# Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine

JIM PAUL: Good morning again and welcome to this symposium on managing Hawai'i's trust doctrine. My name is Jim Paul, and I'm a member of the committee that has been working on pulling this program together today.

We are privileged to have with us two of the most widely respected and well-known people in the United States, with respect to the public trust doctrine, Prof. Joseph Sax and Mr. Jan Stevens, whom you will be hearing from shortly. We are also privileged to have with us today, as I'm sure all of you here know, a very wide and very remarkable cross section of Hawai'i's leaders and people who are very interested in this doctrine. Most of you, as you know, have played a role in some way, some small and some very large, in the cases and in the development of this doctrine and where it is today. We have a very interesting array of perspectives from different points of view about the doctrine and what it means to people who are in some way responsible for dealing with it and implementing the doctrine.

The catalyst for this symposium was the August, 2000 *Waiāhole* Ditch decision.[1] Several interested parties who are involved in that case believed that a gathering such as this was essential to focus on the public trust doctrine and specifically that doctrine as it has now been established by that decision in Hawai'i. By coincidence, both of our speakers today, Prof. Sax and Jan Stevens, are quoted by the Hawai'i Supreme Court in that decision. We hope by the end of today that all of us here will have a better understanding of certain issues, such as just what is Hawai'i's public trust doctrine, who is responsible for managing and implementing that doctrine, what are the specific responsibilities of the state and its subdivisions and agencies, what does it mean on a day-to-day basis for regulators, policy makers and managers of the state, and why is it supportive of and consistent with many of the native Hawaiian and native American notions of the relationship between human beings and natural resources.

It is now my pleasure to introduce Prof. Denise Antolini, who will introduce our keynote speaker for the day, Prof. Joseph Sax. Denise is an assistant professor at the William S. Richardson School of Law, here at the University. She is very active in the law school's environmental program and has been very active, not only in this law school, but also in previous lives in environmental issues across this state and elsewhere. She was at the birth, if I can call it that, of the *Waiāhole* case, a long, long time ago, but not too far

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[1] *In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing, 94 Hawai'i 97, 9 P.3d 409 (2000) [hereinafter "*Waiāhole*"].

away, when she represented the Waiāhole-Waikāne Community Association and others when this case became a contested case hearing before the water commission. Perhaps most importantly, she was a student of Prof. Sax's in his first year at the University of California, Berkeley, and she is looking forward to introducing him today.

DENISE ANTOLINI: Aloha and good morning. Especially in Hawai'i, water is life, and rain, literally and figuratively, environmentally, culturally, and economically, is a blessing. The Hawaiian word for water, "*wai*," is a beautiful word used to describe so many special places with special sources of water like Waiāhole, Waikāne, and Waianu. The importance of water to Hawaiian culture is evident in the term "*waiwai*," which means wealth and "*kanawai*," which means law.

Yesterday, I had the great privilege of accompanying Prof. Joseph Sax and his wife Ellie, and Jan Stevens and his wife Karen on a tour of the Waiāhole water system and stream. The morning was very gray and very rainy, circumstances that might have dampened the spirits of a less intrepid group of travelers, but Joe, Ellie, Jan, and Karen were not only, as you might guess, very experienced travelers, but each of them has visited Hawai'i many times over the past thirty years. So as we began driving up the Waiāhole Valley Road into the mist-shrouded Pali, I think they all knew we were in for an unforgettable Hawaiian adventure.

Suddenly, we had a view between the dripping trees of the stunningly steep cliffs ringing the back of Waiāhole Valley. The spectacular sight of a symphony of gushing waterfalls plunging down the Pali took our breath away. As we climbed up the rough road to the tunnel, it quickly became evident to me that, yesterday, the day that these very special people came to visit it, Waiāhole stream was spectacularly high, perhaps at record levels, and the roaring sound was phenomenal. It was a chicken skin experience.

So why do I relate this story to you as a way of introducing Prof. Joseph Sax? For three reasons. First, to me the rain was a sign of blessing for their visit to Hawai'i. I hope they continue to enjoy every minute of it and to come back often. Second, the full and wild stream was a tribute, in my mind, to Joe. Without knowing it, and in a far away place that he probably never knew he would visit, and as a result of scholarship that he began over thirty years ago, his wisdom and passion had a real, positive, immediate, and breathtaking impact. Yes, like so many of you in this room who had some role and a little something to do with the restoration of Waiāhole stream, Joe was partially responsible for the fact that that stream was gushing and not trickling. The third reason is that Joe and his lifetime of scholarship reminds me of the vitality, the purity, the wealth, and the blessing of our water in Hawai'i. For more than four decades, his contributions to law teaching, legal scholarship,

and public policy have been like those waterfalls; incredibly prolific, sometimes unexpected, always enriching, fluid, inviting, and powerful. He has authored over eight books and over a hundred articles on law and public policy that are listed in your bibliography in the areas of endangered species, citizen suits, environmental impact statement law, property law, takings, public lands, especially national parks, and, of course, water law and the public. His life of teaching and scholarship has touched so many lives, lives of people he never knew and probably will never meet—decades of students, advocates, communities, decision makers, and litigators, and most importantly, he's touched the *'āina*.

From my experiences, first as a student of his the first year when he arrived at Berkeley, then as a public interest litigator, and now as a law teacher teaching environmental law, I am very grateful to him for his pioneering work, especially in the areas of citizen suit litigation and water law. Joe is recognized throughout the country as one of the founding fathers of modern environmental law, not just the public trust doctrine. He's not only a lawyer's lawyer, but, in my view, he's a scholar's scholar. He makes a difference. His biography is summarized in your materials but let me highlight for you what other nationally recognized scholars themselves have said about Joe Sax.

In 1998, there was an extraordinary panel of scholars from across the country at an annual conference of the American Association of Law Schools in San Francisco, and I was lucky enough to be able to go to this panel discussion of five or six distinguished scholars, all there to talk about the scholarship of Joe Sax. And what a tribute it was. The room was packed. The convener of that panel, Richard Lazarus from Georgetown University Law Center, said this about Joe:

> If one were to ask legal scholars to name the two or three most significant natural resources law scholars of modern times, Prof. Joe Sax's name would be on everyone's list. Extraordinarily engaging in person, he is even more so in his legal scholarship. He presents a rare combination of passion and intellect. He has, in his own work both as a teacher and a scholar, demonstrated the positive attention for bridging academic scholarship and law reform. He has been a mentor, a model, and indeed, an inspiration of many of those who teach and practice natural resources law today.

He is a historian, a multi-disciplinarian, an inventor, a tinkerer, a first-class lawyer with a passion and a vision. Also known as the "dean of water law," he is a master of rhetoric, he's a populist, he's an optimist. Prof. Sax, thank you again for coming to Hawai'i. We thank you for inspiring us, for educating us, and for your creative and pragmatic approach to environmental law in the public interest. Aloha and welcome.

PROFESSOR SAX: Water is unique among resources and it's not unique simply because it sustains us, though, of course, it does that. Unlike other resources, unlike land, oil, or timber, which are also essential to our modern lives, water, whether we find it beneath the earth or in surface streams, is a moving and a cyclical resource. Its supply is uncertain and changeable from season to season and from year to year. By its very nature, it is a shared common property. We cannot command it as a fixed object as we do with land or with other minerals. The water we use today is not the same water we'll use tomorrow, and the water we use is routinely used again and again by someone else downstream or downgradient, and ultimately water returns to the sea. It is a continuum. Surface water and underground water are parts of a single integrated system. For these reasons, the legal regime applied to water is unlike any other, and this has been true in every state and in every nation and at all times. Water is never owned in the usual sense. We acquire only use rights in it, or what lawyers call a "usufruct." Because water is inherently a common resource, it is subject to common servitudes, such as the right of public navigation. We find these concepts in various forms in all legal systems, not only those familiar remnants of the ancient Roman law that underlie the modern public trust doctrine, which restricts privatization of the sea and the seashore, but also, for example, in Spanish law, some elements of which are still operative in the American Southwest.

One such concept is the *pueblo* right which establishes a common entitlement to water for the benefit of the whole community, or *pueblo*, and which therefore limits the ability of anyone to vest in themselves private rights in such water. You might be surprised to know that the City of Los Angeles is a *pueblo* and that even today it holds *pueblo* rights in the Los Angeles River and in the ground water in the San Fernando Valley tributary to the Los Angeles River. Similarly, in the eighteenth and nineteenth centuries, Spanish communities in America constructed community ditches, or *acequias*, which members of the community were obliged to maintain, and such facilities are still found and maintained in places like rural New Mexico. Irrigation projects in early Indian communities in the Southwest were also community and not individual efforts. All these diverse laws from widely separated places on the globe emphasize one idea: Water is first and foremost a community resource whose fate tracks the community's needs as time goes on.

Water law evolves in the common law tradition. Public trust law is common law founded on community water rights. Public trust law evolves to meet community needs. But public trust law is only one instrument in this more general world. In western water law, a whole panoply of distinctive rules apply to water, all of which insulate it in greater or lesser degree from ordinary commodification. While one can acquire these so-called usufructory, or use rights as property rights in water, and while they are constitutionally

protected property rights, they can only subsist so long as they are for beneficial use, only for the amount that's needed for that beneficial use, only to the extent the water is not wasted, and only so long as the need remains. One cannot hold water without using it merely as an investment, and non-use triggers forfeiture statutes that will return unused water to the public. These are the general principles of water law.

In more humid regions where riparian law prevails, the central public precept of water law is that rivers belong to the place where they arise. Traditional riparian law permits use only to those whose land borders the water, and it prohibits water from being taken out of the watershed of origin for use. Moreover, riparian doctrine traditionally restricted diminution of natural flows, holding that the values of a river must be protected for each successive resident and for the downstream community. While some of these rules have given way in light of contemporary water needs, it is a striking fact that elements of the riparian doctrine's communitarian ideology has been making a strong resurgence in many places in the arid west.

Watershed protection and restoration, which has recently emerged as a new environmental goal, is as old as the English common law of riparian rights and natural flow. A number of western states, among them Colorado, Montana, and California, have versions of so-called "area of origin" laws. These laws implement policies that are designed to assure access to native waters for those communities in which waters originate, as against the fully commodified market property approach to water and water rights.

There's one other feature of water law that reveals its essential status as a common resource. I've already referred to its evolutionary character that permits it to adapt to meet the changing needs of the community that depends upon it. Because water is so central to the life of a community of which it is a part, water law has shown itself to be remarkably adaptable to the evolving needs of the community. Some of these transformations are well known. In pre-industrial England and America, as I mentioned just a moment ago, the natural flow doctrine prevailed. Rivers were left to flow as they did in the state of nature, which suited agricultural and pastoral landscapes prior to the Nineteenth century. As industrialization got under way, most prominently with the mills that powered the early industries of New England, natural flow doctrine yielded to a more industry-friendly doctrine known as "reasonable use." The law changed to permit the diversions to produce hydropower, and natural flow doctrine gave way, though versions of it are making a strong comeback in the context of environmental restoration.

