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Public Access Shoreline Hawaii v. Hawai'i County Planning Commission: Expanding Hawaii's Doctrine Of Custom

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*PUBLIC ACCESS SHORELINE HAWAII v.
HAWAI'I COUNTY PLANNING COMMISSION:
EXPANDING HAWAII'S DOCTRINE OF CUSTOM*

*Laura C. Harris**

I. INTRODUCTION

Rapid development of coastline areas in Hawaii has sparked the attention of several native Hawaiian public interest groups. The growth of large resort hotels and condominiums along the beaches is eliminating areas once open for the exercise of traditional gathering practices. Tensions have risen between those interested in promoting the development of the land and those interested in preserving the traditional Hawaiian culture. In recent years, disputes have resulted in court challenges to state regulations permitting development on coastal properties.

In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*,¹ the Supreme Court of Hawaii unanimously upheld a lower court's decision that allowed an organization representing native Hawaiian interests to challenge the issuance of a Special Management Area (SMA) use permit. The court ruled that Public Access Shoreline Hawaii (PASH) had standing to participate in contested case hearings before the planning commission in order to challenge a proposed resort development.² The court further stated that under the Hawaii Constitution, a state agency has an obligation to "preserve and protect" traditional and customary Hawaiian rights and an affirmative duty to consider potentially adverse effects on those rights when issuing SMA permits.³ Essentially, the court recognized that, with respect to developing lands, the developer's private property

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1. 903 P.2d 1246 (Haw. 1995), *cert. denied*, *Nansay Haw., Inc. v. Public Access Shoreline Haw.*, 116 S. Ct. 1559 (1996).

2. *Id.* at 1250.

3. *Id.* at 1273.

interest⁴ is subject to superior rights established by customary and traditional native Hawaiian gathering practices.

The extent to which Hawaii has used and expanded the doctrine of custom to support traditional native Hawaiian practices and the public's access to coastal lands and waters is the subject of this Note. Part II provides a look at the legal background encompassing the doctrine of custom and Hawaii's recognition of customary practices. The court's decision in the *PASH* case is analyzed in Part III. Part IV discusses the consequences of the court's decision and how the decision supports public interest goals.

II. LEGAL BACKGROUND

A. *The Doctrine of Custom*

The doctrine of custom imposes a servitude on otherwise private property, often allowing public access over private property, such as coastal lands, or preventing the landowner from exercising certain uses of the land.⁵ It can be traced to early English law, where it was applied broadly to claims of land and water rights.⁶ Historically, the doctrine was limited to individual pieces of land within a local community⁷ and provided that after many years of unrestricted common usage, the public acquired legal access rights over such property.⁸ Discussions of the common law recognition of customary servitudes and the basic elements establishing a claim of custom often cite William Blackstone's Commentaries on the Law of England,⁹ which suggest that the use be: (1) exercised

4. *Id.* at 1268, 1270-71.

5. For a detailed discussion of the doctrine of custom, see Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 30-35 (1995).

6. *Id.* at 31.

7. Andrea C. Loux, Note, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183, 184 (1993). See also David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996).

8. State *ex rel.* Haman v. E.R.W. Fox, 594 P.2d 1093, 1101 (Idaho 1979) (quoting Post v. Pearsall, 22 Wend. 425 (N.Y.Ct.Err. 1839)).

9. Bederman, *supra* note 7, at 1382 (discussing Blackstone's Commentaries and its use in American law).

so long "that the memory of man runneth not to the contrary;" (2) without interruption; (3) peaceable and free from dispute; (4) reasonable; (5) certain; (6) obligatory once established; and (7) consistent with other customs.¹⁰

In the United States, the doctrine has been recognized in a few states,¹¹ almost exclusively for public access to beaches.¹² Courts must determine whether to preserve the asserted custom by "balancing the respective interests and harm"¹³ and consider that "permitting access to private property . . . may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land."¹⁴

More than one state has found that customary rights are consistent with the underlying property law of that state. In *Stevens v. City of Cannon Beach*,¹⁵ the Oregon Supreme Court utilized the doctrine to prevent landowners from excluding the public from dry sand areas of the ocean shore.¹⁶ A 1979 Idaho case¹⁷ also applied the doctrine of custom in a claim to establish public rights to privately-owned waterfront property. The court stated affirmatively that "[t]here being no statute which ex-

10. Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 903 P.2d 1246, 1262 n.26 (Haw. 1995) (quoting 1 W. BLACKSTONE, COMMENTARIES 76-78 (Sharwood ed. 1874)).

