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Not in My Backyard: The Clash between Native Hawaiian Gathering Rights and Western Concepts of Property in Hawaii

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NOT IN MY BACKYARD *PASH V. HPC*: THE CLASH BETWEEN NATIVE HAWAIIAN GATHERING RIGHTS AND WESTERN CONCEPTS OF PROPERTY IN HAWAII

BY
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Western property law in Hawaii exists in an uneasy truce with the original native gathering practices that existed before the arrival of Europeans. The Author traces the development of Hawaiian law, from the early cases that severely restricted gathering rights to the more permissive results in PASH v. HPC. *The Author argues that this trend is a positive one, but that it must take place within the dominant fee simple land tenure system now in place in Hawaii.*

I. INTRODUCTION

It is the first day of spring and you drive out to the little piece of land you recently purchased in the country for a picnic. When you get there you find a group of people with axes busily chopping down several of the trees that give the property its appeal. You rush over to confront these people and save your trees. After much blustering, you learn that the culprits are a family that live on the next plot over. The mother calmly informs you that they, and their ancestors before them, have been harvesting trees from this land for firewood for several hundred years. You scream nasty words like "trespass," "litigation," and "damages" at them until they finally leave your property. Watching them go, you shake your head and laugh ruefully at the nerve of some people. After all, it is your land and your trees. Who cares if they and their ancestors have been doing it for hundreds of years? You have the law on your side; this is your private property.

But what if you live in Hawaii? And what if the family is a family of native Hawaiians? Do the same rules of exclusivity apply in this situation? Should they? Over the last several years there has been a growing trend in Hawaii to offer legal protection to native Hawaiian gathering rights even where these rights are in direct conflict with the Western system of land tenure now in place in the state. The impetus for this legal movement was the passage by Hawaiian voters in November 1978 of article XII, section 7, an amendment to Hawaii's Constitution. The amendment provides that:

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> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[1]

Many see article XII, section 7 as an explicit guarantee of the continuance of a number of religious, cultural, and subsistence practices by native Hawaiians.[2] As such, this amendment has the potential to create considerable havoc in a state where there is already tension between native Hawaiians and the non-native population.[3] Among the traditional rights protected by article XII, section 7 are native Hawaiian gathering rights.[4] In the years since the passage of article XII, section 7 there have been several cases attempting to trace the exact shape of these gathering rights.[5]

The dilemma is obvious. As with so many other places around the world, Hawaii's native people and their culture have been profoundly changed by contact with Westerners. A familiar pattern developed on the Hawaiian Islands. An economically and militarily stronger Western society has dominated a native people and their culture to the point where many of the customary and traditional practices of that native culture have been, if not extinguished altogether, at least made subservient to the norms of the imposed culture. Such has been the case with the traditional Hawaiian system of land tenure. The Western system of private land ownership, with its ingrained notion of exclusivity, is at best an uncomfortable fit with the land tenure system practiced by native Hawaiians before contact with Westerners.[6] The traditional Hawaiian land tenure system did not place great importance on the tenets of privacy and exclusivity in land use.[7] It is therefore unsurprising that the imported Western legal system in place in

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[1] HAW. CONST. art. XII, § 7.

[2] MELODY KAPIIALOHA MACENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 185, 216, 219-20, 227, 229, 240-41 (1991) [hereinafter HANDBOOK].

[3] A recent and tangible reflection of this tension can be seen in the results of a state-sponsored plebiscite that took place in August 1996. The plebiscite was sent to more than 80,000 persons of Hawaiian ancestry and asked the simple question: "Shall the Hawaiian people elect the delegates to propose a native Hawaiian government?" The Hawaiian Sovereignty Elections Council announced that the plebiscite had passed by a three-to-one margin. The results, released after the resolution of legal challenges brought by non-native residents of the islands who questioned the constitutionality of a vote that was restricted to one race of people, mean that an as-yet-undefined form of Hawaiian sovereignty will go forward. *Hawaiian Sovereignty is Favored Native Plebiscite "Dawn of New Age,"* ARIZ. REPUB., Sept. 14, 1996, at A8.

[4] Kalipi v. Hawaiian Trust Co., 656 P.2d 745, 748 (Haw. 1982). Native Hawaiians gathered both cultivated and non-cultivated items depending on the availability of the items in the particular *ahupua'a* in which they gathered. For example, native Hawaiians living in the uplands would supplement their diet of cultivated plants such as yam and taro with wild plants they gathered from the surrounding hillsides. HANDBOOK, *supra* note 2, at 223.

[5] *Kalipi*, 656 P.2d at 745 (discussed *infra* Part IV.A.); Pele Defense Fund v. Paty, 837 P.2 1251 (Haw. 1992) (discussed *infra* Part IV.B.); Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 903 P.2d 1246 (Haw. 1995) (discussed *infra* Part IV.C.).

[6] HANDBOOK, *supra* note 2, at 3.

[7] *Id.* at 4.

Hawaii has been used to legitimize the imposed fee simple property system, often at the expense of traditional native practices, such as gathering, that were viewed as incompatible with the fee simple system.[8]

The Western system of land tenure has been dominant in Hawaii for the last one hundred years.[9] However, when the government of Hawaii converted its land tenure system to one modeled on the Western fee simple system, it did reserve certain traditional and customary rights for the native Hawaiian tenants of an *ahupua'a*.[10] Section 7-1 of the Hawaii Revised Statutes expressly permits native tenants of an *ahupua'a* to retain gathering rights within the *ahupua'a*.[11] In addition, section 1-1 of the Hawaii Revised Statutes provides that native Hawaiians have the right to gather items that are not specifically included in section 7-1 where the gathering of these items can be demonstrated by a pattern of "Hawaiian usage."[12]

In practice, however, private property owners have often prevented native Hawaiians from exercising these traditional gathering rights.[13] Private property owners fear that allowing native Hawaiians to continue these traditional practices would create an intolerable invasion of their exclusive rights to use and occupy their land as fee simple land owners.[14] As a result, despite these express statutory protections, native Hawaiian gathering rights have traditionally taken a back seat to the concerns of the fee simple landowner in Hawaii.