Similarly, the unique business needs of the timber industry in the upper Midwest, the lumber that built places like Chicago, demanded a revised definition of navigable water, one of the keystone concepts of traditional water law. Except during the winter when they could be skidded across the

snow, the only way to get the great white pine logs to market was by floating them down the rivers. But only waters where tides ebbed and flowed and where ships went carrying freight were traditionally navigable public highways. So the courts revised the notion of navigability and narrowed the rights of private land owners along these streams in the Midwest by determining that a river could be navigable even if it was not affected by the tides, and even if its suitability for commerce was measured by the movement of lumber and not by ships. This is another classic example of the common law's judicially led evolution to accommodate the public and public trust right in navigation.

As population moved west past the hundredth meridian, the line dividing the so-called humid and arid regions of North America, another and even more dramatic change occurred. Riparianism, the very essence of water law in Anglo-American tradition, was simply not recognized in most of the West. Instead, western states fashioned the prior appropriation system which, among other things, abolished watershed of origin restrictions, and permitted water to be moved out of the basin where it was needed, first for mining, later for irrigation, and finally to support municipal development in cities like Los Angeles, Denver, Albuquerque, and San Francisco. Riparian landowners objected that no such change could be achieved as against their traditional riparian rights to the water and that such rights were implicit in their land titles. Of course, as we now know, those claims too were overwhelmingly swept aside by the same reasoning that had led to the modification of the natural flow doctrine and to the redefinition of navigability. The courts found that water was a community resource and that rights in water were always contingent on the fundamental needs of the community at the time, reflecting natural conditions, such as aridity, or the evolution of social goals.

In a famous opinion in 1882, the Colorado Supreme Court said "we conclude that the common law doctrine is inapplicable here. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict with the old."[2] The evolutionary character of water law has continued in a variety of contexts. The principle of the *Coffin*[3] case that I just quoted, and the commitment to beneficial use which, at that time, meant economically productive use as the source and limit of water rights, gave rise to another Colorado case some twenty-five years later in which it was determined that leaving water instream could not qualify as a beneficial use and no one could acquire a right to leave water instream.[4] Why? Because by the standards and the goals of that day, water was

[2] Coffin v. The Left Hand Ditch Co., 6 Colo. 443, 447 (1882).

[3] *Id.*

[4] Empire Water & Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913).

considered too precious to be left in the river. Indeed, it was standard law that the only way to perfect the beneficial right of use was physically to take the water out of the river and to apply it to some economic purpose. When more contemporary values to protect fish and riparian services, as well as recreation, came to the fore, it was argued, as it had been when the appropriation doctrine first displaced the riparian doctrine, that to treat instream flows as beneficial and to allow an individual or a state agency to appropriate water instream for environmental protection was to take away the established property rights of others to appropriate the water. But the courts rejected this claim just as they had rejected the previous traditional claims, and today instream uses are everywhere considered beneficial, even essential, uses of water.

So once more, history's wheel turned. I noted a minute ago that Colorado eliminated riparian rights from the very beginning of settlement. Many other western states, the Dakotas, Oregon, and California, retained some of these riparian rights at least for a while. Then in various ways, with the one exception of Oklahoma, they either eliminated or restricted the acquisition of future riparian rights, although loss by nonuse was absolutely antithetical to traditional riparian doctrine. In each such instance, it was asserted that the abolition of unused riparian rights was a violation of vested property rights. Those claims too have failed. While California courts struggled with this issue over many years, they have finally accepted that unused riparian rights can be subordinated in order to foster more efficient and more beneficial uses of water, as called for by the Constitution's mandate that water be used for reasonable and beneficial purposes in the public interest.[5]

Nearly a half century earlier, the California Supreme Court had rejected the claims of riparians that they could use water as extravagantly as they wished to benefit their lands, however great the adverse impact on others who had a need for the water. This pre-existing riparian property right, inherited from the times of abundance of water, was abolished by state constitutional mandate in 1929, long after the common law entitlement had been recognized. Yet again, the courts rejected the claim that riparians' constitutionally protected property rights had been violated.[6] The courts held that traditional, riparian prerogatives were no longer permissible in light of the common interest in putting water to beneficial and reasonable use as understood by the needs of the time.

I could extend this list almost endlessly. To your relief, I will not, but I hope the central point I'm trying to make is by now obvious. The rules governing the use of water have always been in a dynamic relationship with

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[5] *In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656 (Cal. 1979).

[6] Chow v. City of Santa Barbara, 22 P.2d 5 (Cal. 1933).

the evolving values of the community. You will no doubt have noticed that in all the examples I have given you so far, I have made little mention of the public trust doctrine, as such, and indeed the examples I've provided did not rest explicitly on the public trust. The public trust doctrine provides the theoretical underpinning of a general legal superstructure that submits water rights and water uses to evolving community needs.

It is, however, in public trust cases that the courts have most fully articulated the legal relationship between private use and public entitlement. Public trust doctrine in America is nothing new. It is generally traced back to a New Jersey case[7] in 1821 and to the U.S. Supreme Court's decision in the famous *Illinois Central*[8] case in 1892. In each such case, the central message was that the land underlying navigable waters could never be privatized to the detriment of fundamental public rights in the lands and in the water overlying them. The trust is old, but its applications to water diversions and to environmental protection is new.

In congruence with the fundamental principle that I have been describing, public trust doctrine also adapts to emerging social goals and needs. It is often mistakenly asserted that the public trust deals only with submerged lands, such as tide lands, and thus that it has nothing to do with water used by irrigators or municipalities who divert water from rivers or who pump ground water. On the contrary, the public trust is centrally *about* water. States took ownership of bottom lands in the original thirteen colonies and later in the public land states (of which Hawai'i, of course, is not one) precisely in order to protect public uses in the overlying waters, uses that traditionally embraced navigation, water-related commerce, fishing, and in some places, fowling.

Restrictions on disposition of public trust bottom lands were imposed primarily to prevent filling or other uses that would limit use of the overlying waters or access to them. But there should be no misapprehension about the fact that public trust doctrine is primarily a water doctrine and only instrumentally a land doctrine. In a time before modern regulatory government existed, it was believed that bottom land proprietorship was essential to control overlying water use. While it's true that the 1983 *Mono Lake* decision[9] in California is the first case that expressly applied the public trust to diversionary uses, followed shortly thereafter by Idaho[10] (whose legislature has set itself up in opposition to the courts), and perhaps next by

[7] Arnold v. Mundy, 6 N.J.L. 1 (1821).

[8] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

[9] Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983) (commonly referred to as the "Mono Lake" case) [hereinafter, "*Mono Lake*"].

[10] Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983). *But see* IDAHO CODE §§ 58-1201 to -1203 (Matthew Bender 2000).

Nevada,[11] you will find nothing in the public trust cases or in the literature to suggest that the trust as protection of overlying waters excludes protection against diversionary uses. Indeed it could hardly be argued that diversions that impaired public navigation, for example, could not or would not be enjoined under the public trust even in its most traditional forms. The explanation for the delayed application to appropriations for municipal use or irrigation, as we saw in the *Mono Lake* case[12] or as you've seen in your recent Hawai'i case, is founded in the fact that the need did not arise until social values evolved to recognize the need to protect instream, environmental, and related values.

Public trust doctrine, like water law doctrine generally, has tracked community goals and priorities. During the century and a half dating from the time of *Arnold v. Mundy*,[13] the 1821 New Jersey case, up to the era of the *Mono Lake* decision,[14] our priorities were overwhelmingly focused on the utilization of water to promote settlement and economic development. That is what I was describing earlier, noting the adoption of a new navigation doctrine, the changes in riparianism, and the innovation of appropriation doctrine. During those times, the public interest was viewed as being promoted by encouraging diversionary uses, even to the point of disallowing or forbidding instream uses. Of course, even in those days, no one thought it was a good idea to diminish fisheries or to destroy the biological productivity of estuarial areas. It was simply assumed that in the vastness of the country, those values would be taken care of in undeveloped streams, that they would be protected in reservations such as national parks or wildlife refuges, or that they would be dealt with by technological fixes, such as fish hatcheries that were to compensate for the destruction of salmon habitat.

As to the economies of indigenous people, insofar as they depended on water, it must be said tragically that for a long time it was generally believed that the public interest would be advanced by terminating traditional uses, repudiating native culture and beliefs, and assimilating native people into the mainstream economy. Today, everywhere in the mainland West, Native American water rights in the form of federal reserved rights are being asserted and are being recognized though they had been long ignored. As with trust rights generally, they do not expire simply because they have been unacknowledged for no matter how long a period of time. Today, each of these earlier conceptions that I've described, whether as to indigenous people, as to ecological services, or as to threatened species or fisheries, has either

[11] Mineral County v. Nevada, 20 P.3d 800 (Nev. 2001) (concurring opinion).

[12] *Mono Lake*, 658 P.2d 709.

[13] 6 N.J.L. 1 (1821).

[14] *Mono Lake*, 658 P.2d 709.

been repudiated or sharply revised, just as the various earlier conceptions of water rights were revised to meet the public priorities of their day.

As water doctrine has evolved, so has the common law public trust doctrine, often in phase with new statutes and new constitutional provisions that made the trust explicit where it had previously been expressed only in common law judicial decisions. In terms of the public trust, probably the most significant modern decision is not the *National Audubon*[15] Mono Lake case, which is so well-known, but an earlier case called *Marks v. Whitney*,[16] decided in 1971. That case held the scope of public trust protection could evolve with changing public values and that the general purpose of the trust to protect public rights in overlying water was sufficient to encompass environmental values instream. As the court put it,

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. . . . There is a growing public recognition that one of the most important public uses . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments that provide food and habitat for birds and marine life . . . .[17]

One cannot contemplate the *Marks* case without recognizing that its conceptualization of the modern public trust made *National Audubon* inevitable. After all, how can one protect the marine environment without water? The adaptive or evolutionary nature of the public trust has been recognized in a number of states such as Washington and New Jersey.[18] A few years after *Marks v. Whitney*,[19] the North Dakota Supreme Court opined that planning must take into account the impact of water use as a public trust obligation.[20] In New Jersey, the courts have focused attention on beach access, recognizing the vastly increased importance of recreational use of water in modern times.[21]

A similar issue arose recently in Connecticut where limitation of beach access to town residents was challenged as a violation of the public trust, and while the court did not accept that theory, it did hold that the exclusion

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[15] *Mono Lake*, 658 P.2d 709.

[16] 491 P.2d 374 (Cal. 1971).

[17] *Id.* at 380.

[18] Orion Corp. v. Washington, 747 P.2d 1062 (Wash. 1987); State Dep't of Envtl. Protection v. Jersey Cent. Power & Light Co., 308 A.2d 671, *rev'd on other grounds*, 351 A.2d. 337 (N.J. 1976).

[19] 491 P.2d 374.

[20] United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976).

