



# KA NU HOU



"The News"

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## FROM THE CHAIR

We close out the final quarter of 1997 with three seminars in each of the next three months. First, this month, on October 31st is the annual litigation update seminar, chaired by Bill Deeley. Confirmed speakers include Bob Godbey, Phil Leas, Carl Christensen and Jerry Guben. Subjects include cases on leasehold conversion, res judicata and collateral estoppel, landlord remedies and termination by sellers of agreements to sell. The seminar will be held at the HEI Co. Training Center commencing at 8:30 a.m.

Second, on November 18th, the Section will co-sponsor a land use seminar, keynoted by Federal Circuit Judge S.J. Plager who will discuss regulatory takings. Other confirmed speakers include Honolulu DLU Director Jan Sullivan, Hawaii Department of Health Deputy Director Bruce Anderson, Honolulu Deputy Corporation Counsel Jane Howell, Land Use Research Foundation Director Dan Davidson, Corps of Engineers Attorney Pat Billington, and Ben Kudo and Ken Kupchak. Subjects will include development plans and their enforcement, state-county regulatory jurisdiction, implications of PASH for land use permitting, impact of selected environmental laws and programs on land use permitting, and land development conditions (impact fees and other exactions). I have the honor of chairing this seminar, which will be held at the Japanese Cultural Center, commencing at 8:30 a.m.

Third, on December 9th and 10th, the Section will co-sponsor a "must-attend" real estate law seminar at the HSBA annual meeting. Chaired by Deb Chun, Mark Hazlett and Mitch Imanaka, the seminar will intro-

duce and cover selected topics from the new, three-volume Hawaii Real Estate Manual which will be available to registrants there for the first time. Covering virtually every conceivable topic associated with the practice of real estate law in Hawaii, the 38-chapter manual is edited by the chairs of the seminar (Chun, Hazlett and Imanaka). Presentations will be by selected chapter authors.

Finally, I would like to thank my fellow officers Sheila Sakashita, Tom Rosenberg and Jan Kobayashi for their help and support during this past year. What we accomplished - CLE, liaison with other sections, membership, newsletter - is due to their efforts. Special thanks to Board Member and Past Chair Nancy Grekin for designing and implementing the Section's Web Site, and to Board members Randy Brooks and Harrilynn Kameenui for our new Section bylaws. Thanks also to the most supportive and engaged board in the HSBA. We regularly filled the HSBA conference room with our elected and past-chair representatives (including our neighbor island representatives via conference call) at our monthly meetings, and the discussion was always full and animated. I am sure Sheila Sakashita will have the same wonderful support in 1998 as she assumes the chair of the Section in December, and I wish her every success.

With Aloha,

David C. Callies,  
Chair, Real Property and  
Financial Services Section

## THE BACKLASH AGAINST PASH:

LEGISLATIVE ATTEMPTS TO  
RESTRICT NATIVE HAWAIIAN RIGHTS

By D. Kapua Sproat\*

(Editor's note: Footnotes have been omitted  
but are available through the Section.)

### INTRODUCTION

In 1995, the Hawai'i Supreme Court reaffirmed the pre-eminence of Hawaiian custom and usage in State law with its decision in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* ("PASH").<sup>1</sup> In what many view as a landmark decision, the Court held that a public interest group with Native Hawaiian members had standing to participate in a county-level contested case hearing because Native Hawaiian interests are distinct from those of the public at large.<sup>2</sup> The Court further held that land titles in Hawai'i confirm only a "limited property interest when compared with typical land patents covered by Western concepts of property so that Native Hawaiians will retain rights with regard to undeveloped land, to pursue traditional activities."<sup>3</sup>

Certain large land owners, developers, and title guarantee companies were strongly opposed to the Court's clarification of the scope and content of traditional and customary usage, and introduced a backlash of bills in the 1997 session of the Hawai'i Legislature. Some claimed that the Court's de-



cision interpreting Hawai'i's constitutional and statutory provisions for Native Hawaiian rights unduly encumbered landowners' private property interests.<sup>4</sup> Specifically, they alleged that the rights of Native Hawaiians to access undeveloped land for various religious, subsistence, or cultural purposes "has led to difficulties in selling, buying, and financing real property in the State of Hawai'i."<sup>5</sup> Those interests also contended that the Court's reaffirmation of Native Hawaiian rights created a state of "uncertainty"<sup>6</sup> which led to "an immediate and direct negative impact on employment opportunities, personal income, and the economic and social welfare of all of Hawai'i's citizens."<sup>7</sup>



In response to those arguments, practitioners of Native Hawaiian traditions defended their rights on historical and legal grounds in the legislative hearings that followed. Due in part to the way Western concepts of private property were established in Hawai'i, those countering the backlash explained that the protection of customary practices was and is necessary for the perpetuation of Hawaiian culture and lifestyles in an evolving society.<sup>8</sup> This coalition claimed that State constitutional and statutory laws with a historical basis in laws of the Hawaiian Kingdom clearly reflect the unique "background principles" of property in Hawai'i.<sup>9</sup>

This disagreement over the content and extent of private property rights and uses in the islands exploded at the beginning of the 1997 legislative session. Bills were introduced in both the Senate and the House of Representatives to regulate the exercise of traditional and customary uses. In the numerous hearings that ensued, the legality and limitations of State regulation of traditional and customary rights was furiously debated.