In the 1960s, a grassroots movement directed at gaining judicial and legislative affirmation of native practices on the islands began to gain momentum. The passage of article XII, section 7, which guarantees native Hawaiians their traditional and customary rights for religious, cultural, and subsistence purposes, was the first major victory for the movement.[15] Along with sections 7-1 and 1-1, this amendment gave proponents of native Hawaiian gathering rights a powerful new tool in their struggle. The years since the passage of this amendment have seen the struggle move from the legislature to the courts. It is a struggle to reconcile gathering practices that developed in Hawaii when the people of the islands practiced a subsistence economy[16] with the mercantile system that developed in the years following contact with Westerners.[17]

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8 *Id.* at 223.

9 LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 169 (1989) [hereinafter PARKER].

10 *Id.* In so doing, Kamehameha III, King of Hawaii, stressed the importance of reserving these resource rights for the Hawaiian people so they could make their lands productive. *Id.* The *ahupua'a* was the basic land division in pre-Western Hawaii. *See* GLOSSARY OF TERMS, *infra* Part V (defining *ahupua'a*); *see also infra* Part II (discussing the traditional Hawaiian system).

11 HAW. REV. STAT. § 7-1 (1994).

12 *Id.* § 1-1; PARKER, *supra* note 9, at 168.

13 PARKER, *supra* note 9, at 169.

14 *Id.*

15 HAW. CONST. art. XII, § 7.

16 HANDBOOK, *supra* note 2, at 225.

17 *Id.*

This Comment will analyze the contours of this struggle by providing a historical framework with which to view the issues, and by surveying several key cases where the Hawaii Supreme Court has attempted to strike a balance between traditional gathering rights of native Hawaiians, and the modern system of fee simple land ownership and Western property rights now in place on the islands. A line of cases beginning with *Oni v. Meek*[18] in 1858, and continuing to this day with the recently decided case of *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*[19] demonstrate the difficulty the court has faced in trying to strike a balance between these sometimes antagonistic systems. This Comment will demonstrate both the strengths and weaknesses of the present system of land tenure in Hawaii. Although this analysis will argue for the continued expansion of native Hawaiian gathering rights, it will do so in the firm belief that any such expansion will have to take place within, not outside of, the dominant fee simple land tenure system now in place in Hawaii.

Part II gives a brief historical sketch of the development and nature of native Hawaiian gathering practices. Part III outlines the process by which Westerners gradually took control of Hawaii's government as the traditional Hawaiian land tenure system was replaced by a fee simple system of land ownership that was outwardly hostile to many of its practices. Part IV analyzes, in chronological order, a series of cases wherein the Hawaii Supreme Court has struggled to balance the legally protected interests of native Hawaiians in exercising traditional gathering practices with the demands of the modern fee simple land tenure system in place in Hawaii for exclusivity. Part V concludes by proposing that this line of cases demonstrates a positive evolution away from an either/or view of land tenure possibilities in Hawaii and toward a system in which the traditional practice of gathering can be tailored in ways that will allow its exercise in a modern Hawaii that operates under a Western land tenure system.

II. The Traditional Hawaiian Gathering System

Prior to contact with Westerners, the people of Hawaii had a highly developed culture and a stable land tenure system that supported an estimated 300,000 individuals.[20] Traditional Hawaiian culture was closely linked with the land on which the people lived.[21] The *ahupua'a* was the unit that was most closely related to the everyday life of the Hawaiian people.[22] An *ahupua'a* is an economically self-sufficient, pie-shaped unit of land with the nose of the pie starting in the mountain tops and spread-

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18 2 Haw. 87 (1858).

19 903 P.2d 1246 (Haw. 1995).

20 HANDBOOK, *supra* note 2, at 3.

21 PARKER, *supra* note 9, at 9. "The Hawaiians' closeness to the land was reflected in their religious rights and beliefs. Their belief in the gods of the sea, volcano, water, rain, and agriculture was an intrinsic part of their relationship with nature." *Id.*

22 HANDBOOK, *supra* note 2, at 3.

ing out along the shore.[23] The *ahupua'a* could be as large as 100,000 acres or as small as 100 acres.[24]

Gathering activities were an important part of this land tenure system. Gathering provided the tenant with items for both religious and medicinal practices, and, most importantly, with an additional source of food in times of famine due to drought or other adverse climate conditions.[25] Gathering took place in the uplands as well as along the sea coast. Hunting feral pigs was considered gathering.[26] The result of this extensive system of gathering was that early Hawaiians gathered on a great deal more land than they actually cultivated.[27] As an early Western observer of the islands remarked: "Hawaiian life vibrated from *uka*, mountain, whence came wood, *kapa*, for clothing, *olona*, for fish line, *ti-leaf* for wrapping paper, *ie* for rattan lashing, wild birds for food, to the k*ai*, sea, whence came *ia*, fish, and all connected therewith."[28]

Early Hawaiian culture followed a fairly strict hierarchical structure. "At the top were the *ali'i 'ai moku* and *kahuna nui* (priest), then the *ali'i'ai ahupua'a*, the *ahupua'a konohiki* and finally, the *maka'ainana*, literally, people of the land."[29] However, while the *maka'ainana* owed allegiance to those above them, they also had liberal rights to use all of the *ahupua'a* resources.[30] The traditional land tenure system in Hawaii was described as follows in a 1979 report on Hawaii's land and water resources:

> This ancient land system was thus sharply different from Western ideas of private land ownership. The ali'i nui (or mo'i) himself enjoyed no absolute ownership of all the land . . . . [t]he *maka'ainana* were free to leave the *ahupua'a* if they were unhappy with a particular chieftain (*ali'i*) or *konohiki*. In short, the

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[23] *Id.*

[24] *Id.* It is interesting to note one way in which the traditional Hawaiian land tenure system had something in common with a Western system of land tenure. Each of the *ahupua'a* had specific names and boundaries and, like the Western system's reliance on titles and deeds, native Hawaiians relied on certain individuals within the community who were trained to know the boundary lines of each *ahupua'a* and could be called upon to settle any disputes regarding rights to the land. PARKER, *supra* note 9, at 13-14.

[25] HANDBOOK, *supra* note 2, at 223. Early Hawaiians gathered any number of cultivated and non-cultivated items ranging from wild plants from the mountainsides to shellfish from the ocean shores.