[21] Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47 (N.J. 1972).

violated expressive and associational rights under the Constitution.[22] The Wisconsin Supreme Court recently found that privatization of waters through what is called "dockominium" marinas violated the public trust;[23] another adaptive use of public trust doctrine to modern recreational conditions and a recognition of public as opposed to merely private uses of water. In Vermont, the court found that when private uses of trust lands consistent with the trust cease, such as use for wharfage, the trust restrictions reemerge and the property cannot be treated as free of the public trust.[24]

The public trust is of special importance, as the states have expressly recognized, because it invokes not just authority but a duty on the part of government to protect public rights. Agencies of the state have an affirmative obligation to come forward and to take on the burden of asserting and implementing the public trust. Moreover, the public trust is a continuing obligation. In trust waters there can be no such thing as a permanent, once-and-for-all allocation of trust waters or land. That principle is essential to acknowledge government responsibilities to respond to changing public needs and changing roles for water in the economy. *National Audubon* affirmed that the public trust is a continuing obligation that cannot be completed as to any given moment in time, but must remain open to accommodate new and changing conditions. That, by the way, was not an invention of *National Audubon* in 1983, but it had been the law in California since the 1920s when it was articulated in an off-shore oil development case.[25]

Similarly, in the old *California Fish*[26] case going back to 1913, the court held that grants of trust property must be read as implicitly reserving public rights and public trust uses as against assertions of permanent privatization. Other states, such as Arizona, have elevated the public trust to a sovereign obligation. The Arizona Supreme Court stated, "The public trust doctrine is a constitutional limit on legislative power."[27] The Illinois Supreme Court and the Illinois Federal District Court have each overturned express legislative grants of trust property to private entities making clear that they view the trust as a constitutional mandate.[28] The Washington Supreme Court said: "Courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny as if they were measuring that legislation against

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[22] Leyden v. Town of Greenwich, 777 A.2d 552 (Conn. 2001).

[23] ABKA Ltd. P'ship v. Wisconsin Dep't of Natural Res., 635 N.W.2d 168 (Wis. App. 2001), *review granted*, __ N.W.2d __ (Wis. 2001).

[24] Vermont v. Cent. Vt. Ry., 571 A.2d 1128 (Vt. 1989).

[25] Boone v. Kingsbury, 273 P. 797 (Cal. 1928).

[26] People v. Cal. Fish Co., 138 P. 79 (Cal. 1913).

[27] San Carlos Apache Tribe v. Superior Court, 972 P.2d 179 (Ariz. 1999).

[28] People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773 (Ill. 1976); Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs, 742 F. Supp. 441 (N.D. Ill. 1990).

constitutional protection."[29] Each of these approaches in its own way is in accord with the general constitutional view in western states that water belongs to the people, that it can never be fully privatized, and that the public interest in water can never be granted away.

As the New Jersey court put it 180 years ago, such a result "could never be long borne by a free people."[30] Speaking more broadly, it could be said that the whole history of property is not one of fixity but of adaptive change within an evolving social setting, and this process goes back as far as one might want to look. At one time, only eldest sons could inherit. When that posture became socially unacceptable, a dramatic change in property rights occurred. Similarly, and until much more recently, when a woman married, all of her property became her husband's to dispose of at his sole will. As the status of women changed, legislatures enacted Married Women's Property Acts, and ended the husband's dominion over spousal property. Well within the last century, child labor laws, maximum wage and hour laws, and minimum safety standards for workers have each invalidated valuable, contractual property rights that had previously been recognized.

Sometimes new technological information, such as knowledge about radiation, required that formerly valuable equipment be taken off the market. At one time, as some of you may recall, every shoe store had a machine with an x-ray that x-rayed your feet to show that the shoes were not too tight. Modern health laws made those machines valueless. Property became non-property. The invention of the airplane forced us to modify the notion that one owned his land from the center of the earth to the top of the sky. Sometimes, conversely, technology increases property rights. Newly intrusive eaves-dropping equipment, for example, moves us to reconsider the definition of what it means to trespass.

Sometimes social norms change. In the late nineteenth century, when a number of states adopted prohibition on liquor sales, stores and distilleries were left with liquor they could not legally sell. Courts rejected the claim that such laws violated property rights in the remaining stocks.[31] When the railroad was invented, noise and smoke, which by earlier standards would be a nuisance, became a feature of contemporary life that people were required to tolerate to some extent. In light of this history, it can hardly come as a surprise to anyone today that we should see property doctrine evolving to bring about a reorientation of traditional relationships between water devoted to diversionary offstream uses and instream retention. It should come as no surprise that there are now increased restrictions to promote water quality, and

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[29] Weden v. San Juan County, 958 P.2d 273 (Wash. 1998).

[30] Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

[31] Mugler v. Kansas, 123 U.S. 623 (1887).

that the long ignored claims of indigenous people are finally getting recognition.

Although the public trust doctrine has been one important means through which some of these reallocations have been achieved, it is not the only one and many parallel changes could take place, and indeed are taking place through other means. Even the most casual observer of contemporary resource law is aware that statutes like the Clean Water Act and the Endangered Species Act have been instrumental in reallocation of diversions in order to create greater instream flows. Indeed, within recent decades, we have seen instream flow rights recognized for the first time in a number of states and have seen a much greater use by water permit agencies, as well as federal land management agencies, to maintain and enlarge bypass flows so as to protect instream resources downstream. The U.S. Forest Service has utilized bypass flows as a condition on its right-of-way renewals for water projects and the same sort of conditions are being required on hydropower licenses as they come up for renewal. We have even seen these issues arise in the reopening of interstate water allocations in the U.S. Supreme Court.[32]

In addition, active litigation and settlements by Indians to finalize reserved right claims for reservations have made mainland native people and their traditional claims major factors in ongoing water reallocations that are taking place almost everywhere in the western states. Obviously, many of these developments parallel changes that may be generated by Hawai'i's recent *Waiāhole* Ditch case. To be sure, there are some features of that opinion that I'm sure will be discussed today that are distinctive to Hawai'i, or at least are only incipient in other states, such as the application of the trust to domestic use, to ground water without explicit reference to navigable waters, and references to native and traditional and customary uses.

Of course, California decisions also generated new applications of old principles, as I'm sure Jan Stevens will discuss in considerably more detail. In addition, the Hawai'i opinion may suggest a level of engaged judicial oversight that has not, or at least has not yet, been a feature of water rights administration in some other states under the public trust doctrine, regarding issues like burden of proof and the so-called precautionary principle. However, there are many examples, some of which I've already noted, of vigorous judicial commitment to protect public trust values, even including invalidation of legislation that was determined to undermine the public trust. Active implementation of public rights in water reflecting contemporary public values, rather than those of an earlier time, would put Hawai'i squarely in the mainstream of America's evolving water law system. Thanks.

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[32] Nebraska v. Wyoming, 515 U.S. 1 (1995).

JIM PAUL: Thank you very much, Prof. Sax. Now I'd like to introduce Peter Adler. He is our moderator for the first panel.

PETER ADLER: Good morning everybody. Thank you, Jim. Thank you Prof. Sax for a very thoughtful start to our symposium today.

Here's the way we are going to do this panel. First, I'm going to ask each of our distinguished panel members, all of whom are attorneys and two of whom are current or former chairs of the Board of Land and Natural Resources, to take five minutes each to summarize what's in the papers that people have in front of them but haven't yet had a chance to read. I know there will be a little bit of bargaining and dickering over time so some of them may yield time to others. Watching attorneys negotiate can be exasperating so I suggest we don't watch them too closely and just count on them to divide the time up and not go on too long. Jim Paul, I'm going to ask you to start, if you would, and tell us what's in your paper with as much particularity on Hawai'i's application of public trust as you can.

JIM PAUL: Thank you, Peter. Let me see if I can take less than five minutes. I have a paper that's in the materials that is an attempt to summarize the *Waiāhole* Ditch case with particular focus on the public trust doctrine, and I've tried to do that by quoting excerpts, hopefully in an organized way, that helps the reader understand what is a lengthy and at times complex decision and to make it perhaps a little bit easier to understand. I've also tried to pull out lists of what I believe are the duties of the state as a trustee of the statewide water resources trust, referred to for the first time by the *Waiāhole* decision. I tried to list those duties as I believe they flow from the decision. I tried to suggest duties of water applicants and the burdens they must carry as a result of the decision. I talked a little bit about the burden of proof issues as set forth by the Supreme Court, which may be, or certainly is a candidate for, the most important aspect of the decision for some people. And finally, I tried to talk a little bit about what the Hawai'i Supreme Court decision said about the relationship between counties in particular, county planning processes, and the water commission.

Let me suggest that there are some fundamental principles about the public trust doctrine as a result of the *Waiāhole* Ditch case, seven or eight fundamental principals of the Hawai'i public trust doctrine. Briefly and with some simplification for purposes of being brief. First, at its core, it provides enduring protection of certain precious natural resources in Hawai'i for the benefit of not only all people but for the benefit of future generations. Second, the State of Hawai'i is the trustee, the trustee of the public trust resources with all of the duties that go with the notion of being a trustee. Third, the public trust doctrine is a powerful property right of its own that in

most circumstances takes precedence over other property rights whether they are private property rights or governmental property rights. Fourth, the public trust doctrine requires principled public and rational planning processes concerning the use and potential destruction of public trust resources. Fifth, the burden is squarely placed on those who seek to use the public trust resources such as the Waiāhole Ditch water, squarely placed on those who seek permits to use that water, to prove that there will be no significant harm to the public resource. The court noted that that burden is higher in the case of private commercial uses. Sixth, Prof. Sax stated the so-called precautionary principle, when scientific data and analysis is simply inadequate to assess the potential damage to resources from requested uses. That lack of science should not be used as a basis to permit the use, the degradation, or the destruction of the public trust resource. The science-based precautionary principle should apply to protect resources when the harm from use or consumptive activity cannot be measured with some degree of confidence. Seventh, the public trust doctrine closely mirrors native Hawaiian and native American notions of stewardship of natural resources and the relationship between human beings and those resources. And eighth, as Prof. Sax has just articulated, hopefully convincingly, the doctrine evolves and it is a central feature of the doctrine that it has evolved and it will continue to evolve.

PETER ADLER: Thank you. Ken, can I ask you to go next so we try to take this somewhat in order.

KEN KUPCHAK: Thank you, Peter. Despite the fact that I've written a law review article in 1971 suggesting the burden of proof as it is today in this decision, today I'm acting as the devil's advocate, the ghost of Christmas future, exclaiming that the emperor has no clothes. Federal law suggests that Hawai'i's public trust doctrine evolved or was born anew in August 1959, the moment of statehood. What were the public resources in 1959? These 1959 resources are determined by law and not by science. They are determined by legal decisions and possibly how the government itself addressed these rights and maybe even taxed them. In 1959, public trust resources cannot be expanded without paying just compensation. The 1978 constitutional amendments that we made cannot take away previously recognized property rights. The highest courts in Maine, Massachusetts, New Hampshire, and New York have acknowledged, as Prof. Callies has indicated, that, if the state courts drift from the historic trust moorings, they risk running afoul of the Fifth Amendment.

In the last nine years, the U.S. Supreme Court has thrice reinforced this caution previously recognized by Justice Stewart in 1977, when he said, "A sudden change in state law, unpredictable in terms of relevant precedents, . . .

[would not] defeat the constitutional prohibition against taking property without due process of law. . . ."[33] In 1992, the *Lucas* Court,[34] which created the "background principle" exception, noted that only "objectively reasonable application of relevant precedent" would qualify.

