiction

- Highest level of protection. "Appurtenant rights are preserved"
- Appurtenant rights may be severed if attempts are made to transfer or reserve these rights

Native Hawaiian Rights: DHHL Reservations

- The Commission must "incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands"
For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Hawai‘i Constitution Article XI § 1

Kelly v. 1250 Oceanside, 111 Haw. 205 (2006)

Community groups sued the County of Hawai‘i and DOH for violating the public trust doctrine by failing to prevent 1250 Oceanside from violating water quality standards.

The Circuit Court agreed and the developer appealed.

Supreme Court decision is complex. Most relevant to our training, the Court held: (1) the County also had an affirmative duty under PT to protect coastal waters from polluted runoff. (2) DOH's PT duties included ensuring conditions were actually implemented.

What does this mean for you?

- What does having a public trust over water resources really mean?
- How do you fulfill your kuleana to protect and conserve water resources?
- And how does this fit in with other laws and policies that your agency is charged with implementing?
What is the Public Trust over water?

Waiʻāhole, 94 Haw. 97 (2000)

- "The public trust doctrine applies to all water resources without exception or distinction."
- "In view of the ultimate value of water to the ancient Hawaiians, it is inescapable that the sovereign reservation was intended to guarantee public rights to all water, regardless of its immediate source."
- "Protected "trust purposes" include resource protection, Native Hawaiian rights and practices, appurtenant rights, & domestic water. Waiʻāhole added DHHL reservations
- Presumption in favor of trust purposes; burden on state and commercial users to justify proposed uses

Fulfilling your kuleana under the Public Trust

Waiʻāhole, 94 Haw. 97 (2000)

- Imposes "a dual mandate of 1) protection and 2) maximum reasonable and beneficial use."
- Establishes an "affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses whenever feasible."
- Decisionmakers "may compromise public rights in the resource pursuant only to a decision made with the high priority these rights command under the laws of our state."
How does the PT work with other laws?

*Waihola, 94 Haw. 97 (2000)*
- The public trust provides independent authority to guide agencies in fulfilling their mandates
- Practically speaking, the public trust is a prism through which members of the Governor’s cabinet must examine their responsibilities under specific laws they are charged with enforcing
- Decisionmakers must hold permit applicants to their burdens of proof & actively protect water resources
- Decisions must articulate a reason(s) in the context of the laws and policy the decisionmaker/agency enforces

Got it?
- Everyone still with me?
- Just in case, let’s look at how one county agency worked valiantly to fulfill its public trust duty to protect and conserve Hawai‘i’s water resources

*Kaua‘i Springs*
- Kaua‘i Springs operates a private water bottling business in Koloa, Kaua‘i
- The facility is on land zoned for agriculture & needs permits
- KS buys water from Knudsen Trust taken from Kahili Mountain via tunnel & ditch
- Planning Comm’n held public hearings & sought input from Water Comm’n & PUC, which was inconclusive
Kaua‘i Springs, cont.

- Planning Comm'n ruled that KS failed to carry its burden of proof & denied the permit
- The Planning Comm'n did an admirable job of fulfilling its Public Trust duties, e.g., holding KS to its burden of proof
- KS appealed and the circuit court ruled in its favor
- On April 30, 2013, the ICA issued an opinion & in February 2014, the Supreme Court ruled

Kaua‘i Springs, cont.

- The Supreme Court affirmed the ICA's decision to the extent it vacated the circuit court's judgment & remanded to the Planning Commission
- Dealt with two major issues
- We will focus on the factors a government agency must consider in reviewing an application for the use of a public resource under Kelly

Six principles for agencies

- The Hawaii Supreme Court distilled six principles that decisionmakers must apply to fulfill their mandates:
  1. "The agency's duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use[.]"
  2. Decisionmakers "must determine whether the proposed use is consistent with the trust purposes[.]
  3. Decisionmakers need to "apply a presumption in favor of public use, access, enjoyment, and resource protection[.]"
Six principles, cont.

(4) Decisionmakers must "evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water."

(5) "If the requested use is private or commercial, the agency should apply a high level of scrutiny" and

(6) Decisionmakers must apply "a 'reasonable and beneficial use' standard, which requires examination of the proposed use in relation to other public and private uses."

Four affirmative showings for applicants

- The Court also highlighted four affirmative showings that applicants must make to carry their burdens under the trust:
  (1) "their actual needs and the propriety of draining water from public streams to satisfy those needs"
  (2) the absence of practicable alternatives, including alternate sources of water or making the proposed use more efficient;
  (3) "no harm in fact" to public trust purposes "or that the requested use is nevertheless reasonable and beneficial" and
  (4) "if the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved."