[26] *Id.*

[27] *Id.* at 224.

[28] C.J. Lyons, *Land Matters in Hawaii No. 1*, 1 THE ISLANDER 103 (1975) (quoted in HANDBOOK, *supra* note 2, at 224) (emphasis added). These gathering practices were not without regulation. The *Konohiki*, or resident chief, of each *ahupua'a* would establish *Kapu*, or rules and regulations that dictated what items could and could not be gathered in that *ahupua'a*. These restrictions served the dual purposes of conserving resources and ensuring that the *Konohiki* had exclusive access to his favorite items. The Laws of 1839 established uniform gathering practices on all the islands. These laws established restrictions on gathering certain kinds of plants and shell fish. There were many other rules and restrictions under the Laws of 1839 that served to create a somewhat controlled system of gathering on the islands. HANDBOOK, *supra* note 2, at 224.

[29] *Id.* at 4.

[30] *Id.*

members throughout the political hierarchy shared a mutual dependence in sustaining their subsistence way of life.[31]

The *ahupua'a* was administered by the *ahupua'a* chiefs who were collectively known as the *Konohiki*.[32] The tenants of each *ahupua'a* had an absolute right to use the resources of the entire *ahupua'a* in order to "[h]unt, gather wild plants and herbs, fish off-shore, and use parcels of land for taro cultivation together with sufficient water for irrigation."[33] It should be understood that while a tenant of one *ahupua'a* had liberal use rights within his or her own *ahupua'a*, these rights did not give the gatherer the right to simply take whatever they desired from land cultivated by another.[34] Thus, while a native gatherer could travel freely upon the land in search of gatherable items, he or she had to respect the use rights of others to exclusively harvest items from land they cultivated.[35] This ability to travel over large tracts of land in search of gatherable items is an inseparable component of the practice of gathering. Unfortunately, it is also exactly the sort of thing that is made nearly impossible under the Western system of fee simple land ownership where land is divided into parcels with definite boundaries, and the owner of each parcel has an expectation of exclusive use of the land.

III. Western Influence and Conquest

"From 1778, when Captain James Cook first arrived in Hawai'i, until 1850, when the *Kuleana* Act was passed, Hawaiian society suffered a series of systematic shocks of an ideological, social, and, at times, physical nature."[36] In 1795, Kamehameha I, with the help of Western arms and al-

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[31] *Id.* at 4-5.

[32] Gina M. Watumull, Comment, *Pele Defense Fund v. Paty: Exacerbating the Inherent Conflict Between Hawaiian Native Tenant Access and Gathering Rights and Western Property Values*, 16 U. Haw. L. Rev. 207, 213 (1994) [hereinafter Watumull]. Most *ahupua'a* were divided into subdivisions called *ili*. Many have compared the Hawaiian land tenure system to the European feudal system. They point to the hierarchical structure in place and the fact that the commoners owed a work obligation to those above them as proof of this similarity. However, there are many significant differences between the Hawaiian land tenure system and the European feudal system that serve to distinguish them. First, unlike Europe, no concept of fee simple existed in Hawaii at this time and land holdings would not necessarily go to the heirs of the *Konohiki*. Second, a commoner in Hawaii could leave the *ahupua'a* at will if dissatisfied with his or her landlord. Serfs in feudal Europe had no such freedom of movement. *See* Neil M. Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 848-49 (1975).

[33] Handbook, *supra* note 2, at 4. "From the ancient Hawaiian perspective, water was not owned, but was subject to a right of use for productive purposes." *Id.* at 149. The issues surrounding water usage in Hawaii parallel those involved in gathering rights. Here as well there is a clash between a native concept of use rights and the Western private ownership system that has been imposed by outsiders. This conflict remains unresolved in Hawaii case law. However, the recent adoption of the state water code has provided at least a partial solution to many of these complex issues. *Id.*

[34] Parker, *supra* note 9, at 10.

[35] *Id.*

[36] Maivan Clech Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 Wash. L. Rev. 233, 237 (1989).

lies, unified all the islands under his rule, with the exception of Kaua'i.[37] Almost as soon as Westerners came to the islands they started to pressure the powers that be in Hawaii to alter the existing land tenure system to one that more closely resembled the system of their home countries.[38] Chief among those pressuring for a change in the land tenure system were the foreign traders who sought a more stable and familiar land tenure system in order to ensure the continuous flow of goods out of the islands.[39]

These traders wasted no time in establishing an active fur and sandalwood trade, as well as a prosperous whaling industry.[40] As these industries grew, the traditional gathering practices of native Hawaiians declined.[41] Hawaii's economy was transformed from one based on subsistence practices to a mercantile system that required a constant flow of labor in order to harvest the sandalwood and whales.[42] Many of the Hawaiians who had previously engaged in gathering practices in order to provide food and shelter for their families were now engaged full-time in the back-breaking labor required to support these industries.[43] These laborers began to rely on the payment they received from their work to buy the new and exciting goods now being introduced to the islands by the traders.[44] While gathering practices continued to provide many Hawaiians with food, clothing, and religious necessities, there was a decided decrease in overall gathering during this time.[45]

By 1839, the Islands' meager supply of sandalwood was exhausted, along with most of the whales.[46] Foreigners began to invest in large-scale Hawaiian agricultural production for the growing California market. Pressure to alter the existing land tenure system mounted as Westerners who were considering investing large amounts of money in Hawaiian agriculture demanded a more secure (i.e., more "Western") land tenure system.[47] These investors wanted Western growers to have fee simple title to the lands purchased for growing sugarcane and pineapple, the two principal crops being contemplated. In response to this pressure, the government of Hawaii enacted several constitutional and statutory measures. Most important among these was the Great *Mahele* of 1848[48] which divided all the

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37 HANDBOOK, *supra* note 2, at 5.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.* at 225. The rise of the sandalwood trade in particular had a profound effect on native Hawaiian's ability to gather. As the Western trader's demands for sandalwood increased, many native Hawaiians spent more and more of their time harvesting and transporting the sandalwood and less time engaged in native practices. There are stories of Hawaiian women pulling up sandalwood seedlings so that their children would not be forced to take part in this task. *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 5.