This past year in *Bush v. Gore*,[35] Rehnquist, with Scalia and Thomas concurring, noted that state attempts to redefine background principles can't undermine a takings claim. This echoed a previous dissent to a denial of certiorari by Scalia, joined by O'Connor, in 1994. In 1997, the New York Court of Appeals was able to read these tea leaves in refusing to expand the public trust doctrine to non-navigable waters, because of the sudden and unstable impacts of such a decision on private property rights.[36]

Let me suggest that the reversal of *City Mill*[37] on science may run afoul of this caution by the Supreme Court. If so, where else does *Waiāhole* lead us?

Like *PASH*,[38] *Waiāhole* is a lawyer's dream. There are no standards. This case may create an unconstitutionally broad delegation of authority to the Water Commission. This decision provides few clues as to what a public trust use, purpose, or value is today. Even more scary is that these unknown terms are said to possess the potential to continually evolve. The only place they seem to come to rest, even momentarily, is at the Supreme Court.

These concepts should immediately intimidate any landowner, developer, or lender. Assuming that you could freeze "uses," "purposes," and "values," we are also missing the next starting point that is, what is the "natural state" of the stream in question? To what point do we measure the natural state? Pre-Menehune, pre-Tahitian and pre-Marquesan immigration, pre-Cook, pre-Mahele, pre-overthrow, pre-annexation, pre-Ditch, Pre-Statehood, pre-1978, or pre-code? What "stream flow" guarantees the perpetuation of a "natural state?" Is it a minimum? Is it a seasonally fluctuating standard? Is a use moratorium required while this is determined? What standards ensure that such a determination is not arbitrary?

Assuming that we can clear these hurdles, what water use allocation guidelines are there? Do instream uses trump diversions? How about the

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[33] Hughes v. Washington, 389 U.S. 290, 296-97 (1977) (Stewart, J., concurring).

[34] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[35] 531 U.S. 98 (2000).

[36] David L. Callies & J. David Breemer, *Background Principles: Custom, Public Trust, and Preexisting Statutes as Exceptions to Regulatory Takings*, *in* TAKING SIDES ON TAKINGS ISSUES: THE PUBLIC AND PRIVATE PERSPECTIVES § 6.10, at 139-40 (Thomas E. Roberts ed., 2002).

[37] City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929).

[38] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 245, 903 P.2d 1246 (1995) [hereinafter "*PASH*"].

following diversions: drinking water, customary and traditional uses, agriculture or aquaculture?

And what justifies a distinction between agriculture/aquaculture and other private uses? As between offstream uses, are there any allocation guidelines? The court's vested right dicta arguably is limited in application to distinguish between public trust uses and non-public trust uses. The public trust doctrine provides little support for favoring one private user over another. A use would either seem to be a public trust use or not. And we have not yet touched on the tension between this new constitutional child and pre-existing constitutional rights, including those superior rights under the federal constitution. Of course, under the police power, the state could always take what it needed, but it had to pay for it.

By trying to ex post facto shoehorn in under a *Lucas* footnote the recently resurrected public trust doctrine, Hawai'i seeks to avoid paying the piper. Will it be successful? We won't know until either the Water Commission or the Court actually denies the previously private use. The *Waiāhole* majority uses the words "exclusive use" when it distinguishes private uses from "public trust" uses. This might be a clue that the court did not mean to totally disenfranchise private uses, but rather merely subjected them to rationing.

One potential avenue through this maze might be to recognize pre-existing offstream uses, but limit them to their share of an intermittent and fluctuating "surplus" over the predetermined minimum "instream natural state" flow. This "surplus" might be divided pro rata between the preexisting offstream uses with reasonable and equally applied conservation standards.

New uses, however, might have to run the gauntlet of pre-qualification regulation and justification. Perhaps new uses might be allowed only to the extent that either sufficient surplus remained or rights to a pre-existing use were acquired. This might create a market in offstream use entitlements, but only in favor of pre-qualified new uses.

To the extent that, after some mystical guideline-less balancing, offstream public trust uses trump instream or pre-existing offstream private uses and survive the "takings" scrutiny, these trumped uses might also vie for any resultant surplus.

Without legislative-adopted, equally applied guidelines, however, the present system is subject to attacks for being arbitrary and a breeding ground for favoritism and graft. The bottom line, however, is that it appears that my workload is guaranteed for the future.

PETER ADLER: Thank you, Ken. Tim, if you would go next.

TIM JOHNS: Thank you, Ken, and what do you really think? I am a member of the land board, but nothing that I say today should indicate my preference

to vote one way or another on particular issues that might come in front of me so I'm speaking today as a private citizen. You could look at the paper that I submitted. The question that was posed to me was what is the public trust doctrine in Hawai'i? The short answer is it's really whatever the Supreme Court says it is. And I'm not trying to be flip about that, but basically it is a common law doctrine, it has its grounding in the Constitution but it's an underpinning that's floating around in a lot of case law and it's only going to be brought into focus by the Supreme Court, and possibly by the Water Commission, but, I think ultimately by the Supreme Court.

What I tried to do in my paper even more briefly than what Jim did, is talk a little about the lessons of *Waiāhole* and then raise some questions that I thought might be instructive to think about in terms of the *Waiāhole* water decision and what kind of themes might be floating around *Waiāhole* and the public trust doctrine. One major theme that I saw was that the public trust doctrine is an intragenerational, as well as an intergenerational, equity doctrine. So, it's a way to protect certain public uses in certain public resources, to have those uses distributed equitably among people today. It is also an intergenerational equity doctrine, so future generations' uses of certain public resources are to be protected, and that's very much in line with native Hawaiian land management practices and theories. I described it in a bit more detail in my paper, but basically it's intragenerational and intergenerational, so it's not only people today but also people in the future who are being protected.

The second major theme that I saw was that the public trust doctrine, as espoused in the *Waiāhole* water case, is both substantively protective, as well as procedurally protective. It sets out certain substantive rights, but it also, as Jim alluded to when he said the burden of proof is possibly one of the most important parts of the decision, has a very large procedural component to it as well. So for those of us that are going to be wrestling with those decisions in the future, the procedural part of it is going to be very important, and Jim spent quite a bit of time in his paper going through how those procedural protections are set up. *Waiāhole* not only sets out substantive rules but also procedural protection as well. In other words, it sets out *what* is protected, but also how it should be protected on a daily basis.

The second part of my paper addressed questions in light of the lessons of *Waiāhole*. Now the public trust doctrine may evolve in Hawai'i in the future, but if you want to know what the public trust doctrine means now, if you read *Waiāhole* very narrowly and very closely, it's pretty clear what it means for the Water Commission, the *Waiāhole* participants, and Oahu water planning. It's less clear what it might mean for the Water Commission issues that come down the road that don't fit the same fact pattern as the *Waiāhole* case. So, for example, what if it's a public use versus a public use? What does

*Waiāhole* tell us about that instead of a public versus a private use? To recap, the first level of question is, what does *Waiāhole* mean for water planning in general? And that's pretty clear. I think the Supreme Court was very clear about that. It's less clear when you start talking about what *Waiāhole* means for the Water Commission's business in general. I think it's even less clear when you start talking about the Land Board, the Land Use Commission, and Chris Yuen's planning department. How do you apply the *Waiāhole* decision to their actions with regard to water decisions? And then the next question that I posed is, what about non-water resources, public trust resources, or other resources that are protected under the Constitution or held in trust by the state for our people today and in future generations? Does the public trust doctrine, as set out in *Waiāhole*, only cover water, or does it cover land, or does it cover any other public trust resource?

So those are the four kinds of questions that, depending on how the supreme court and/or the bodies that are going to be forced to implement and decide those questions, will determine what the public trust doctrine is going to look like in Hawai'i in a few years. And even though Prof. Sax said we are in the mainstream, I think that we're probably going to be a bit on the cutting edge as well, depending on how those questions are answered.

PETER ADLER: Bill, if you would give us a summary of what's in your paper.

BILL TAM: I would like to disagree with the last two speakers, although they're old friends. I have more faith actually in the decision and in the water code than I have heard so far. I would begin by reminding all of us that the supreme court in the *McBryde*[39] decision pointed back to the source of title to land in Hawai'i so I am less afraid of the takings argument for a very simple reason. The background principles of property law in Hawai'i that Justice Scalia referred to in the *Lucas* case, and which the *McBryde* court referred to, go back to the very principles of the 1848 Land Commission and recognize that the public trust doctrine in Hawai'i is a function of Hawai'i law. It is not a national rule. It is Hawai'i law. The background principles include the following statement that is embedded in the title of all land in Hawai'i. "What is the nature of the extent of that power which the King has bestowed on this board?" I.e., the 1848 Land Commission board.

> [H]is private feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands are the following: . . . [t]o encourage and to enforce the usufruct of the lands for the common good. These prerogatives, power and duties his

[39] McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973).

> majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board and titles consequent upon them must be understood subject to these conditions.[40]

Hawai'i's public trust doctrine has been embedded, not simply in the title of all the land. It has always been subject to that. So Ken's notion that it depends on the 1959 determination of the rights here is in error. But under the police power of any sovereign, there is always that ability to regulate. Hawai'i adopted the public trust doctrine, not in the *Waiāhole* decision, not in the *McBryde* decision, not in the 1978 ConCon, not in statehood, not in territorial time, not even in 1899 when the Republic Supreme Court formally adopted the common law doctrine, *King v. Oahu Railway*.[41] Arguably, the public trust doctrine, which was part of common law in England and in the United States, was adopted in 1892 when Hawai'i Revised Statutes 1-1 said that the common law of England, as amended by the common law of the United States and the statutory law, is the law of Hawai'i.

There is another notion of public trust which I want people to understand. It is a doctrine, distinct, but related. There are express public trusts as in the Admissions Act. This is a different line of cases and a different set of principles, although they overlap. The doctrine we are talking about here arises in judicial context as a limitation on the power of government itself to alienate permanently those trust assets.

In figuring out what the rules are for allocation going forward, I am more confident than Tim or Ken about how to figure out the answers. I would offer you the following thought. Think of the decisions that anyone in the government must make when they go to work in the morning. There are a lot of people here who are going to be faced with this issue in the next couple of years. You get to your desk in the morning and how do you actually do this? I would offer the following suggestion: Think of an inverted pyramid in which the fundamental questions have to be answered before you can get to the secondary questions, and the fundamental questions are, at a minimum, what is necessary to protect the resource now and in the future? Now, the supreme court on page 146 of their decision said that, looking at the preface and the purposes of the water code, there is not a categorical priority for protectional overuses. That is true in any particular instance where you have a specific decision you have to make, but with regard to the overall protection of the resource, it is necessarily a categorical imperative. It is necessary that the resource be in existence before you allocate it. So the issues that you have to sort through must start like a metaphorical raindrop in the hydrologic cycle from the top and work its way down. There are a series of rules with regard

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[40] *Id.* at 186, 504 P.2d at 1338.

[41] King v. Oahu Ry. & Land Co., 11 Haw. 717 (1899).

to how you allocate under the common law. There are riparian doctrine rules and there are the correlative use ground water rules as modified by the recent decision. We're not operating in a vacuum. Properly understood, those are sorted out. They do not say how much you get under a particular instance because that would depend on all the other competing uses. In Hawai'i, as Jim pointed out, there is a very close parallel between public trust doctrine and traditional Hawaiian customs. The public trust doctrine is just the secular western way of describing a lot of what Hawaiian practices were. So Hawai'i is particularly suited for the public trust doctrine in its own traditions and customs. People should look at those as parallel ideas employing different vocabularies to do similar things. They're not at odds with each other.