In an attempt to understand the intricacies of this disagreement, this paper will examine the fundamental differences in West-

ern and Native Hawaiian property concepts and laws in Hawai'i as it relates to certain legislative proposals. Part I traces the legal evolution of Native Hawaiian rights from their historical development in the Kingdom of Hawai'i to their current codification in Hawai'i Revised Statutes § 1-1 and § 7-1 ("HRS 1-1" or "1-1" and "HRS 7-1" or "7-1"). Part II illustrates the expansion of protection by Article XII Section 7 of the Hawai'i Constitution ("XII-7"), and Part III analyzes the impetus for and legal illegitimacy of current legislative attempts to regulate and re-define Native Hawaiian rights. This paper concludes that the protected status of Native Hawaiian rights, as codified by the Legislature and interpreted by Hawai'i's judiciary, reflects unique Hawaiian social and legal relationships to real property. In light of this history, regulatory attempts to circumvent the fundamental duty of respecting and accommodating traditional and customary practices violates current laws, undermines judicial integrity, and threatens Hawaiian culture.

## I. THE LEGAL EVOLUTION OF NATIVE HAWAIIAN RIGHTS

In an attempt to understand the backlash against *PASH* and disagreements over concepts of property in Hawai'i, an overview of Native Hawaiian rights is imperative. A summation of early Hawaiian land tenure principles, as well as the text and background of two statutory provisions, establish the basis for early protections of traditional and customary uses in contemporary Hawai'i.

### A. Concepts and Laws Relating to Land Tenure in Eighteenth Century Hawai'i.

Hawai'i's concepts and laws relating to land tenure are distinct within United States law.<sup>10</sup> Much of this difference is attributable to the islands' unique cultural and historical background.<sup>11</sup> Before be-

ing overthrown by the United States in 1893, Hawai'i was an independent nation. Although the constitutional monarchy governing the Kingdom at the time of its overthrow adopted principles similar to Western property law, those precepts evolved from Hawaiian customs and traditions.<sup>12</sup>

Prior to the documented arrival of Westerners in 1778, the prevalent system of land tenure was an intricate and interdependent arrangement based on land use and control.<sup>13</sup> Native Hawaiians lived in reciprocity with the 'aina (land base), which they believed would sustain them if properly respected and cared for.<sup>14</sup> The land was not commodified and could not be bought or owned.<sup>15</sup> Under the pre-contact system, the 'aina was an embodiment of the *akua* (god or gods), and as direct decedents of the *akua*, Native Hawaiians were responsible for utilizing the 'aina in ways that respected that relationship and benefited everyone.<sup>16</sup>

For the most part, the social structure and resource management of the islands (*na moku*), divided the 'aina like pieces of a pie, with boundaries following natural land divisions, and stretching from the mountains down to the sea.<sup>17</sup> *Moku* were divided into *moku* (districts), which in turn were comprised of *ahupua'a* (land units).<sup>18</sup> Each *ahupua'a* was further subdivided into *'ili* (individual farming parcels).<sup>19</sup>

These land divisions were administered by a socially stratified political system resembling a pyramid (leadership positions increased in number as they decreased in rank).<sup>20</sup> At the top of the pyramid was the *akua*.<sup>21</sup> Below the *akua* was an *ali'i* class, headed by a *mo'i*.<sup>22</sup> The *mo'i* appointed loyal followers within the ruling class (*ali'i 'ai moku*, *ali'i 'ai ahupua'a*, *konohiki*) to manage individual *ahupua'a* or *moku*.<sup>23</sup> These *ali'i* directed the *maka'ainana*, or class of resident tenants, in their care of the land.<sup>24</sup>

Pre-contact society was largely communal in the sense that *maka'ainana* cultivated the resources of the *ahupua'a* (both land and sea) to provide for their communities of relatives, both close and distant.<sup>25</sup> Although individuals were responsible for specific tasks, all members of society shared access to the natural resources necessary for survival.<sup>26</sup> Those who cultivated *kalo* (taro) shared with others who tended the *loko'i'a* (fishpond), as well as those who raised 'uala (sweet potato). Although individuals had their own house plots, they utilized and were responsible for other resources of the *ahupua'a* beyond the boundaries their *kuleana*.<sup>27</sup> Specifically, *maka'ainana* enjoyed numerous rights including access to public areas of an *ahupua'a*, lots for cultivating food, shared use of water for wetland and dry-land crops, fishing, hunting, and gathering rights, as well as the right to erect structures for sleeping, cooking, eating, storage and camping.<sup>28</sup>