11. The doctrine of custom has specifically been recognized in Oregon, Idaho, Texas, and Hawaii. *Bederman*, *supra* note 7, at 1380 n.16. See *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993); *State ex rel. Haman v. Fox*, 594 P.2d 1093 (Idaho 1979); *Arrington v. Mattox*, 767 S.W.2d 957 (Tex. App. 1989); *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982).

12. Another theory used for maintaining access to coastal lands and waters is the Public Trust Doctrine. This doctrine is founded in the principle that by its nature and characteristics of its uses, some lands are regulated by the government in the public trust. *Bederman*, *supra* note 7, at 1455 n.8. Most commonly, the doctrine provides that "lands are preserved for public use in navigation, fishing and recreation and state, as trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of the waters for those purposes." BLACK'S LAW DICTIONARY 1232 (6th ed. 1990). It is important to note that the designated public beach area is most often defined as the mean high tide line, as defined by the Supreme Court in 1935. *Stevens v. City of Cannon Beach*, 854 P.2d at 454-55 n.12.

13. Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 903 P.2d at 1261.

14. *Id.* at 1259 (quoting *Kalipi v. Hawaiian Trust Co.*, 656 P.2d at 748).

15. 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994).

16. *Id.* at 456.

17. *State ex rel. Haman v. Fox*, 594 P.2d 1093 (Idaho 1979). The doctrine of custom is valid in Idaho, yet not met under the facts of this case.

pressly or impliedly rejects the doctrine of custom, . . . the doctrine does obtain in Idaho."¹⁸

B. *Hawaii's Recognition of Customary Rights*

Hawaii is generally known as a state rich in culture and native heritage. While some protection for traditional activities can be found in the Hawaii Constitution and statutes, the courts have also utilized the doctrine of custom to recognize protected rights in these long-standing practices.¹⁹

Although not directly addressed in its early decisions, the Hawaii Supreme Court has generally recognized the traditional native Hawaiian practice of gathering items from the land.²⁰ The court has also recognized uses of custom to define the location of seaward property boundaries,²¹ and to grant access to Hawaiian trails.²²

In 1982, faced with a challenge to traditional gathering rights on undeveloped private property, the court addressed for the first time the gathering rights²³ of persons within traditional land divisions, called an ahupua'a.²⁴ In *Kalipi v. Hawaiian Trust Co.*²⁵ the court analyzed three

18. *Id.* at 1101.

19. Bederman, *supra* note 7, at 1426-27.

20. In the 1879 case *In re Boundaries of Pulehunui*, 4 Haw. 239 (Haw. 1879), the court stated:

[A] principle very largely obtaining in these divisions of territory [ahupua'a] was that a land should run from the sea to the mountains, thus affording to the chief and his people a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top.

Id. at 241, cited in Paul Lucas, *Gathering Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 223, 225 (Melody Kapilialoha MacKenzie ed., 1991).

21. *In re Ashford*, 440 P.2d 76 (Haw. 1968) (recognizing that Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice, and usage, and finding that the boundary between private land and public beaches is delineated by the edge of vegetation).

22. See Lucas, *supra* note 20, at 216 (citing *Barba v. Okuna*, No. 8160 mem. (Dec. 3, 1982) (a right established by custom does exist for use of Hawaiian trails)).

23. The court stated, "[w]hile the extent and scope of the latter set of rights [water] have been the subject of discussion by this court . . . we are unable to find any previous interpretation of the gathering rights found in the statute. The issue we address is thus one of first impression." *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 748 (Haw. 1982).