I think another factor that tends to get forgotten in academic discussions about the law are geographic facts affecting Hawai'i. That is what we all have to keep in mind. Although often unstated, we are on islands. We are bound by the shoreline and the ocean. We are here at the grace of the mountains that catch enough of the rainfall as clouds graze by and fill up parched aquifers. The water in Hawai'i's streams, unlike the Columbia River, for example, runs quickly down to the ocean. Hawai'i streams run out in a day. We, more than other places on continental landmasses, are constrained by the geographical limits and our close interrelationships. While prior appropriation might work on the mainland, it is inappropriate in Hawai'i, both by custom and by geography. So the public trust doctrine is uniquely suited for describing a lot of the traditions that already exist. The notion of caring for the future and caring for future generations is embedded in the culture here. Prof. Sax has written about Kenneth Boulding's notion that we are now on "spaceship earth." Our Hawaiian cousins figured that out a long time ago. They came here on small canoes. Finally, I want to bring to your attention two chronologies at the end of my paper: 1) the evolving nature of Hawai'i water law as Prof. Sax mentioned, and 2) a conceptual evolution. Thank you.

PETER ADLER: Gil, I want to invite you as a commentator if you have any reflections on either the points made or the issues that have been raised because they're starting to come up.

GIL COLOMA-AGARAN: I just wanted to make a couple of observations about some of the things that you've said and also about the public trust doctrine itself. First, I want you to think about the fact that Peter said that this entire panel here is made up of all lawyers except for himself. The first question you really have to think about is, do you want the only people who work on these types of issues to be lawyers? [Laughter.] This is the *Waiāhole* decision. I've been carrying it around for a couple of weeks now. When I first read the decision, I read it and said this may be something just for

lawyers, but I actually read it because I was sort of interested in seeing what they said. Now that I'm back at the department, I had to read it to see what they are telling us to do, and it's a lot easier to say it than to do it.

And the next thing I want to talk a little about is the notion of who the trustee is. I think a lot of people who will read the decision will say it's the Water Commission, but it's also the state legislature, and that's something people should take seriously because when I say it's a lot easier to say than to do, a lot of it's going to depend on what kind of resources the Water Commission and other people are interested in doing or getting the best scientific information you can have in order to allow decision makers to move forward. You're going to need resources. In a couple of weeks, hopefully, we'll have something coming before the Water Commission from some panel that the *Waiāhole* decision required that will be setting up a format to look at funding some studies. We also have some legislative proposals to help fund those studies as well. But what usually happens is the usual rule that the executive proposes, the legislature disposes, and sometimes you don't get what you're looking for.

The other thing I wanted to make a comment on a little bit, and I don't necessarily disagree with what Bill is saying, but I think we have to be very careful in the notion of whether or not the U.S. Constitution doesn't ultimately control what happens in Hawai'i if we're part of this country. I know that you're saying that the origin of the trust is really set in Hawaiian law and I don't know if you can say that separate or apart from what U.S. law is. I appreciate very much what Jim Paul said in his summary of the case, but I would encourage everybody to try to read the whole thing. One thing about summaries is that it sometimes depends on what you're looking for in the decision. I've seen summaries that focus on something on page sixty-five, for example, where the court said: "Apart from the question of historic practice, reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection to the unavoidable impairment of public instream uses and values." If that's all you have in summary of what the *Waiāhole* case says then that suggests that, yeah, you can do the diversions, you can do a lot of things, but there's nothing protective about it. The other last thing is really again going back to who do you want making the decisions and the people that are appointed to these positions? What do they have to know before becoming part of that panel?

[Q & A Section omitted]

PETER ADLER: I would like to introduce Bill Tam, who is going to introduce our next speaker, Mr. Jan Stevens. Bill was the lawyer to the Water Commission for over ten years, and as many of you know was the lawyer for

the Water Commission during most of the underlying proceedings in the *Waiāhole* case.

BILL TAM: This morning we're honored to have a second speaker with enormous experience in the area of the public trust doctrine. Jan Stevens has been in the trenches for the last thirty-five to forty years trying to make the public trust doctrine work in California. Jan is responsible for introducing Mr. Don Maughn, the then-current chair of the California Water Resources Control Board, to Hawai'i. Don Maughn came here in 1987 and spoke at the state legislature and people's water conference. His presentation to legislators was critical in making them realize the importance of adopting a water code. Jan has been a lifelong public servant. He has brought a persistent intelligence and undaunted courage to that job. He has been a role model for other people in public life as to how to behave and how to bring the public issues to the floor of the right forums. Jan Stevens.

JAN STEVENS: Thank you very much, Bill. It's really a pleasure to be here in more ways than one. I've enjoyed this program enormously. The chant was deeply moving and appropriate, and the hospitality has been exceptional. I'll do my best to try and assist you in dealing with this complex antediluvian and ancient theory, the public trust.

I was interested to hear the *Waiāhole* Ditch hearings likened to the O.J. Simpson trial, and I wondered what Johnny Cochran might have done with this. Perhaps he would come up with an argument for water use like this, "If the use don't fit, you must change it." Maybe that would have convinced the water board. It's hard to simplify these matters but I do want to share some of my feelings about implementation of the trust and how it's worked in four cases in California.

It's hard to define the public trust doctrine. I think this program has gone far toward analyzing the beautifully drafted and very thoughtfully prepared opinion of the Hawai'i Supreme Court. When I was in one of my first public trust hearings in the California Supreme Court, Justice Richardson (no relationship to Chief Justice William S. Richardson, but a very brilliant man) leaned over, smiled, and said, "What is this thing that you call a public trust, that you're trying to impress upon Clear Lake?" Although literally foot after foot of pleadings had been filed attempting to define it, obviously the court had not grasped our argument. So, I stammered out something as I usually do, about how it's an interest of the public in property, akin to an easement, which precedes that of individual owners. And, as usual, I thought the next day about an example that might have been much better. Based on the gospel of St. Paul, I could have said, "It's the substance of things hoped for and the evidence of things unseen." And perhaps this is what it is in *Waiāhole*.

Now I want to welcome Hawai'i to the world of western water. Remember what Wallace Stegner said about the west: "It's about water." I was somewhat surprised that a state that I thought was blessed with large quantities of water would still be suffering from the conflicts and the scarcities that have pursued most of the arid west, particularly California. But since such conflicts exist here, I want to welcome you to the world of the water buffaloes, beasts that historically have rampaged over lakes, rivers, and underground basins in the west, defending what they perceive to be their rights against a motley but menacing crowd of fishermen, bird watchers, biologists, and environmentalists. The term "water buffalo," I think, is particularly suitable here. It's traditionally applied to the defenders of vested water rights, members of a very small and arcane water law bar. It can be contrasted to the phrase "tree hugger," which is usually applied by water buffaloes to environmentalists and others who advocate instream protections.

This buffalo must exist in Hawai'i because the dictionary says it is found in most tropical and subtropical regions. It's defined as an animal that, when pestered, wallows in the water on damp soil for protection.

For years the water buffaloes had things pretty much their own way. The water agencies believed they had no alternative but to approve an appropriation if the water was going to be put to an economic use. Riparians could draw their water subject to little control, and the owners of underlying ground water could pump to their heart's content. But as the great American poet Bob Dylan said, "The times they were a changin'." And as Joseph Sax said, "Beneath the murky navigable waters, there stirred an ancient doctrinal beast capable of giving the water buffalo a good fight."

The public trust doctrine goes back to Roman law. The Emperor Justinian is the ancient father of the public trust, just as Professor Joe Sax is its modern and youthful father. A primary attribute of public trust is that it's a part of governmental sovereignty. What we need to remember about the public trust is that it's an attribute of sovereignty that cannot be dealt away by legislatures or by administrative agencies. It is a central function of government. This trusteeship, this duty going back to Roman law, reflects that some things like the air, the waters, their beds and banks, cannot be reduced to that kind of "sole and despotic dominion and control" that Locke and Blackstone recognized as private property. Even in those days, the tidelands and the waters over them were held in trust for the people, and as the New Jersey Court stated in 1821, reducing them to positive possession was a concept that violated the law of nature and the constitution of a well-ordered society, and which never could be long borne by a free people. This statement came only thirty years after the revolution, which makes the court's words especially meaningful.

In this country, the trust was articulated in the *Illinois Central*[42] decision in 1892 by an otherwise rather conservative justice, but one of decided views and a firm character. Justice Steven Field came from California. He served on the California Supreme Court and then the United States Supreme Court. He wrote an eloquent opinion in *Illinois Central*, saying essentially that the legislature had no power to dispose of the people's interest in the navigable waters surrounding them. This has pervaded the law of ultimately every state since then. It is the principle that inspired the vehement declaration in the *Mono Lake* decision, that the trust is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands.

Logic compelled the conclusion that the rule of law protecting the waters of the state, as Prof. Sax said, necessarily must extend beyond the beds and banks of commercially navigable rivers and lakes. In the nineteenth century, commerce was important. We didn't have much time for recreation or bird watching, so it's natural that the public trust was defined in terms of commerce, navigation, and fisheries. But the public trust is a common law concept, and it has evolved in a number of different ways to protect public rights not only in commercially navigable rivers, but also in rivers capable of recreational use—rivers that support fisheries and riparian values.

There is another basis for the common law evolution of the trust, and that is the fact that when you do things in the tributaries of large navigable waters, they can affect those waters. They can obstruct navigation, and they can pollute, and they can destroy public trust values, which historically and traditionally exist within the larger water bodies. In the nineteenth century, hydraulic mining was a major industry in California, and the rubble washed down mountains. Debris obstructed the American and Sacramento Rivers way downstream, flooding fields and wiping out farmers. In a historic decision, the California Supreme Court upheld the prohibition of hydraulic mining on trust grounds. It didn't occur on the river itself; it occurred way upstream, but it was ruining public trust values in the navigable rivers, and the public trust was applied as a basis for stopping it. It was inevitable that this would lead to *National Audubon*,[43] an opinion which so eloquently explained why the public trust should protect the waters of Mono Lake. The facts of the *Mono Lake* case have been widely published. Mono Lake is the largest body of water entirely within California. Its large population of brine, shrimps, and flies made it a virtual avian travel-lodge, frequented by large numbers of California gulls, grebes, Wilson's Phalaropes, snowy plovers, and other birds that were annual migrants.

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[42] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

[43] *Mono Lake*, 658 P.2d 709 (Cal. 1983).

By 1941, the Los Angeles Aqueduct, which was originally pushed up to the Owens Valley to take the waters of Owens Lake, was extended into the Mono Basin and started diverting the water going into the Mono Lake as well.

Now, by the time the *National Audubon* case had been filed in 1979 by a small motley crew of environmentalists, represented on a pro bono case by Morrison and Foerster, the city had largely drained Owens Lake and had begun diverting water from the Mono Lake Basin in greatly increased amounts through a second "barrel" of its aqueduct. Since 1941, when the diversions began, Mono Lake had dropped over forty feet. Its volume was reduced nearly fifty percent, and its salinity had nearly doubled to the point where even brine flies and shrimp creatures would not long be able to survive. Nearly 15,000 acres of dry lake bed had been exposed, giving rise to toxic dust storms, and creating a land bridge to Negit Island, then the principal nesting place for the California gulls. This bridge made it easy for predators to raid their nests.