47 *Id.*

48 Act of June 7, 1848, 2 REV. LAWS HAW. 2152-76 (1925).

lands of Hawaii between the King and the Chiefs and recorded these transactions in the *Mahele* Book.[49] This plan was implemented by simultaneous mutual quitclaims by the King and the Chiefs wherein the King quitclaimed his interest in specific *ahupua'a* to the Chiefs and the Chiefs quitclaimed their interest in the balance of the land to the King.[50] The day after the completion of the *Mahele* the King gave 1.5 million acres of the 2.5 million acres he had claimed during the *Mahele* to the government.[51] These lands became known as Government Lands.[52]

The last step in the *Mahele* process was to determine what interests the *maka'ainana* or tenants had in the land.[53] The *Kuleana* Act of 1850 awarded the native tenants a fee simple title in their plots of land.[54] However, each tenant had to apply for this title in the *kuleana* and many failed to do so, either out of ignorance of the law, or a lack of money to pay the necessary fee.[55]

At the end of the *Mahele* period, 1.5 million acres of land were in the hands of the chiefs, another 1.5 million acres were set aside as Government Lands, one million acres still belonged to the king, and a mere 28,600 acres had been claimed by the people.[56] More legislation soon followed which gave Westerners the right to own and convey land in Hawaii, and provided for the alienation of Government Lands to Western interests.[57] The Great *Mahele*, and its related legislation, opened the door for the incredible growth of foreign land ownership and control on the islands.[58] This rapid expansion of industry and foreign land ownership inevitably led to a decrease in gathering among native Hawaiians.[59] Not surprisingly, the Western plantation and ranch owners wanted to acquire the most fertile lands. These were often the same lands that had traditionally supported a

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49 HANDBOOK, *supra* note 2, at 7.

50 *Id.*

51 Watumull, *supra* note 32, at 216.

52 *Id.*

53 HANDBOOK, *supra* note 2, at 8.

54 2 REV. LAWS HAW. 2141-42 (1925).

55 HANDBOOK, *supra* note 2, at 8. The plan adopted by the King and Chiefs for the division of the lands envisioned the *maka'ainana* receiving one-third of the land of Hawaii. However, only 26% of the adult male population received any land at all (for a total of 28,600 acres going to the *maka'ainana)*. This figure represents less than 1% of the total land of Hawaii.

56 *Id.* at 9.

57 *Id.* at 9.

58 By about 1896 or 1897, Westerners, who made up a mere 21% of the population, nevertheless controlled 57% of all taxable lands and paid 67% of the real estate tax in Hawaii. Meanwhile, native Hawaiians, who comprised 36% of the population, paid only 24% of the same tax. Lam, *supra* note 36, at 238.

59 HANDBOOK, *supra* note 2, at 225. As large tracts of lands on Hawaii were opened up to development for use as sugar and pineapple plantations, many of the trails that had provided native Hawaiians with access to neighboring *ahupua'a* were destroyed. As a result, gathering was made considerably more difficult. Plantation owners were rarely sympathetic to the needs of native Hawaiians in this area. It does not take much imagination to figure out that these land owners would not be terribly concerned with ensuring that native Hawaiians had a way to get across their land in order to take items from it. *Id.* at 212.

large portion of the gathering on the islands.[60] As these lands came under fee simple ownership they were taken out of the store of land upon which gathering could take place. This process continued over the next several decades. It was not until the passage of article XII, section 7, that the Hawaiian courts began to see cases in which native Hawaiians challenged refusals by fee simple land owners to recognize their statutorily protected right to gather.

IV. Judicial Expansion of Native Hawaiian Gathering Rights

Over the last one hundred years, land ownership in Hawaii has steadily evolved away from communal living and toward a Westernized system. Today, Hawaii is in many ways no different from any other state. Most of its residents live in an urban setting and rely on the wages they make from jobs in these cities to provide for the necessities of life. Hawaii has been broken up into fenced parcels of private property replete with "no trespassing" signs. Exercising traditional gathering practices has not been easy under these circumstances.

Gathering requires both large tracts of land on which to gather and the ability to travel freely between these tracts of land. The Western system of land ownership is hostile to both of these requirements. Under this system, land tends to be broken up into discrete parcels and the owner of each parcel normally has an expectation of exclusive use of the land. This reality must be contrasted with the protections offered to native Hawaiian gathering practices by sections 7-1 and 1-1 of the Hawaii Revised Statutes and the express mandate of article XII, section 7, which requires the protection of gathering rights that have been traditionally and customarily exercised by native Hawaiians.[61] The Hawaii Supreme Court has had to balance the expectations of exclusivity and ownership of the fee simple landowner with the statutorily protected rights of the gatherer.

A. Kalipi *and Its Precursor*

In addition to offering native Hawaiians the opportunity to gain fee simple title to their lands, the *Kuleana* Act of 1850 also sought to protect the rights of tenants to gain access to the sea and the mountains so they could continue to gather in their traditional manner.[62] However, in the 1858 case of *Oni v. Meek*,[63] the Hawaii Supreme Court held that the rights enumerated in the *Kuleana* Act were the exclusive rights held by tenants within the *ahupua'a*.[64] The plaintiff Oni had brought suit to recover the value of two horses, taken by the defendant landlord and sold as strays

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[60] Levy, *supra* note 32, at 857. "By 1852, thousands of acres of prime Hawaiian land were in the hands of foreigners. More importantly, Western property concepts were imposed on the legal structure and would facilitate the rapid, steady takeover of Hawaiian-owned lands during the next several decades." *Id.*

[61] Haw. Const. art. XII, § 7; Haw. Rev. Stat. §§ 1-1, 7-1 (1994).

[62] Handbook, *supra* note 2, at 151-52.

[63] 2 Haw. 87 (1858).