24. An ahupua'a is defined by the court as "a land division usually extending from the

sources of law recognizing gathering rights. The first source, Hawaii Revised Statutes section 7-1, is an 1851 statute that specifically enumerates certain items which can be gathered within an ahupua'a.²⁶ The court concluded that native Hawaiian gathering rights could be asserted under section 7-1 under three conditions: (1) the individual must reside within the ahupua'a where the rights are to be claimed; (2) the rights can only be exercised on undeveloped lands; and (3) the rights are exercised for the purpose of practicing native Hawaiian customs and traditions.²⁷

The second source for gathering rights protections is Hawaii Revised Statutes Section 1-1, also termed the Hawaiian usage exception.²⁸ This statute accepted the common law of England, including notions of private property rights, as of the time the Statute was adopted in 1892. However, the statute specifically reserved an exception for any Hawaiian custom practiced before that date.²⁹ The *Kalipi* court interpreted this exception as allowing for "native understanding and practices which did not unrea-

mountains to the sea along rational lines, such as ridges or other natural characteristics." Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 903 P.2d 1246, 1250 n.1 (Haw. 1995).

25. 656 P.2d 745, 748 (Haw. 1982).

26. HAW. REV. STAT. § 7-1 (1993) provides:

[W]here 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, hoes, timber, and cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water . . . and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

Id.

27. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d at 749.

28. *Id.* at 750. HAW. REV. STAT. § 1-1 provides:

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

....

Id. (emphasis added).

29. Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 903 P.2d at 1268. "Accordingly, § 1-1 represents the codification of the doctrine of custom as it applies in our state . . . [and] fixed November 25, 1892 as the date Hawaiian usage must have been established in practice." *Id.* See also *Bederman*, *supra* note 7, at 1427.

sonably interfere with the spirit of the common law,"³⁰ including the practice of gathering.

The third basis for gathering rights is the 1978 amendment to the Hawaii Constitution, which protects customary rights exercised for subsistence, cultural, and religious purposes for descendants of native Hawaiians.³¹

After the *Kalipi* court found a constitutional and statutory basis for granting native Hawaiians access over private property to practice traditional rights within their ahupua'a, in 1992, the court expanded this right in *Pele Defense Fund v. Paty*.³² The *Pele* court found that "native Hawaiian rights protected by article XII, section 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised."³³ The court reasoned that the language of the Constitutional amendment lends protection beyond the specific gatherings rights enumerated in the statute.³⁴ The court distinguished the *Kalipi* court's requirement that the customary practice was limited to within the ahupua'a by stating that the *Pele* members asserted rights based on traditional access and gathering patterns, not on land ownership, the argument of *Kalipi*.³⁵ Thus, by removing the residency requirement, *Pele* departed from previous customary law as applied in Hawaii.

30. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d at 750.

31. HAW. CONST. art. XII, § 7 (1978) provides:

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

Id.

32. 837 P.2d 1247 (Haw. 1992).

33. *Id.* at 1272.

34. Gina M. Watumull, Comment, *Pele Defense Fund v. Paty: Exacerbating the Inherent Conflict Between Hawaiian Native Tenant Access and Gathering Rights and Western Property Rights*, 16 U. HAW. L. REV. 207, 244 (1994).

35. *Pele Defense Fund v. Paty*, 837 P.2d at 1271.

III. PUBLIC ACCESS SHORELINE HAWAII V.
HAWAII COUNTY PLANNING COMMISSION

A. *The Lower Court Denies Standing*

Nansay Hawaii, Inc. applied to the Hawai'i County Planning Commission (HPC) for a SMA use permit to build a resort on a 450-acre shoreline area located within the designation of an ahupua'a. Several anchialine ponds,³⁶ significant to native Hawaiians exercising traditional practices of gathering rights, were located within the proposed development site.³⁷ In accordance with agency rules, a public hearing was held on the permit application where the organization PASH and an individual, Pilago, presented testimony and requested contested case hearings on the development permit. The HPC denied the requests on the ground that their interests were "not clearly distinguishable from that of the general public"³⁸ and therefore did not have standing to participate in a contested case. The HPC subsequently granted the SMA use permit to Nansay.³⁹