By then most of the Owens Valley, and the Mono Basin as well, were owned by the L.A. Department of Water and Power. There was some forest service land left, but very little private land. And when you went through that whole pristine area of the Sierra, you would see L.A. Department of Water and Power trucks everywhere, carrying forth their duties of making sure that the water went down to this great city.

The city engineers tried a number of things to protect the gulls. They tried blasting to increase the channel; that didn't work. They put up big fences, coyote-proof fences supposedly, and we went out there and saw the coyotes' tracks pacing up and down in front of the fences until they found a place where they could jump in, take a short swim, and have a delicious meal. It wasn't very hard to realize that the only ultimate solution to saving Mono Lake and preventing it from becoming that "saline sump" that the city already saw it as, was by increasing the amount of water going into it. This, of necessity, would result in decreasing the amount of water going to Los Angeles.

Well, you can imagine what a gargantuan struggle ensued from this. The 1979 lawsuit was based on the public trust theory, one which had not been applied to water diversions in California, except by indirection in the early decisions prohibiting practices that affected waters downstream by siltation and debris. After a great many maneuvers through state and federal courts, the case finally reached the California Supreme Court. That court issued its historic *National Audubon* opinion holding that "appropriative water rights and the public trust doctrine were part of an integrated system of water law that permitted Audubon to pursue the public trust against the city."

Now the court realized that the public trust doctrine was on a collision course, as it said, with the appropriative rights system. These were rights that

the city believed it had secured fair and square. They were rights that, hitherto, the administrative agency charged with administering the water rights system believed it had no alternative but to grant, regardless of predictions of harm to the public trust values and the fisheries of the state. In reaching its decision, the court stressed four basic principles, all of them rooted in trust law: one, under the public trust doctrine, every citizen has standing to bring an action to protect the public trust. So the Mono Lake Committee, this small band of heroes in the Mono Basin who were virtually penniless but dedicated, had standing to bring this action, as did the National Audubon Society; two, the public trust applied to the non-navigable tributaries of navigable waters; three, it imposed a duty of continuing supervision and control over the public trust values of Mono Lake, a large navigable lake in California; four, it required the consideration of trust impacts in evaluating the water rights of the city, and it imposed the power and duty to avoid harm to trust values whenever feasible—a power not bound by past decisions made with respect to those water rights.

Southern L.A.'s water rights were not frozen in law. Public trust principles prevent any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.

Now there was a caveat, just as there was in the *Waiāhole* case. The court recognized that as a matter of current and historical necessity, the legislature may authorize the diversion of water to distant parts of the state, even though unavoidable harm to trust uses of the source stream may result. The court recognized, in other words, that water had been going to Los Angeles for many, many years, and the city was somewhat dependent on it. This requires a balancing, but one involving the state's affirmative duty to take the public trust into account in planning the allocation of water resources and to protect trust uses whenever feasible. In the Mono Lake dispute, the water board had essentially thrown up its hands. In 1940, when L.A. perfected its permits, it concluded it was powerless to impose conditions to protect trust values. Forty years later, the California court took a fresh look and concluded that neither the legislature, the water board, or any judicial body had determined that the needs of Los Angeles outweighed the needs of the Mono Basin, and that the benefit was worth the price. Nor had any responsible body determined whether some lesser taking would better balance the diverse interests involved.

Accordingly, the court held that all uses of water, including public trust uses, must now conform to both public trust considerations and the state constitutional standard of reasonable use.

Well, this case went two places on remand. First off, it went to the Superior Court in El Dorado County for initial consideration and implementation of the California Supreme Court's decision. It was assigned to Judge Terrence

Finney, an ex-district attorney whose previous experience was largely criminal, and who was initially concerned at being saddled with such a monster case, handled by large bands of attorneys who flew in from all over the state.

National Audubon and the Mono Lake Committee asked the court to enjoin the city's diversions pending a final water rights determination. The hearings went for two and a half months. This was perhaps the eighth or ninth year of the Mono Lake litigation, a short case by water rights standards, but one which was dear to many. Ultimately, Judge Finney issued a preliminary injunction directing the city to refrain from making any more diversions, unless the lake levels reached a designated stage, pending a final determination. He concluded the lake was in danger of suffering irreparable harm.

The case then went back to the water board for consideration of the city's permits. After another two or three months of hearings, the board came up with a solution designed to preserve the habitat, prevent dust storms on the exposed lake bed, protect the brine shrimp, and maintain the scenic values of the lake. It didn't order that the lake be restored to its pre-diversion levels. It left some water for Los Angeles. But it directed the city not to take out any water until the lake had reached a level of sixteen feet. The board decided that in balancing trust interests, the best answer was to raise the lake high enough to preserve the gulls, prevent the dust storms, and to enhance the ecological and scenic values.

Los Angeles decided not to appeal this decision. The city felt that it had had enough, that the handwriting was on the wall, and that the environmental balance must be restored, at least in part, to the basin.

Since *National Audubon*, of course, there have been three more occasions in which to implement the public trust. The public trust creature has been liberated from its historical shackles, as Joe Sax once characterized it, and he's appeared in varying forms and guises. I always envisaged the trust as something that lurks below the waters of navigable lakes, rivers, and tidelands, but obviously, as you can see, it has a great deal of strength today. It has the ability to come out of those waters, to close floodgates, and to stop canals and diversions hitherto beyond attack. There are a number of ways in which the creature has appeared. There are statutes which express the public trust, and constitutional provisions as well, which can be characterized as means by which the legislature has carried out its duty as trustee. One California statute expresses a trust purpose by providing that the use of its water for recreation and preservation, for the enhancement of fish and wildlife, is beneficial. Another one provides that fish must be kept in good condition below dams and other structures. The California appellate court has expressly stated that this was a legislative implementation of the public trust doctrine.

Other western state courts, including those of Arizona, Idaho, Montana, and Washington, have expressly recognized the public trust. The Nevada Court indicates it may be willing to, when the time is right, and now, of course, the Supreme Court of Hawai'i has applied it to water in the state. Now you face the duty of implementing its principles in water allocations, which as Gil pointed out, is somewhat more difficult than enunciating those eloquent principles in general terms.

I was struck by the similarities between *National Audubon* and the *Waiāhole* Ditch decision. I think they go beyond their agreement on their legal principles, as important as that may be. Both cases involve the reallocation of water from large and costly structures built around the turn of the century to accommodate growing needs. In both cases, the court expressed a much broader view of the powers of the state, under the public trust doctrine, than did the administrative agency charged with administering these water rights. And in both cases, a number of parties and amici reflected a sort of who's who of all the economic, political, and environmental powers of the state.

What about the world after *National Audubon* in California? In the first place, the dire predictions made by the L.A. Department of Water and Power about the adverse impacts on economy and our civilization did not come true. Initially, the city published pamphlets suggesting inner city school children would have to go without drinkable water and affordable power if their diversions were restricted at all. This did not happen. The city went along with the water board's decision, and the decision was more palatable by a number of conditions. State funds were made available for water reuse programs. The Metropolitan Water District was happy to increase its sales of Colorado River water, which, along with state water project water from the San Joaquin Delta, goes to Los Angeles to satisfy its needs. It may be that the city does not have as firm an expectation of free potable water that it had prior to *National Audubon*, but maybe it never really had a right to that certainty. This sense of security was false to begin with, and we can no longer afford it today.

Now, a few cases have arisen since then, and I think the way they were handled might be of benefit to you here in Hawai'i. In one case, the court decided the case after reference to the water board for an expert opinion and recommendation. In another one, the superior court decided the case all by itself without the help of the water board, and in the third one, the water board itself is attempting to deal with public trust issues.

[Case descriptions have been omitted.]

Perhaps this pattern, if not the result, is what we should look at. The common law doctrine is somewhat amorphous. While it's powerful, it doesn't

really provide a focused directive that can be given by the legislature, which in the final analysis, is the trustee for the people of the state.

What lessons can we learn from California's encounters with the public trust? The trust doctrine isn't a cure-all for the resolution of competing water uses. It does provide some salutary guidelines and protections for resources that were sadly neglected in past allocations of water. It requires a consideration of trust values in determining the uses of water, and requires the avoidance of harm to those values whenever feasible. It reminds state agencies and property rights advocates alike that the state's power and duty to protect trust values is a continuing one, and the issuance of a riparian water rights permit does not place water beyond the reach of those protections.

What it does not do is revoke Mark Twain's observation that "while whiskey is for drinking, water is for fighting over." The long fierce battles between water buffalos and tree huggers are going to go on. Cases will last for generations, as water rights matters often do. The spirit of Bleak House will survive, but a few good results are emerging. First, the legislative and administrative agencies have been encouraged or prodded to consider the impacts of their actions on public trust values. Second, legislative guidelines are emerging. And third, the water rights agencies have slowly begun to consider values beyond the ones that they have traditionally followed. All of these cases I previously discussed, except the Yuba River one, were settled at the trial court or board level, begrudgingly, but nevertheless realistically. The public trust, that ancient behemoth, hidden for so long beneath the waters, has emerged to confront the water buffalo. His appearance on the field should do much to even up what was such an uneven battle in past decades. Thank you.

JIM PAUL: Thank you very much, Jan. Jan will now turn into the commentator for our next panel, which is going to be chaired by Kem Lowry. Prof. Kem Lowry, among many other things, is the chair of the Department of Urban and Regional Planning.

KEM LOWRY: Thank you, Jim. We've heard a great deal this morning about the public trust as legal doctrine, and our task on this panel is to grapple with some of the practical issues associated with implementing the public trust doctrine. Planners and resource managers have to grapple with drawing up use rules, making plans, making recommendations for regulatory decisions, and all those other things that we associate with management. To extend Peter's metaphor, it's the planners and the managers who have to line the duckies up. So the practical problem for those who are the planners and the managers is how is the public trust going to be manifested in the everyday work that they do. How is their work going to be different if they take the public trust seriously?

Joining me on the panel are five or six people who are directly involved in management, incorporating the public trust in management decisions, or whose management work is affected by public trust decisions. From the far end, we have Charlene Hoe, who is the Executive Director of the Strategic Planning Section of Kamehameha Schools. And Jan Stevens is joining us. And Colin Kippen, who is the Deputy Administrator of the Office of Hawaiian Affairs. Next to him is Senator Colleen Hanabusa from the twenty-first district and also Vice President of the Senate. Bill, the Director, Department of Land and Natural Resources, Division of Aquatic Resources. And Chris Yuen, who is the Big Island Planning Director. We've invited each of the panelists to make a short introductory statement that summarizes the key points in their paper, and then we'll go straight to the questions from that. So with that in mind, I'm going to start this time at this end. I'll ask you, Chris, if you would begin.

CHRIS YUEN: Good morning and aloha everyone. I'm impressed that so many people have taken their Saturday morning off to talk about this important topic. People often discuss that you have a distinguished panel. I want to recognize that we have a very distinguished audience, including people that were directly involved in the *Waiāhole* decision as public advocates, attorneys, members of the commission, and decision-makers. We have many people in the community who have worked hard on water issues without recognition or compensation for many, many years. And I also want to say aloha to many members of the DLNR who deal with these kinds of issues on a daily basis and are responsible for a lot of the day-to-day management of the things we have been talking about here this morning.