*Maka'ainana* did not own the land they tended in a "fee simple" sense.<sup>29</sup> Instead, they occupied land managed by an agent of the *mo'i*, and paid taxes in the form of goods and/or labor.<sup>30</sup> This relationship was mutually beneficial in the sense that *mo'i* and his/her agents served as intermediaries for the common people by managing resources and making political decisions on their behalf.<sup>31</sup> In return, the *maka'ainana* provided for the basic needs of the *ali'i*.<sup>32</sup> Although either party could disregard its responsibilities, this was not very common.<sup>33</sup> If a *konohiki* was cruel or abusive, the *maka'ainana* were free to move to another district.<sup>34</sup> Likewise, if a *maka'ainana* was not fulfilling his or her tasks, s/he could be evicted or killed.<sup>35</sup> Despite the fact that the *maka'ainana* did not own the land they occupied, they were "fixed residents"<sup>36</sup> and often had more security than the *ali'i*. If a *mo'i* was replaced as a result of natural death or warfare, control of the land was usually redistributed without displacing the *maka'ainana*.<sup>37</sup>

### B. The Imposition of Change.

Once Hawai'i became known to the Western world, the pre-contact system of land tenure was heavily strained, as an additional demand for goods was placed on the *maka'ainana*. Foreign vessels sought provisions to stock their ships,<sup>38</sup> and by 1810 a growing market for the export of sandalwood also developed.<sup>39</sup> As these demands increased, communities were less able to meet even their own needs because the *maka'ainana* were sent to gather sandalwood instead of caring for the resources of the *ahupua'a*.<sup>40</sup> The *ali'i*, meanwhile, accumulated growing debts by purchasing merchandise from merchants and traders on credit.<sup>41</sup> Most importantly, introduced diseases exacted a heavy toll on the Native Hawaiian population, as previously limited contact with bacteria common elsewhere increased the impact of foreign diseases on Hawaiians.<sup>42</sup>

While the native population struggled to maintain its health and way of life, foreign traders and merchants tried repeatedly to collect sandalwood debts. Eventually, warships from the note holders' native countries came to induce payment.<sup>43</sup> Foreign demands for land also mounted as newly arrived sailors, merchants, and missionaries sought parcels in lease or fee.<sup>44</sup> *Maka'ainana* were simultaneously evicted as *ali'i* traded or lost their lands to foreigners.<sup>45</sup>

In attempt to quell the scramble for land and the disenfranchisement of the *maka'ainana*, Kamehameha III (the reigning *mo'i*, also known as Kamehameha III) promulgated a Declaration of Rights in 1839, and a Constitution in 1840.<sup>46</sup> The Declaration of Rights was published to protect the interests of all inhabitants of the Hawaiian Kingdom,<sup>47</sup> thus providing protection for *maka'ainana* independent of the *ali'i*.<sup>48</sup> The Constitution of 1840 affirmed this guarantee and, with regard to land ten-

ure, declared that the *mo'i* held all of the land in the islands in trust for the *ali'i* and *maka'ainana*, and that no land could be conveyed without his consent.<sup>49</sup> Despite the promulgation of these documents, the disputes over land continued.

After a six-month takeover by the British in 1843, and under pressure from his foreign advisors, Kamehameha III made another effort to secure the sovereignty of his nation and a land base for his people.<sup>50</sup> In 1845, he created a Board of Commissioners to Quiet Land Titles to delineate the scope and outcome of all land claims.<sup>51</sup> After reviewing the current system of land tenure, the Commissioners instituted a process for settling all land claims in the Kingdom.<sup>52</sup> Despite creation of this Commission, few claims were resolved until the interests of the *mo'i*, *ali'i* and the *maka'ainana* were separated.<sup>53</sup>

After tremendous debate between the *mo'i*, his foreign advisors, and the Privy Council, a collective decision was made to institute a system of fee simple ownership whereby the *mo'i*, *ali'i* and *maka'ainana* would receive title to individual parcels.<sup>54</sup> In what became known as the Mahele of 1848, Kamehameha III first reserved 'aina he wished to retain.<sup>55</sup> The *ali'i* then quit-claimed their interests in Kamehameha III's properties, and he relinquished his interest in theirs.<sup>56</sup> In order to receive a title deed, *ali'i* were required to petition the Land Commission and pay a commutation fee.<sup>57</sup> The *maka'ainana* did not participate directly in the Mahele; instead, 1.5 million acres were given to the government "subject always to the rights of native tenants."<sup>58</sup>