PASH and Pilago challenged the agency's decision to deny the contested case request and to grant the SMA use permit. After the trial court found that both PASH and Pilago had standing,⁴⁰ an intermediate court of appeals ruled only PASH was entitled to participate in a contested

36. The court described anchialine ponds as follows:

Anchialine ponds are defined by the court as shoreline pools without surface connection to the sea having waters of measurable salinity and showing tidal rhythms. The ponds are commonly located in recent lava flows which had depressions deep enough to reach the water table. The ponds consist of brackish water with a crustacean-mollusk dominated faunal community along with several species of shrimp and a variety of vegetation types.

Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 900 P.2d 1313, 1316 n.3 (Haw. 1993).

37. The significance of Hawaiian gathering rights centers around the historical designation of the ahupua'a. The original purpose of gathering activities was for subsistence, medicinal, or religious uses. The division of the land provided for a variety of items to be available from the land and the sea. As the land began to be developed, private property concepts demanded limitations on the exercise of gathering rights. See Lucas, *supra* note 20, at 223-26.

38. Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 903 P.2d at 1246, 1250 (Haw. 1995).

39. *Id.* at 1250-51.

40. Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 853 P.2d 542 (Haw. 1993).

case hearing.⁴¹ The court further stated that the HPC “disregarded the rules regarding the gathering rights of native Hawaiians and its obligation to preserve and protect those rights.”⁴² Nansay and the HPC appealed, which set the stage for the Hawaiian Supreme Court to decide both the standing and the gathering rights issues.⁴³

B. The Parties’ Arguments and the Court’s Decision

Nansay and the HPC made several arguments against granting PASH standing to participate in a contested case hearing. First, they argued that there is no obligation for the HPC to consider or require protection of traditional and customary Hawaiian rights in granting a SMA use permit.⁴⁴ They also contended that if such an obligation exists, by requiring Nansay to establish a program for preserving and maintaining the anchialine ponds on the development site, the HPC had fulfilled that obligation.⁴⁵

Second, they argued that PASH failed to establish a prima facie claim of native Hawaiian gathering rights. They argued that Hawaii law requires that the customary use be one of the traditional gathering rights enumerated in section 7-1 of the statute, established as of 1892, and that the evidence presented only shows shrimp gathering at the ponds as of the late 1920s.⁴⁶ Finally, Nansay argued that limiting development of the property would “fundamentally alter its property rights,” amounting to an unconstitutional taking.⁴⁷

The Hawaii Supreme Court upheld the decision granting standing to PASH to participate in a contested case hearing. The court focused on the preservation of customary rights as established in Hawaii law, ruling them consistent with the doctrine of custom. Finding support in *Kalipi* and

41. *Public Access Shoreline Haw. v. Hawai‘i County Planning Comm’n*, 900 P.2d 1313, 1322 (Haw. 1993). Regarding Pilago, the court explained that his interest was not sufficiently “personal” to distinguish it from that of the general public. *Id.* at 1321.

42. *Id.* at 1320.

43. *Public Access Shoreline Haw. v. Hawai‘i County Planning Comm’n*, 853 P.2d at 542. Pilago did not appeal the decision. The question for the Hawaii Supreme Court was limited to PASH’s standing. *Public Access Shoreline Haw. v. Hawai‘i County Planning Comm’n*, 903 P.2d 1246, 1251 (Haw. 1995).

44. *Public Access Shoreline Haw. v. Hawai‘i County Planning Comm’n*, 903 P.2d at 1251.

45. *Id.*

46. *Id.*

47. *Id.* at 1272.