I'm not going to talk about water very much. We've heard a lot about water this morning. I could give a long explanation, and it's always useful to talk about where you're coming from and your background, and I could spend a long time talking about my transition from environmental activist to government bureaucrat with a stop as an attorney along the way. I have to confess that, but I guess to take one fact from my background, I grew up in Hilo. As a result, it's hard for me to completely relate to the idea of the scarcity of water. We have 135 inches of rain! I grew up by a stream, Honali'i Stream, where I, as a youth, enjoyed instream benefits and made beneficial use of the stream flow. Today we recognize many species of *O'opu* as an endangered species. As I grew up, we young fellows in the neighborhood recognized it as a delightful thing to spear and eat, and certainly we won't do that anymore, but I thought I would talk about something a little bit different than just water.

The question came up in the earlier panel, what are the implications of the public trust doctrine for other natural resources? I started off my paper by

quoting from the Hawai'i State Constitution, which says that "all public natural resources are a public trust." Now I want to say something right at the outset about this. The public trust doctrine, as discussed here today, and as discussed by Prof. Sax and in the *Waiāhole* water decision, is not going to be imported wholesale into all public natural resources. I'm going to talk in just a minute about what are public natural resources. As we talk about what those are, you'll see that there are many aspects of water law that don't apply, that are not going to apply. But I wanted to discuss this morning as a way of reminding us and reminding those of us who are responsible in some more direct way for the stewardship of those resources that yes, our state constitution says that those are something to be held in trust. I think that the overall direction that is being given to us by the *Waiāhole* decision is that the long-term health of those resources is what we must put first when we're making the hard decisions that we have to make.

Public natural resources, what are they? Let's start with the things that everybody would agree with. Air, that's a big one. Bill is in charge of aquatic resources, fish, wildlife, wild animals that live around us, not so wild sometimes, public lands, lands owned by the people of Hawai'i, geothermal energy. Another big one, the sea and the seabed, insofar as they are under state jurisdiction and insofar as the state has control of them. The big areas. How is this going to be a legal handle? My role as a planning director is to try to guide our decision-makers in our county so that they don't make mistakes that have to be undone some day by the courts. I think that a lot of law, a lot of legal decisions, are made as a result of public decision-makers making decisions that are, that do need to be undone and law is made in those respects, but the first line of action is the people that make the decisions in the first place and we need to make those in a very, very careful way. When I started working, one thing I told my staff, as a guiding principle we were going to go by, is something that's taught to carpenters, "measure twice, cut once." Take a good hard look at what you're doing. Take a hard look at it again before you make a decision that can't be undone. What are the areas that may be public natural resources that are not so obvious? I spoke earlier about public lands. Well, what about it? This is a tie-in to water, we've talked about water being a public trust resource. Our groundwater here and on all the islands depends on upland water recharge—the *mauka* lands. Much of this, fortunately, is in public ownership. It behooves us as managers of that public land to look at those aspects of managing those lands and seeing that those are managed properly for recharge. But there are also private lands. To what extent are private lands, upon which water recharge is dependent, upon which the aquifers depend, to what extent are those impressed with some kind of public trust for that purpose? And just to finish, and on the areas that are specifically in my paper, where I think that the court may some day step in one

of these areas outside of the water and say a mistake has been made is in the area of automatic approval. The state legislature in 1998 passed a law that essentially says that all business and development related permits, including those that are involved in land use, environmental regulation and the like, can be automatically approved if the governmental body does not act upon them within a set period of time. And thinking about the bodies that make these decisions, whether it's BLNR, our own Planning Commission, the Land Use Commission, the most likely way for there to be a really stupid decision coming out of one of these bodies is if they happen to blow the timeframe at some point and enact something by an automatic approval. And I would suggest that, some day, if a particularly egregious and damaging decision is made by virtue of an automatic approval, the courts may come in and say that the natural resource that is being jeopardized by that decision is a public trust and, like *Illinois Central*, like these other public trust cases, step in and reverse that. There are a couple of things I'd like to say and I'll entertain questions about. I just want to say, if I could just say one more thing on a theme, and I want to say this to try to explain to those of you in the public why sometimes people like myself who have jobs now in the government don't do what we ought to do or don't do as good a job as we should do, and you have to, we do a much better job at regulation than management.

In the *Waiāhole* water case, it was very important, and there was a question, is that something that was worth the effort? I think no doubt it was worth the effort, but in the *Waiāhole* water case you had maybe fifteen attorneys in the room, you had commissioners, you had transcribers, you had some of the brightest people in the state, maybe twenty-five people in the state in a room discussing the allocation of water. All that water depends upon recharge from upland forests. Folks, you don't have twenty to twenty-five people out there working on those upland forests, fixing the fences, making sure that alien plants don't spread in the forest. We need to do a much better job in active management.

KEM LOWRY: Thanks. Okay, Bill.

BILL DEVICK: I need to start with a disclaimer: I am not a lawyer. As such, I don't want to keep my thinking bound by legal principle. I look at the public trust, and I see a tool that should be interpreted in the broadest possible sense. If we look at what decision making has done in the past, things have really gotten rather messed up. If we look at fisheries, they've collapsed. If we look at what's happening in streams, we've got lots of problems. If we look at the land, we have serious problems. Why has this happened? It's because decision-making has largely been focused on economic interests. I see public trust as both a philosophy and a potential tool to shift that thinking, to shift the

balance in decision-making towards protection and conservation, thinking about the future, rather than simple immediate, economic advantage.

Obviously, we'd like to have this, and obviously it's much easier said than done. One thing that is seriously lacking in achieving this level of consideration is good science, a good understanding of what it is that we're dealing with. There is the precautionary principle, which is frequently associated with public trust, and it can be used at least by some people as an excuse to not collect the information. If we don't know, that becomes an argument for not making a decision, especially towards protection or conservation. So, we need the science. If we don't have that, if we don't have the good information, in terms of what we want to see, we simply fall back to the precautionary principal, and we're going to make the lawyers on the first panel very happy. They're going to have lots of work, and we're not going to get what we want.

KEM LOWRY: Thank you.

COLLEEN HANABUSA: I guess on the panel I'm one of those who you look to have something wise to say about where the legislature is going to go because, after all, we are deemed to be the state and the trustees of the public trust doctrine. All I have to say is that the reason why you do not have the kind of legislation that many are looking for is because of the fact that you have so many types of views, a lot of them conflicting, that have to be balanced, and we do not, we the legislature, do not balance that well at all.

The *Waiāhole* decision is very significant to me, not so much as an attorney but as a lawmaker, because of certain things that the Supreme Court said that I think will impact how we look at the public trust doctrine, how we look at the whole area of water rights into the future. And that is, I think, best stated by the dissent of Justice Ramil when he pointed out that, in his opinion, the majority trumped the water code by this nebulous common law doctrine called the public trust. And, of course, he was in the minority, but what it does tell us is that, in fact, the Supreme Court of Hawai'i has now actively interjected themselves in a way that I don't believe that they have in the past. They are saying that they are the ultimate entity that will determine whether or not we, the state, have fulfilled our public trust in terms of the natural resources, not only constitutionally mandated, but also mandated in common law principle.

What it tells us in the legislature is, as the court did say in the majority, that we are unable to abdicate our trust responsibilities, whether it is by way of the water code or even the water commission, that, in my opinion, were established constitutionally by the people in the constitutional amendment. But what does this then mean in terms of the legislature? We are undisputedly the trustees, but what does that then mean for us in terms of how we then

exercise the issue of the public trust and the management of this resource? And I will tell you I don't know whether the legislature as an entity has any idea as to how it will do it. It will continue to basically abdicate it, I believe, to the Water Commission as the entity that should be making those decisions, and it will continue to be lobbied by all of the varying interest groups to change that water code, which everyone will feel somehow affects how this necessary natural resource is managed, and the result will be probably what you all have seen. Many of your faces are very familiar because you're in our offices on various sides of various issues, and you know that for the most part what happens is practically nothing. And let me give you an example. How many of you know what LISA is? I mean, it's a constitutional requirement, and basically nothing has happened, and every time there's a move towards LISA, there's a movement against it, and what's really interesting is that many times, that move is done by both sides, what we would consider both sides of the issue. Both environmentalists don't want it done in a certain way, and the people who represent development, they don't want it touched. So we end up almost with status quo at every juncture, and we're almost at, what it seems to me, is that we have sort of an artificial balance here, and it isn't until one group is going to push that the other group is going to react. Let me give you another example. We all know *PASH*, the infamous *PASH* decision, gathering rights, native Hawaiian rights. If you ever come to a situation where people want to start to talk about, "Let's codify, let's do something about it." You'd be fascinated to know, you'd have people from both sides of that issue saying "Let it be." We think it's working because no one wants anyone else to get a one-upmanship on it. This legislature is going to probably continue that way as long as the people that are represented maintain that. When that balance shifts by the electorate's choices and whatever party preference or whatever the elections may be, I will predict that there will be a shift in that balance. At that point in time, my estimate will be that you'd probably have more lawsuits filed, and it will be filed under the public trust doctrine because that resource, and as you see the sentiments of the communities today, and especially in these economic times and the events of September 11th, I believe you will find more and more of these types of decisions made with the short, immediate future in mind, and for that, you will have sacrifices made, in terms of what people would like to say are the public trust and the future.

People are looking more to what is immediate and even saying, if there isn't an answer for the immediate, how can you look for the future, what are you preserving it for? So these are the kinds of issues that the legislature is going to be faced with, and unfortunately, I believe that the concept of the public trust in the near immediate future will be fine if we can just keep it in the balance that it is in now. Thank you.

KEM LOWRY: Colin.

COLIN KIPPEN: Aloha. We were asked to not so much focus our energies on what the decision itself says in terms of the doctrine. We've heard about it, and from my perspective, this is a seminal case. It is a case that, for someone who is a Hawaiian rights advocate, is long overdue, but all it does, in my opinion, is say something we all knew already existed. If you look at the materials I prepared, I began with a very simple statement, and it was this, "Without a resource, you can have no practice." For me, *Waiāhole* represents an opinion which basically says that we will care about the protection of the resources. In my paper that I presented, I go on and talk about some of the doctrine, some of the rules that are in the case, and I guess the fundamental things that I think have changed, and for all of you who are planners or who are bureaucrats or who are people who are deeply concerned about how we're going to meet this objective, the basic thing that has changed is what we have said, that those who make decisions about water are trustees. There is a picture in that case, and I'm a person that loves pictures, and the picture is a picture of an umpire. And if you read the case, it talks about how people who make these decisions, trustees, must not merely be umpires passively calling balls and strikes. Now Barry Bonds just hit seventy two, and I know that many of you here probably, in fact let me just see a show of hands. How many of you here play softball? You know, I got to say that you folks really need to spend more time on recreation.