Kaua‘i Springs, cont.

- What does this mean for you?
- Carefully examine the board’s mandates and how they impact fresh water resources
- Use the public trust as a framework for your analysis: presumption in favor of public trust purposes, permit applicants bear the burden of proof, etc.
- Consider what impact your decision will have on traditional & customary Maoli practices

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[Image -3x0 to 795x612]
E ho'okō kākou l ko kākou kuleana hana

We carry out our individual and collective responsibilities!
Government & Crown Lands

As a result of the Māhele between the Chiefs and King, the King receives approx. 2.5 million acres
- Sets apart 1.5 million acres for the Government
- Retains 984,000 as his personal lands, the King's (Crown) lands
- All lands, including lands of the Chiefs, are still subject to the rights of native tenants
Results of the Māhele Process

Queen Lili‘uokalani

1891 - Queen Lili‘uokalani succeeds to the throne upon Kalākaua's death.
1893 - She prepares a new constitution limiting the vote to Hawaiian-born or naturalized citizens.

1893 Overthrow

A small group of businessmen who controlled the islands' economy and private property oppose the new constitution and want annexation to the United States.
U.S. Minister to Hawaii John L. Stevens orders U.S. Marines to land in Honolulu to aid the annexationists.
Republic of Hawai‘i

- 1894 – Republic of Hawai‘i confiscates Crown Lands in its Constitution; Crown Lands deemed to be free of any prior trust
- 1895 – Land Act combines Government and Crown Lands into “public lands”
- 1898 – Hawai‘i is annexed to U.S. by joint resolution rather than through treaty process requiring 2/3 vote of the Senate

Annexation & Organic Act

- Sovereignty of the Islands and approximately 1.8 million acres of Government and Crown lands ceded by the Republic to the United States
- Income and proceeds to be utilized for “benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes”
- Language confirmed in 1900 Organic Act
- Crown Lands deemed to be free of any prior trust

Hawaiian Home Comm’n. Act (1921)

Congress concerned by decrease in Native Hawaiian population and remedial condition of Hawaiian people
Congress enacts the Hawaiian Homes Commission Act setting aside 203,500 acres of Government and Crown land for homesteading by Native Hawaiians – defined as those of not less than 50% Hawaiian ancestry
Section 4. As a compact with the U.S., State must adopt Hawaiian Homes Commission Act in constitution.

Section 5. The United States transfers to the State, primarily through section 5(b), approximately 1.4 million acres of Government and Crown Lands, including Hawaiian Home Lands.

Sec. 5 (f) of the Admission Act

The lands granted to the state by section 5(b), together with the proceeds... and income are to be held by the State as a public trust for one or more of the trust purposes:

- support of the public schools and other public educational institutions;
- betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended;
- development of farm and home ownership on as widespread a basis as possible;
- making of public improvements;
- provision of lands for public use.
Purpose of Amendments
- Unite Hawaiians
- Allocate a portion of trust income and proceeds from Government and Crown lands to OHA to benefit Native Hawaiians
- Self-government and self-determination
- Establish a trust, with trustees elected from the beneficiaries, to control and manage assets

State Constitution Amended 1978
Lands transferred to State pursuant to sec. 5(b) of Admission Act (excluding HHCA lands) are held as a public trust for native Hawaiians and the general public
Office of Hawaiian Affairs is created
Pro rata portion of income and proceeds from trust lands will go to OHA to benefit native Hawaiians
HRS § 10-3
- A "pro rata portion" of all funds derived from the public land trust shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians.

HRS § 10-13.5 (1980)
- Legislature set "twenty percent of all funds derived from the public land trust" to be expended by OHA for the purposes delineated in HRS Chapter 10

Trusted v. Yamasaki (1987)
Literal interpretation of HRS Section 10-13.5 "would be at odds with [other] legislative commitments." Issues related to interpretation of OHA's 20% share are "of a peculiarly political nature and therefore not for judicial determination..."
Must go back to Legislature to clarify
Aftermath of OHAs v. State

• Act 304 defined "revenue" and trust corpus; established process to determine prior amounts due OHA.

• $130 million paid to OHA for its share of the trust lands revenue for 1980-1991 period.