[64] *Id.*

after the defendant had found them grazing in the *ahupua'a* that he owned under fee simple title.[65]

The court considered the scope of the rights held by native Hawaiians under the now dominant Western property system and held that because Oni was not a resident of the *ahupua'a* in which he was pasturing his horses, he had no right to do so.[66] The import of this holding was that customary rights were assumed to cease upon the acquisition of fee simple title to a *kuleana* or *ahupua'a*. This was the last statement on the matter for almost a century. The next time the traditional rights of native tenants were addressed by the Hawaii Supreme Court was four years after the passage of article XII, section 7 in the 1982 case of *Kalipi v. Hawaiian Trust Co.*[67]

The plaintiff Kalipi owned a taro patch in the *ahupua'a* of Manawai and a house lot in the *ahupua'a* of 'Ohia, but Kalipi actually resided in the nearby *ahupua'a* of Keawenui.[68] Kalipi filed suit against the fee simple owners of the Manawai and 'Ohia *ahupua'a*, claiming he was entitled to gather in these *ahupua'a* despite the fact that he did not actually reside in them. He based this claim on the protections afforded him under sections 7-1 and 1-1 of the Hawaii Revised Statutes.[69] The fee simple owners of the respective *ahupua'a* argued that if the right to gather existed, it belonged only to residents of the *ahupua'a* in which the gathering rights were sought.[70] They argued that traditional gathering conflicted with the principle of fee simple land ownership and should not be allowed as a matter of policy.[71]

Ultimately, Kalipi's claim failed largely because he did not reside in the *ahupua'a* in which he sought to exercise gathering rights.[72] Despite this defeat, *Kalipi v. Hawaiian Trust Co.* represents an important victory for the proponents of native Hawaiian gathering rights in Hawaii. It was the first case to recognize that such a right had survived to the present day and it is useful to examine the specifics of the court's holding to see how this right was viewed.

The Hawaii Supreme Court began its opinion by asserting that while article XII, section 7 was not controlling on its decision, it clearly imposed an obligation on the state to preserve and enforce traditional and customary native tenant rights, including the right to gather in a traditional and customary manner.[73] Kalipi based his claim on the two separate statutory provisions that he claimed gave him the right to practice his gathering rights in the *ahupua'a* in question. The first of these statutory provisions

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65 *Id.*

66 *Id.* at 96.

67 656 P.2d 745 (Haw. 1982).

68 *Id.* at 747.

69 Watumull, *supra* note 32, at 230.

70 *Id.*

71 *Id.*

72 *Id.* at 231.

73 Kalipi v. Hawaiian Trust Co., 656 P.2d 745, 747-48 (Haw. 1982); Watumull, *supra* note 32, at 230-31.

was Hawaii Revised Statutes section 7-1.[74] Section 7-1 was adopted from section 7 of the *Kuleana* Act. Section 7-1 in relevant part provides that "where the landlords have obtained, or may hereafter obtain, *allodial* titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live."[75]

On Kalipi's section 7-1 claim, the court held that "lawful occupants of an ahupua'a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather those items enumerated in the statute."[76] In other words, the Hawaii Supreme Court set out three conditions precedent to the exercise of gathering rights under section 7-1: 1) the tenant must physically reside within the *ahupua'a* from which the item is being gathered, 2) the right to gather can only be exercised upon undeveloped lands within the *ahupua'a*, and 3) the right must be exercised for the purpose of practicing native Hawaiian customs and traditions.[77] Kalipi was not a resident of the *ahupua'a* in which he sought to gather, and it was on this ground that the court held against him.[78]

The court stressed the need to find the proper balance between the rights guaranteed by section 7-1 and recognized property interests in the *ahupua'a*.[79] The three conditions precedent that the court formulated aptly demonstrate this attempt to strike a balance. The court's rationale for requiring residency in the *ahupua'a* and the requirement that the gathering could only be done in furtherance of the practice of native Hawaiian customs and traditions were based on the plain meaning of the language of section 7-1.[80] There was no great leap of faith involved in instituting these conditions; section 7-1 seems fairly clear in requiring them.

The court's desire to strike a balance between the gathering rights of native Hawaiians and the property interests of landowners of the *ahupua'a* (themselves often native Hawaiians) can be seen most clearly in the judicially imposed requirement that the gathering rights of native Hawaiians be limited to the undeveloped lands within the *ahupua'a*.[81] The court justified this requirement by pointing out that although such a requirement is not expressly stated in section 7-1, it must have been the intent of the drafters of section 7-1 because to allow gathering on developed land would be an unjustifiable violation of the basic foundations of Western property law.[82] The court explained the requirement by stating that without it nothing would prevent residents from going onto fully de-

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74 HAW. REV. STAT. § 7-1 (1993).

75 *Id.* (emphasis added).

76 *Kalipi*, 656 P.2d at 749.

77 *Id.* at 745-50; HANDBOOK, *supra* note 2, at 226.

78 *Kalipi*, 656 P.2d at 752.

79 *Id.*

80 Watumull, *supra* note 32, at 231.

81 *Kalipi*, 656 P.2d at 752.

82 *Id.* at 750.

veloped lands to gather.[83] "In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers."[84]

It is hard to argue with the court's reasoning on this point. Indeed, by imposing a requirement that gathering be limited to only undeveloped land the court is perfectly in step with the traditional system of gathering. There was never a right to gather on the cultivated lands of another in Hawaii. It would be a strange sort of justice to allow today's native gatherers to extend their gathering to lands that would have been off limits under the native Hawaiian land tenure system. More importantly, there can be little doubt that such a restriction is absolutely necessary if there is to be any hope of finding a point at which native gathering can peacefully coexist with fee simple land ownership. It would simply be too much to expect land owners to stand idly by while native gatherers invaded their backyards and golf courses in search of gatherable items. By restricting native Hawaiian gathering rights to undeveloped property, the court makes a necessary and intelligent decision that creates the possibility of compromise and resolution.

The second part of Kalipi's claim was premised on the so-called Hawaiian usage exception set forth in Hawaii Revised Statutes section 1-1.[85] This provision provides that the common law of England is the law of Hawaii "except as otherwise expressly provided by the Constitution or the laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage.*"[86] The court interpreted the Hawaiian usage exception as allowing for "native understandings and practices which did not unreasonably interfere with the spirit of the common law."[87] The court went on to analogize the provision for Hawaiian usage to the English doctrine of custom "whereby practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law."[88] That said, the court then made it clear that section 1-1 does not incorporate all the "requisite elements" of custom.[89] Rather, the court held that "the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular location."[90]

The court went on to say that under its interpretation of section 1-1 these rights should only be allowed to continue "for so long as no actual

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83 *Id.*

84 *Id.*

85 HAW. REV. STAT. § 1-1 (1993).

86 *Id.* (emphasis added).