Pele, the court further imposed an obligation to "preserve and protect" native Hawaiian rights to the extent reasonable when issuing a SMA use permit.⁴⁸

The court reasoned that the Hawaiian usage exception was comparable to the common law doctrine of custom.⁴⁹ The *PASH* court agreed with the *Kalipi* court that "all the requisite elements of the doctrine of custom were [not] necessarily incorporated" into Hawaii law⁵⁰ and proceeded to suggest its own requirements for establishing these rights through custom. First, the court confirmed the *Pele* decision that "rights normally associated with tenancy in an ahupua'a may also apply to the exercise of rights beyond the physical boundaries of that particular ahupua'a."⁵¹ Second, the court found that the term "native Hawaiian" was not a limiting factor, and that protection of these rights is not determined by a specific blood quantum⁵² but extends to "*descendants of native Hawaiians . . . who assert otherwise valid customary and traditional*" rights.⁵³ The court also commented on the "continuous" element of customary practice and held that "the right . . . to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site."⁵⁴ Finally, the court suggested that while these rights "will not necessarily prevent landowners from developing their lands," regulations do apply on

48. *Id.* at 1273. The court found that "the neighbor island county planning commissions . . . are specifically required to give full consideration . . . to . . . *cultural . . . [and] historic . . . values* as well as to the needs for economic development when implementing the objectives, policies, and SMA guidelines set forth in the [Coastal Zone Management Act]." *Id.* at 1256 (emphasis in original). "Accordingly, the HPC may not issue a SMA use permit unless it finds that the proposed project will not have any significant adverse effects." *Id.* at 1257. The court found that one of the CZMA's objectives is 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.*" *Id.* (emphasis in original).

49. *Id.* at 1261. "The 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.* (emphasis in original).

50. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745,751 (Haw. 1982).

51. *Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n*, 903 P.2d at 1246, 1269 (Haw. 1995).

52. *Id.* at 1270.

53. *Id.*

54. *Id.* at 1271.

the "development of land previously undeveloped or not yet fully developed."⁵⁵

Noting a conflict between modern understandings of property ownership and the state's goal of protecting the traditional culture, the court stated that "issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property,"⁵⁶ and that the "western concept of exclusivity is not universally applicable in Hawaii."⁵⁷ Thus, while "unreasonable or non-traditional uses" would not be permitted,⁵⁸ access to private land for customary uses is consistent with traditional Hawaiian notions of private property rights.

Responding to Nansay's argument that granting customary rights results in an unconstitutional taking of Nansay's property, the court held that these customs and usage have always been a part of the State's property law, and therefore, do not constitute a taking.⁵⁹

IV. THE *PASH* COURT FAVORS THE DOCTRINE OF CUSTOM OVER PRIVATE PROPERTY RIGHTS

In a unanimous decision, the Hawaii Supreme Court took a step toward preserving the public's access to coastal lands through application of the doctrine of custom. The court's decision confirmed the public interest in customary uses of lands and expanded the elements used to establish such a claim. The court recognized the need for balancing the interests of public access with the potential harm to property owners, but provided that the "common law rights ordinarily associated with tenancy do not limit customary rights" existing under state law.⁶⁰ The court was

55. *Id.* "[T]he 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.* at 1272.

56. *Id.* at 1268. The court explained earlier that "[g]iven the preservation of Hawaiian usage in conjunction with the transition to a new system of land tenure, . . . it is doubtful that . . . recognition of such rights would have 'fundamentally violated the new system.'" *Id.* at 1267 (quoting *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 751 n.5 (Haw.1982)).

57. *Id.* at 1268.

58. *Id.*

59. *Id.* at 1272.

60. *Id.* at 1269. Although the court declined to overturn *Pele*, it also did not use a strict interpretation of "tenants" and limit access only to those residing within the ahupua'a. Instead, the court interpreted the language of the Hawaii Constitution as general support for

clear that where customary rights may conflict with "western concepts of property,"⁶¹ the landowners have a limited property interest that does not include the right to exclude others.⁶² In these cases, customary rights are supreme over established property rights.