• In 2003, some revenue reinstated
• 2006 Legislature passed Act 178 as interim measure setting OHA revenue at $15.1 million annually; $17.5 million back payment
• Act 178 and Exec. Order 06-06 establish procedures for state entities to report public land trust income; required reporting by agencies

Public Land Trust
Prof. Melody Kapilialoha MacKenzie
2012 Settlement Between OHA & State - Act 15
- Conveyed ten parcels of land in Kaka'ako to OHA
- The property is valued at about $200 million, and the conveyance settled all claims for back revenues, from the date of OHA's establishment in 1978 through June 30, 2012
- Doesn't affect Act 178 – OHA continues to receive $15.1 million annually in lieu of actual pro rata share of the trust revenues
- Also doesn't affect HRS § 10-13.5 setting OHA's pro rata share at 20 percent of trust revenues.

HCR 188 (2016)
- Requests Governor convene Public Land Trust Revenues Negotiating Committee to "resolve[ ] the matter of the income and proceeds from the public land trust that the Office of Hawaiian Affairs shall receive annually under the State Constitution and other state law."
- Committee composed of Governor, Senate President, Speaker of the House, OHA Chair, or their designees
- Status report to 2017 Legislature with final report to 2018 legislature.
Inventory of Trust Lands

- 1981 – DLNR Inventory – 1,271,652 acres
- 1986 – Legislative Auditor’s Report – identified legal issues and numerous logistical problems in doing a full inventory
- 1997 – Act 329: funds to convert DLNR’s Land Div. records into database to manage public lands

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Inventory of Trust Lands

- 2000 - State Land Information Management System operational
- As of 2003, SLIMS total land inventory was 1,302,515 acres (excluding HHCA lands)
- 2011 - Act 54 to further clarify the trust status of lands, particularly those to which state agencies other than the DLNR hold title

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Apology Resolution

100 Years After Overthrow
United States Apologizes & Admits Overthrow Was "Illegal"
1993 Apology Resolution

- Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, *without the consent of or compensation to the Native Hawaiian people* of Hawaii or their sovereign government...
- Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum...

OHA & Aluli Plaintiffs v. HCDCH

- Filed after 1993 Apology Resolution and similar State legislative acts recognizing "unrelinquished claims" of the Native Hawaiian people to the ceded lands.
- Plaintiffs sought to stop sale of lands on Hawai‘i Island and Maui for developments that would include low-income housing.

Hawai‘i Supreme Court

- Justice Nakayama
- Chief Justice Moon
- Justice Acoba
- Justice Levinson

Public Land Trust

Prof. Melody Kapilialoha MacKenzie
Unrelinquished Claims
The "Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [native Hawaiian people]." In our view, the Apology Resolution acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims.

Apology Resolution Gives Rise to Fiduciary Duty
- The Apology Resolution and related state legislation ... give rise to the State’s fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.

State v. OHA
Unanimous decision issued on March 31, 2009
**U.S. Supreme Court**
- Substantive provisions in Apology Resolution are conciliatory; disclaimer language is simply that – cannot be read to imply that there are valid claims
- Apology Resolution does not change substantive law
- Conceded that there may be a basis in State law, which Hawai‘i S.Ct. had also relied upon

**Act 176/Act 169/Act 146**
- On remand, most plaintiffs and State reached settlement resulting in legislative action
- To sell or gift ceded lands, requires 2/3 majority vote of both houses of legislature
- Land exchanges require simple majority of both houses

**Procedure**
- Agencies must determine whether lands are public trust lands; provide information on how that conclusion was reached; provide detailed summary of development plans for the lands
- OHA must get 3-month notice before legislative session
- For sale or gift of land, agencies must hold informational briefing in community where land is located
E Ho'okō Kākou I Ko Kākou Kuleana Hana

- High fiduciary responsibility – same duty as private trustee
- Use reasonable skill and care in managing the public land trust
- Duty of loyalty to the beneficiaries
  - Native Hawaiians as defined in HHCA
  - General public, including larger Native Hawaiian community

E Ho'okō Kākou I Ko Kākou Kuleana Hana

- Trust Revenues – accurately and fully report amounts; significant aspect of trust duty; will also aid in determining fair “pro rata” share to OHA for benefit of Native Hawaiians
- Trust Inventory – ongoing effort led by DLNR; sustain and support this effort; trust duty includes knowing the full contours of public land trust
Alienation of Trust Lands – ensure that Act 176/Act 160/Act 146 process followed; consider impact of alienation on the reconciliation efforts between the State and Native Hawaiian community.