87 *Kalipi*, 656 P.2d at 751.

88 *Id.*

89 *Id.*

90 *Id.*

harm is done thereby."[91] This opinion has been widely criticized by advocates of native rights as an example of the court's attempt to restrain the doctrine of native Hawaiian rights that unduly interferes with established Western ideas of exclusivity.[92] This criticism seems overly harsh and ill-considered. When the court opines that these native tenant rights are acceptable so long as they do not "unreasonably interfere with the spirit of the common law,"[93] it represents a sound assessment of modern realities, not an unwillingness to recognize the importance of native rights. The court is willing to allow the exercise of native rights, but only so far as those rights do not unreasonably interfere with the land tenure system in place on the islands. While this holding may not be the ringing endorsement of native rights that many native Hawaiians were looking for, it does represent a well reasoned attempt to discover a place where these rights can be exercised within a Western land tenure system that is not likely to disappear.

The Hawaii Supreme Court's decision in *Kalipi* was significant for several reasons. First and foremost, the court established that traditional rights exercised by descendants of native Hawaiians for subsistence, cultural, and religious purposes are not subject to extinguishment simply because they may conflict with the principle of exclusivity historically associated with fee simple ownership of land. The court arrived at this statement of the law by closely scrutinizing sections 7-1 and 1-1 of the Hawaii Revised Statutes, as well as article XII, section 7 of the Hawaii Constitution. By doing so, the court gave the first significant interpretation of those provisions, at least as they relate to the gathering rights of native Hawaiians. Judicial recognition of the rights of native Hawaiians to practice their customary and traditional gathering rights even in the context of a Western property system was a significant victory for advocates of native Hawaiian rights.

At the same time, the decision in *Kalipi* evidences a court which is very aware of the possibility for conflict that such a holding creates and, as a result, crafts an opinion that is careful to place limitations on these gathering rights. The court reaffirms the traditional gathering rights of native Hawaiians, but in so doing places a residency requirement and a limitation to undeveloped lands on the gathering practices. The court's controversial holding that the exercise of traditional and customary native Hawaiian rights could occur as long as those practices do not cause any actual harm is a rationally based assessment of the type of compromise needed if the practice of native Hawaiian rights is to be integrated into a Western land tenure system.

Nevertheless, it is worth wondering how much this heavily burdened right to gather is worth when the right is limited to the *ahupua'a* where one resides, and is further restricted to only undeveloped land in the

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[91] *Id.*

[92] David J. Bederman, *Using the Law of Custom to Redefine Property Rights*, A.L.I. 73, 87 (1996).

[93] *Id.*

ahupua'a. After all, most native Hawaiians live in urban settings (*e.g.* Honolulu) where the *ahupua'a* simply does not exist, and even those Hawaiians who do live in a more "traditional" setting are most often surrounded by developed land on which they could not gather. Indeed, the right to gather under these circumstances is a wholly different right than that which was exercised in an earlier time. It did not take very long for the Hawaii Supreme Court to reevaluate its opinion in *Kalipi*. Just ten years later the court was once again faced with the task of defining the scope of the native Hawaiian right to gather in the face of the modern land tenure system in *Pele Defense Fund v. Paty*.[94]

B. The Disappearance of the Residency Requirement

The residency requirement that was one of the foundations of the Hawaii Supreme Court's opinion in *Kalipi* was done away with ten years later when the Hawaii Supreme Court held that native Hawaiian rights protected by article XII, section 7 of the Hawaii Constitution "may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[95] This decision abolished the Hawaii Supreme Court's precedent stretching back more than a hundred years which restricted native tenant gathering rights to the *ahupua'a* of residency.[96] It was extremely controversial on the Islands, inspiring some to predict widespread and open conflict between native gatherers and the owners of the undeveloped lands on which they would now be able to gather. Such hyperbole misses the mark. While it is true that the court's abolition of the residency requirement opens up new lands to be gathered, the fact that the court left the restriction on gathering on only undeveloped lands intact should ameliorate any major conflicts. That said, the court's decision to do away with the residency requirement reflects a significant and overdue change in the relative positions of native rights and Western land ownership on the islands.

The *Pele* case arose after the State Board of Land and Natural Resources (BLNR) exchanged approximately 27,800 acres of public trust ceded land[97] for 25,800 acres of privately owned land.[98] The public trust ceded land was known as the WAO Kele 'O Puna and the Puna Forest Reserve, and it had historically served as a common gathering area for tenants living in neighboring *ahupua'a*. Thus, the native Hawaiians who had traditionally gathered in the Puna Forest Reserve were not residents of the reserve.

The Pele Defense Fund (PDF) filed suit in both federal and state court against the BLNR alleging that the BLNR violated article XII, section

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94 837 P.2d 1251 (Haw. 1992).

95 *Id.* at 1272.

96 Watumull, *supra* note 32, at 208.

97 These are lands that the Republic of Hawaii transferred in conditional fee title to the United States when Hawaii was annexed in 1898. After Hawaii became a state, the United States transferred some of these lands back to Hawaii. HANDBOOK, *supra* note 2, at 26.

98 *Pele*, 837 P.2d at 1253.

7 of the Hawaii Constitution by exchanging the ceded lands.[99] PDF argued that this exchange of lands violated that section in two ways. First, PDF argued that the BLNR violated article XII, section 7 by exchanging ceded lands on which native Hawaiians exercised gathering rights that were protected by the constitutional mandate. Second, PDF argued that BLNR violated article XII, section 7 by continuing to deny native Hawaiians access to the ceded lands to exercise these traditional rights.[100] The Hawaii Supreme Court held that the first claim was barred by the State's sovereign immunity, but that the second claim was separate from the land exchange and therefore justiciable.[101]

In order to prevail, PDF had to clear the obvious hurdle presented by the residency requirement that was a cornerstone of the *Kalipi* decision. The native Hawaiians who sought to exercise their constitutionally protected gathering rights on the ceded lands never resided on those lands and would therefore seem to fail the residency requirement explicitly required by the *Kalipi* court.[102] Citing article XII, section 7, PDF claimed that it was not necessary to demonstrate that its members actually resided in the ceded lands, but only that they are tenants of an abutting *ahupua'a* who exercised traditional and customary rights on the lands.[103] In other words, PDF asked the court to dispense with the strict residency requirement adopted in *Kalipi*, which was based on Hawaii Revised Statutes section 7-1, in favor of a more expansive view of native Hawaiian gathering rights based on article XII, section 7.