The problem when you're playing softball, particularly if you're playing as an adult, which I love to do, and I don't do it as much because my knees are long gone, but the problem with playing softball is that they only give you one umpire when you're an adult playing in a *makuli* game. And when you're in the *makuli* league playing softball, that umpire's positioned behind the batter. And there might be a play at second base, and I want you to just imagine for a second a rather portly umpire standing behind the batter, and there's a steal on, and the guy runs to second base, and the umpire, looking through the pitcher, calls the play at second base. It's a close play; the throw was from the outfield. It is behind the second baseman, because he's looking from the outfield receiving the throw, and that umpire standing at home plate takes not one step to move out into the field to be able to see what's going on. For me, when I read that language in the opinion, you know, I've had some experiences with that situation, where the umpire is cemented into the ground and is not doing the things that he or she needs to do, which is to get out there, into the field. And see what's going on, ask the questions, get the data, do the analysis, and form a conclusion. Now, we know that science is evolving. We know that what we will know tomorrow will not nearly match what we knew yesterday, and it is that way with science. But this case says if you don't

know, then you need to adopt some precautionary principles which protect the resource. You can read all about that in what I've basically written, because it's there. I don't want to take any more time, but if you just remember that one principle. No more are we going to stand for umpires cemented behind home plate. They are going to have to get out there, ask the questions, and they are going to have to make decisions. I wasn't really going to talk about this, but Senator Hanabusa, you made just such a perfect segue for what I want to say now. I work for the Office of Hawaiian affairs, and everything that I've said is my own opinion, but imagine public trustees that are elected. What does that mean? Senator Hanabusa, I think, tried to indicate that you have your constituencies, and you have your political issues that need to be resolved, you have the need to have yourself elected in two years if you're a representative or four years if you happen to be in the Senate. How does that body go about implementing the public trust, one which is long-term and not short-term? I could write volumes about how that structure can lead to some very interesting situations at the Office of Hawaiian Affairs. And a lot of it is structural, but the legislature has a role to play here, and I see the role that the legislature has to play, that it has to provide the resources, the resources for those people to go out and to be able to do the studies that are necessary to make the decisions. How many planning departments have biologists on their staffs? You know, those are the kinds of questions we need to be asking. How many of them really have people who are cultural experts, so that they can define what it is that practice is, so that they can define how it is that we need to protect it?

I conclude my paper with something that all of us know whether you are *Kama'aina*, you are *malihini*, whoever you are, you are on this island, you live on islands, and you have a responsibility to *malāma 'āina*. And, for me, the thing that this case represents, it is just another case in a developing doctrine that our supreme court has embraced, and it is this: that we must *malāma 'āina*, that we must protect the land and the water, and we must protect the rights of those people to be able to practice their traditional and customary ways with respect to that resource.

KEM LOWRY: Thanks Colin. Charlene?

CHARLENE HOE: I'm here on behalf of myself and not on behalf of Kamehameha. The question of why am I here was one that I had in the very beginning. Perhaps it has to do with my job not as administrator of a governmental office or as a regulator on any level but simply as a citizen. I came to the issue of caring for water resources back in the earlier 1970s, and I came to it being much younger and much more naive than I am at this particular moment in time, so I looked to our state constitution for guidance.

To me, it was quite clear that we were to take care of our natural resources and, of course, that would include water as a primary resource. I was concerned about it because our family was trying to reopen some *lo'i* that had gone into remission for a period of time as the older generation passed away and the younger generation had yet to take up its mantle to *malāma* the *'āina*. And as we tried to do that, tried to access our appurtenant rights that came with the land and tend the *lo'i*, we found that the stream that had forever previous to that time in the experience of our family been perpetually running fully sufficient to feed all of the *lo'i* in our particular area was nearly dry. Water was being diverted *mauka*. We needed to find a way to restore water to the stream. So we did our research, we went to all of those agencies, all of those people that we thought were the caretakers of that resource and asked them for assistance. Can you help us find the cause? Can you help us find the solution? To the person, and this was at the county, at the state, and at the federal level, we were told, "It's not our *kuleana*, it's not our business, and furthermore, it's not really a big problem. It's just you folks in that particular little community."

Well, we didn't quite believe that, and so our particular community said well, let's go ask. Let's go statewide and see if our problem is just unique to our *ahupua'a*, or is it broader than that. We actually took up our family, and I say "we" because whatever we've done on these issues over the years, we've taken individual personal responsibility to do it, but we've never done it alone. It's always been multiple people coming together with positive energies to find solutions, rather than reasons why we cannot do problem solving. So, a group of people within our communities bundled up our families in our jalopies, sent our trucks to the neighbor islands, and literally went community to community asking, "Are you folks having water problems and what are those water problems?" We went from Kauai to Molokai, Maui, the Big Island, all around, and everyone that we visited had water problems. No one to that point had really said okay, what can we maybe do about it. As we started talking collectively statewide, one of the ideas that came to us was that maybe we could start with our own state constitution. Maybe we could look at the wording that said, take care of our water and natural resources, and make it a little bit stronger, a little bit clearer, to state that not only do we collectively have a responsibility, but also that our government, of which we are a part, has the responsibility to take the lead, and has the responsibility to set aside resources, both human and financial, to take that task on directly.

I ended up being the person with the short straw and was sent off to the Constitutional Convention in 1978 and became part of an effort, and I mean a very small part of a very broad effort statewide, to try to make the constitutional language clearer so that we could, in fact, have something to go to, some forum to go to, where more than just the economic voice prevailed,

which from our perspective at that point, seemed to be the only voice at the table in making decisions relative to the use and care of water resources. We felt it imperative to provide a forum where more voices could be at the table to look to the long-term care of our water resources, to look to the perpetuity of the health for that resource, not just how to make a dollar today in this time and in this generation. I think we have before us an imperfect vehicle with our water code, and I think we are in the process, collectively as a broad community, of having an ongoing dialogue of how do we best take care of our resource. It's not going to be resolved by one act.

The *Waiāhole* decision is a very important decision, as I would agree with Colin to my left, and it provides a very important step forward, that we need to be actively supporting and working toward resolutions, but I also agree that there are multiple needs to balance, and the question is how do we do that with an eye to forever, not just for today, but with an eye to forever? It takes leadership, yes, from our legislature, but maybe more importantly, from all of us.

I think that I have strong faith in many minds coming together to look for resolution. After serving in the Constitutional Convention and being much more naive, my hopes were, okay, the Constitution says we're going to have this entity, we're going to create this forum, we're going to have a water code, that would happen quickly and instantaneously, and we would have a chance to have a voice. As you know, it took nearly ten years to define what the water code would actually be, and how we would get a water commission. All of those balances, all of those competing voices were part of the dialogue for nearly ten years. Through the course of that, though, I think there was agreement on the need to care for the resource in perpetuity. To me, that's the hope; that common ground there, is the hope.

KEM LOWRY: Anyone want to say anything uplifting? I want to thank the panel. Prof. Sax, if you would be so kind to try to sum up for us perhaps in ten minutes.

PROFESSOR SAX: Well, the panel ended with the question, does anyone want to say anything uplifting? I'll volunteer. First, I think you're very fortunate in your human resources. I was amazed at the depth of knowledge, the commitment, the energy that was expressed by the various people from this state who have been on the two panels we heard. I think it's extraordinary, and you should feel very good about that. It seems to me that's a very positive sign, and I don't think there are very many places that you'd be able to put together panels like that.

Let me add a few words about what I would take home from what I heard today. I thought the point that the public trust is a philosophy and a tool was

just right on the mark. I think that's exactly right. I think it creates an opportunity to revise priorities, to utilize good science and to turn things around from the way they've traditionally been done so that, in the planning process, in the management and administrative processes that are going to go on, resources will be looked at first, and they'll be looked at in the context of good data about what the potential losses and potential opportunities are.

I also want to say something about a question that was raised: Does a court, as a result of a decision like this arrogate to itself authority as against the legislature? I think if you handle things right, that's not the case at all. I hope you picked up some of this from what Jan Stevens said. The importance of having a court that has a strong commitment to such a doctrine and a willingness in an energetic way to see that it's enforced is this. If things work right, it empowers the legislature to move forward, let's say it pushes the legislature to move forward on some agenda items that otherwise would not have received adequate attention. It energizes administrative agencies to act, and it stands ready in the background to make sure that they do their jobs. So the court is there, if you play it right, to help you get the job done and to create some incentives to move in ways that you haven't been able to do before. But you've got to take advantage of that opportunity.

I want to say something also about the fact that comments were frequently made about water controversies that go on and on and on and are endless. Again, if you listened carefully to what Jan was saying, and to the examples that he gave, he indicated that the experience in California has basically been that the potential of having endless litigation has induced people to sit down and to try to work out solutions. In most of these cases, we have worked out solutions that don't give anybody all that they want, but generate a resolution that's acceptable to everybody, and gives to resources a great deal more than they've had traditionally. I think that that's a very positive experience and one that you might want to look to for some potential guidance.

Another point that Jan made that I would also emphasize is that, in the aftermath of the *Mono Lake* case, which was viewed as a very radical decision by a court that had stepped outside of its ordinary role, there was a lot of talk about collapse and catastrophe, that nothing could be built anymore, that people would not get water, that food would not be available, and every other bad thing that you can think of. But as you can see, we're still more or less in business. Things haven't collapsed and people have responded in a positive way, and that's something to be encouraged about.

On a legal point that arose on the first panel, that is, concerns that were expressed about whether the public trust interpretation you have is the taking of property. I want to say a brief word about that. These are questions that will eventually find their way to the U.S. Supreme Court. My own observation is that the critical issue the U.S. Supreme Court will want to look

at is: what is the state law? The Court has been traditionally very deferential to states' interpretation of their own law. You heard Jan and me refer to states like Montana, Idaho, and Arizona. You heard one of the panelists refer to Maine and New York. The reason we referred to different states is that Maine and New York are states that have taken a very narrow view of the public trust. Hawai'i and others take a broad view of the public trust. I think you can expect the Supreme Court of the United States to follow where the states go, so states that have taken a narrow view are likely to have a much more limited public trust and stronger private rights in water. Another question that's important is whether the Court ultimately will take the view that these are rights and commitments, obligations that have in fact been a part of your law for a long time going way back, or whether they are very new ideas, that either the state court itself innovated or that came only at the time of your most recent constitution, which was 1978.

Those are the questions to which I don't know the answer, but those will be the critical questions. In many circumstances, the state courts will say, here is a provision in recent law, but in fact the recent law is simply an affirmation by the legislature or by a constitutional convention of something that had been accepted principles of law in the state for a long, long time. I think this is one question that will undoubtedly arise in the Hawaiian situation if your public trust doctrine is challenged on constitutional grounds.

Finally, I want to say that the public trust doctrine is a very important potential tool. It's not a cure-all, it isn't going to solve all of your resource problems, but it is an important and valuable tool as long as it's used right. As someone who's worked on environmental issues now for forty years, I want to say you are not going to solve all of your problems. This is a world of never-ending struggle. It just goes on and on and on, and you don't move forward as rapidly as you like. But if you're moving forward, even if you'd like to go by miles but you're actually going by inches, at least you're moving forward. As long as you keep at it, you know eventually you'll get there. The fact of the matter is that there never is enough money and everyone has that problem. And there are always powerful forces with projects that want to misuse resources. You have to face up to that reality and you work against it. Now you've got some newly recognized and powerful tools to help you. You also have a lot of knowledgeable and committed people to work on it. From across the water, we wish you good luck.