The court also emphasized an affirmative duty on the part of government agencies to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land proposed for development and to preserve those rights to the extent feasible.⁶³ The court was not precise about what steps the state will be required to take in investigating whether these rights could exist. The implication is that any development permit could be subject to regulations if overlapping native Hawaiian interests are found, even if no record of such use exists, or there is no knowledge of a use at the time the property is purchased.

The court's decision expanded existing Hawaiian law on the extent that traditional gathering rights can be asserted. The court's decision in *Kalipi* specifically limited gathering rights to undeveloped land because the court reasoned that without this limitation "there would be nothing to prevent residents from going anywhere in the ahupua'a, including fully developed property, to gather the enumerated items."⁶⁴ The *PASH* decision opens the door to land "previously undeveloped or not fully developed."⁶⁵

The court also enlarged the potential use of the doctrine by stating that customary rights may still exist even if the exercise of those rights had been abandoned.⁶⁶ While traditional English interpretation of establishing custom requires uninterrupted use, the court found support for its theory that it is possible to maintain a particular custom even if it is not continu-

the rights of public use and access.

61. *Id.* at 1268.

62. *Id.* at 1270. "Customary and traditional rights in these islands flow from native Hawaiian's pre-existing sovereignty. The rights of their descendants . . . were not abolished by their inclusion within the territorial bounds of the United States." *Id.*

63. *Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n*, 900 P.2d 1313, 1320 (Haw. 1993).

64. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 750 (Haw. 1982).

65. *Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n*, 903 P.2d 1246, 1271-72 (Haw. 1995).

66. *Id.* at 1271.

ously exercised.⁶⁷ The court's reasoning is that despite an interrupted use, the right to exercise the use was never taken away.⁶⁸

The same rationale is observed in the court's discussion of who can exercise the customary rights. The court reserved comment on the question whether non-Hawaiian members of a group could claim the same protection.⁶⁹ These theories confirm that the doctrine is premised on the idea that the right is created with the *use* in question and not the individual or the specific parcel of land.

The Hawaii Supreme Court also recognized that the category of traditional gathering rights established by usage has the potential of being expanded under Hawaii Revised Statutes section 1-1.⁷⁰ The court did not provide guidelines, leaving for future cases to determine what qualifies as "unreasonable" or "non-traditional" use. Thus the *PASH* decision remains consistent with the court's vision in *Kalipi* that the scope of traditional and customary uses is to be decided on the "circumstances of each case."⁷¹

While the court suggested requirements for determining whether customary rights exist on a particular piece of property, it also noted that there was a "promising opportunity" for Nansay to integrate cultural education and recreation with tourism and community living,⁷² hoping to find the right balance between the interests of the public and the harm caused to the property owner.⁷³

V. CONCLUSION

The Hawaii Supreme Court's decision in *PASH* is a natural extension of established law and supports the public policy of the public's right to

67. *Id.* at 1262 n.26 (quoting 1 W. BLACKSTONE, COMMENTARIES 76-78 (Sharwood ed. 1874)).

68. *Id.* "[T]he custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove." *Id.* See also Bederman, *supra* note 7, at 1388 (explaining that Blackstone's interpretation of an interruption significant to destroy an established custom is not the interruption of the possession, but the interruption of the right).

69. Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 903 P.2d at 1270 n.41.

70. *Id.* at 1272.

71. *Id.* at 1259 (citing Pele Defense Fund v. Paty, 837 P.2d 1247, 1271 (Haw. 1992) (quoting *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 752 (Haw. 1982))).

72. *Id.* at 1268.

73. This opportunity will probably never be realized as Nansay withdrew its permit application on August 1, 1996. Andrew Gomes, Pacific Business News, July 29, 1996, available in 1996 WL 10525631.

access coastal lands and waters. While the facts of this case support extending access to the land and water based on native Hawaiian gathering rights and the exercise of other traditional practices, the purpose underlying the decision is that the doctrine of custom provides a means for preserving public access to private lands. The court does not attempt to discourage private development, only to prevent development from destroying lands and waters whose preservation is in the public interest and closely tied to customary uses.