The *Pele* court began its analysis by reminding the reader that the *Kalipi* court had expressly said that any analysis of native tenant gathering practices should be done on a case-by-case basis.[104] The court then went on to distinguish this case from *Kalipi*. It pointed out that while the plaintiff in *Kalipi* had been claiming the right to gather in a certain *ahupua'a* in which he did not reside based on the fact that he owned land in the *ahupua'a*, the *Pele* plaintiffs based their claim on the fact that they had customarily and traditionally been exercising their gathering rights on these lands for several generations.[105]

This difference was significant to the court because it placed *Pele* more squarely in line with the language of article XII, section 7. The court relied on the legislative history of article XII, section 7, which contained the statement that some traditional and customary rights protected by the provision may "extend beyond the *ahupua'a*."[106] The court interpreted this language as an indication that the committee "contemplated that some

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99 Watumull, *supra* note 32, at 210.

100 *Pele*, 837 P.2d at 1268; Watumull, *supra* note 32, at 239.

101 *Pele*, 837 P.2d at 1268; Watumull, *supra* note 32, at 239.

102 Kalipi v. Hawaiian Trust Co., 656 P.2d 745, 749 (Haw. 1982).

103 *Pele*, 837 P.2d at 1269; Watumull, *supra* note 32, at 239.

104 *Pele*, 837 P.2d at 1271 (citing *Kalipi*, 656 P.2d at 752).

105 *Id.*

106 *Id.*; Standing Committee Report No. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, 637 (1978).

traditional rights might extend beyond the *ahupua'a*."[107] This was in line with what the court saw as the committee's intent to "provide a provision in the Constitution to encompass all rights of native Hawaiians."[108] By this reading of the legislative history it became clear that the committee did not intend "to have the section narrowly construed" by the courts.[109]

The court based its analysis on article XII, section 7 of the Hawaii Constitution rather than on Hawaii Revised Statutes section 7-1 as the *Kalipi* court had done. This decision has great significance. Hawaii Revised Statutes section 7-1 has a far more restricted statement of native Hawaiian gathering rights than does article XII, section 7. Where section 7-1 contains a residency requirement and an enumerated list of items that can be gathered, article XII, section 7 has no express residency requirement and no enumerated list of items.

The court used the language of article XII, section 7 to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes"[110] as a guide in making its decision.[111] It reasoned that if the tenants of the surrounding *ahupua'a* had traditionally exercised their gathering rights in the Puna Forest Reserve, then these were rights that were customarily and traditionally exercised for subsistence, cultural and religious purposes by native Hawaiians. As a result, these rights were protected by article XII, section 7 regardless of whether these plaintiffs resided in the ceded lands.[112]

It was on this basis that the court espoused its controversial holding that "native Hawaiian rights protected by article XII, section 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[113] Perhaps even more significant than what the court said was what it did not say. While not doing away with the *Kalipi* court's requirement that native gathering rights could be exercised only so long as they do not cause any actual harm,[114] the tone of the court's decision in *Pele* gives the impression that the balance to be struck between native rights and the Western land tenure system in Hawaii is one that requires concessions from both sides. By doing away with the residency requirement while at the same time retaining the undeveloped land limitation, the court manages to follow the intelligent course of the *Kalipi* court. It recognized the absolute necessity of restricting gathering to undeveloped land if there is any hope of fitting it into a Western system of land tenure, and at the same time created a gathering right that has far more usefulness to native Hawaiians than it had before.

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107 *Pele*, 837 P.2d at 1271.

108 *Id.*

109 *Id.*

110 HAW. CONST. art. XII, § 7.

111 *Pele*, 837 P.2d at 1272.

112 *Id.*

113 *Id.*

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

C. PASH *and the Expansion of Native Hawaiian Gathering Rights*

Three years after the Hawaii Supreme Court's decision in *Pele*, the issue of native Hawaiian gathering rights in modern Hawaii once again came before the court in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*.[115] The case arose when Public Access Shoreline Hawaii (PASH) challenged a decision by the Hawai'i County Planning Commission (HPC) denying them standing to participate in a contested case hearing on an application by Nansay Hawai'i, Inc. (Nansay) for a Special Management Area (SMA) use permit.[116]

Nansay applied for the permit in order to pursue the development of a resort on the *ahupua'a* of Kohanaiki on the Big Island (Hawaii).[117] The resort included two hotels with more than 1000 rooms each, a golf course, a health club and retail shops stretching over 450 acres of shoreline.[118] HPC held that PASH, made up primarily of native Hawaiians whose ancestors had practiced gathering on the land where the development was to be built, did not have an interest in the issuance of the permit that was "'clearly distinguishable from that of the general public.'"[119] HPC then voted to deny the PASH contested case hearing request and to grant Nansay a SMA use permit in order to enable it to begin construction on the resort.[120]

The Intermediate Court of Appeals of Hawaii reversed HPC's decision and held that PASH had standing and should be given the opportunity to challenge the issuance of the SMA use permit to Nansay.[121] The Supreme Court of Hawaii heard HPC's appeal from this decision in August of 1995.[122] The court upheld the lower court's holding that the native Hawaiian members of PASH had gathering rights protected by article XII, section 7 of the Hawaii Constitution that could not be summarily extinguished by the state merely because these rights were deemed inconsistent with generally understood elements of the Western understanding of "property."[123]

It is a revolutionary notion that the exercise of traditional gathering practices by native Hawaiians is entitled to protection under article XII, section 7, regardless of any inconsistency with elements of the Western doctrine of property. It is a statement of the law that is unprecedented in the history of the Hawaii Supreme Court. This is especially obvious when it is noted that a mere twelve years earlier the Hawaii Supreme Court was willing to recognize such rights only where their exercise would not cause harm to the Western property system.[124]

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115 903 P.2d 1246 (Haw. 1995).
116 *Id.* at 1250.
117 *Id.*
118 *Id.*
119 *Id.* (citing HPC Rule 4-2(6)(B)).
120 *Id.* at 1251.
121 *Id.*
122 *Id.*
123 *Id.* at 1263.
124 Kalipi v. Hawaiian Trust Co., 656 P.2d 745, 751 (Haw. 1982).

The court was unapologetic about its stance and its distance from the stance of the *Kalipi* court. In fact, the court characterizes the *Kalipi* court's attenuated view of native Hawaiian rights as the result of that court's "preoccupation with residency requirements under HRS 1-1" which "obfuscated its cursory examination of Kalipi's alternative claim based on customarily and traditionally exercised rights."[125] In other words, much like the court in *Pele*, the *PASH* court based its recognition of the native Hawaiian gathering rights on article XII, section 7, not on the much more restrictive Hawaii Revised Statutes 7-1, which had been the basis of the *Kalipi* court's decision.

After a comprehensive survey of the development of the Western property system in Hawaii, the court made the remarkable statement that this examination had led it to the conclusion that "the Western concept of exclusivity is not universally applicable in Hawai'i."[126] In support of this contention the Hawaii Supreme Court cited the Oregon case of *Stevens v. City of Cannon Beach*,[127] in which the Oregon Supreme Court held that when plaintiffs who owned land along the shoreline in Oregon took title to their land "they were on [constructive] notice that exclusive use . . . was not part of the 'bundle of rights' that they acquired."[128] Not only is this a direct repudiation of 150 years of Hawaiian legal precedent, but it is a direct challenge to the viability of traditional Anglo-American notions of property law in Hawaii. The court held in no uncertain terms that when Nansay was issued its land patent in Hawaii it was necessarily issued a more limited property interest than the same land patent would entitle it to in another state without Hawaii's tradition of native rights.

In one of the understatements of the century, the court admitted that this "premise clearly conflicts with common 'understandings of property'" but expressed confidence that "the non-confrontational aspects of traditional Hawaiian culture should minimize potential conflicts."[129] What started in the *Kalipi* decision as a heavily qualified right to gather in modern Hawaii has evolved in a mere thirteen years into a right that could be as powerful as any contained in the Western property system. The exact parameters of this empowered right to gather are still being sorted out in the courts.[130] However, it is certain that after the *PASH* decision the possibility for conflict exists as never before.

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125 *PASH*, 903 P.2d at 1262-63.

126 *Id.* at 1268.

127 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1332 (1994).

128 *Id.* at 456.

129 *PASH*, 903 P.2d at 1268.

130 In February 1996, the Ninth Circuit Court of Appeals upheld a Hawaii district court ruling that the ruling in *PASH* did not give a family of native Hawaiians the right to exclusively occupy and use a fish trap located within a National Historic Park. While recognizing that the decision in *PASH* established that common law property rights do not limit customary rights existing under the laws of Hawaii, the Ninth Circuit makes it clear that no rights to exclusively use and occupy land can be derived from *PASH*. Pai'Ohana v. United States, 76 F.3d 280, 282 (9th Cir. 1996).

V. CONCLUSION

The Hawaii Supreme Court's decision in *PASH* effectively elevates the rights of native Hawaiians to gather in traditional and customary ways to the same level of legal importance as the most basic and fundamental concepts in Western property law. The *PASH* decision shows a court that is at last willing to concede that the fit between Hawaii's native people and their culture and Western concepts of property is not a perfect one. Hawaii's people and their native practices are not a smooth surface over which a system of land tenure that was successful in another place can be spread and expected to adhere. The contours of native Hawaiian history create wrinkles and bumps where the fit between the Western system and the native practices is threatened.

In *PASH*, the Hawaii Supreme Court recognized this problem and acted to remedy it by elevating the legal position of native Hawaiian practices to a level at least on par with that enjoyed by Western property rights on the islands. By doing so the court took an unprecedented and overdue step in the process of formulating a land tenure system in Hawaii that embodies the best of both systems, without disregarding either. However, the court may have sacrificed the workable and carefully wrought solution formulated by the *Pele* court in favor of one that is of unimpeachable morality but questionable workability.

GLOSSARY OF TERMS[131]

- *'aho*: Thatch; cord.
- *ahupua'a*: Land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (*ahu*) of stones surmounted by an image of a pig (*pua'a*), or because a pig or other tribute was laid on the alter as a tax to the chief; the land unit most closely related to the everyday life of the people.
- *ali'i 'ai ahupua'a*: Chief who rules an *ahupua'a*.
- *ali'i 'ai moku*: High chief, controlling an island or district; the one who receives the produce of the district.
- *ali'i nui*: High chief.
- *allodial*: Free; not beholden to any lord or superior; the opposite of feudal; fee simple title.
- *hoa'aina*: Tenant, caretaker, occupant, as on a *kuleana*.
- *'ili*: Land section, next in importance to *ahupua'a* and usually an administrative subdivision of an *ahupua'a*.
- *kapu*: Taboo, prohibition; sacred.
- *konohiki*: Land agent of an *ahupua'a* land division under the chief. In modern times, landlord or chief of *ahupua'a*.
- *kuleana*: Right, privilege, responsibility, title, property; as a result of the 1850 *Kuleana* Act, a tenant's plot of land, which could only include land which the tenant had actually cultivated plus a house lot of not more than a quarter acre.
- *Kuleana* Act: August 6, 1850 act authorizing the award of fee simple title to native tenants for their cultivated plots of land and house lots.
- *Mahele*: 1848 division of Hawaii's lands between the king and chiefs.
- *maka'ainana*: Commoner, people in general, citizen, subject. Literally: people of the land; supported the chiefs and priests by their labor and its products.
- *mo'i*: High chief, king, sovereign, monarch, ruler, queen.
- *ua koe ke kuleana o na kanaka*: "Reserving the rights of native tenants."

[131] Adapted from HANDBOOK, *supra* note 2, at 305-08.