Due in part to the continuing displacement of the *maka'ainana* even after the Mahele, the Kuleana Act of 1850 was passed. Under this Act, fee simple titles for the lands that *maka'ainana* occupied and improved were made available, without a commutation fee.<sup>59</sup> In section 7 of this Act,

*maka'ainana* were also granted rights of gathering, access, and water from other parts of the *ahupua'a*.<sup>60</sup> Section 7 was written by Kauikeaouli and included in the Act due to his concern that a "little bit of land even with allodial title, if they [the people] be cut off from all other privileges, would be of very little value."<sup>61</sup> *Kuleana* occupants were thus afforded unencumbered access within their *ahupua'a* in order to utilize resources necessary to make their *kuleana* productive.<sup>62</sup> Although the *konohiki's* permission was initially required before these rights could be exercised, this condition was eliminated during the next legislative session due to "difficulties and complaints" of interference with the free exercise of *maka'ainana* rights.<sup>63</sup>

Despite these and other efforts to preserve the rights of Native Hawaiians and allow continued exercise of traditional and customary practices amidst the rapid changes in Hawaiian society, developing Western influences made ancestral lifestyles increasingly less viable.<sup>64</sup> Many Native Hawaiians, however, incorporated traditional and customary practices into their contemporary lifestyles and continue to perpetuate their culture in various ways. While some Hawaiians remain reliant on these practices for daily subsistence, others pursue customs for purely recreational purposes.

### C. Early Statutory Protection of Traditional and Customary Uses by the State of Hawai'i.

The continued practice of traditional and customary uses, as discussed in section IB above, is partially enabled by two statutory provisions: HRS 1-1 and 7-1. On the eve of statehood in 1959, the Admission Act made "[a]ll Territorial laws in force in the Territory of Hawai'i at the time of its admission into the Union . . . continue in force in the State of Hawai'i, . . ."<sup>65</sup> Because the 1900 Organic Act similarly

adopted the laws of the Hawaiian Kingdom as those of the Territory,<sup>66</sup> HRS 1-1 and 7-1 actually codify for the State various acts of the legislature of the Hawaiian Kingdom.

HRS 1-1 provides that:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or the laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage, provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.<sup>67</sup>

This section codifies "custom" in Hawai'i, subordinating English and American common law to traditional and customary Hawaiian practices. In addition, it expressly accedes to judicial precedent of the Kingdom of Hawai'i. This substantial deference is due to the defining role that custom played in early Hawaiian law.<sup>68</sup>

The State also provides a second statutory protection for traditional and customary practices. HRS 7-1 declares 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, for their own private use, but they shall not have the right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses, which individuals have made for their own use.<sup>69</sup>

HRS 7-1 makes Section 7 of the Kuleana Act of 1850 applicable in the State of Hawai'i.<sup>70</sup> The rights of *ahupua'a* tenants to gather enumerated items for personal use, and to access other portions of the *ahupua'a*, are therefore preserved. This section also vests *ahupua'a* tenants with rights to adequate water for cultivating crops.

## II. THE CONSTITUTIONAL PROTECTIONS OF 1978

Despite legislative recognition of traditional and customary rights, judicial decisions from both the Kingdom of Hawai'i and the first twenty years of statehood limited the scope and content of Native Hawaiian rights.<sup>71</sup> Although the State judiciary interpreted HRS 1-1 and 7-1 more broadly than Kingdom courts, rights of access, gathering, and water were modest. With the passage of a constitutional amendment in 1978, however, the Court's affirmation and protection of Native Hawaiian rights increased notably.

### A. The Constitutional Amendment.

In 1978, several provisions of the State Constitution were amended in a Constitutional Convention. One hundred and two delegates, with a wide range of backgrounds and interests, took part in the proceedings.<sup>72</sup> Among the delegates there existed a "genuine feeling that the Hawaiian culture and people were the host people of this state . . . and as such should be protected above and beyond others."<sup>73</sup> In response to specific concerns about access and gathering rights, an effort was made to raise current statutory protections to a constitutional level, thereby making traditional and customary uses an "inviolable right."<sup>74</sup> After being drafted in the Convention, and ratified by Hawai'i's voters, Article XII, Section 7 now mandates that:

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.<sup>75</sup>

This section places an affirmative duty on the State to respect and preserve traditional and customary rights. Article XII, Section 7 was included to "preserve the small remaining vestiges of a quickly disappearing culture"<sup>76</sup> by recognizing that traditional and customary rights are "personal rights . . . inherently held by Hawaiians and do not come with the land."<sup>77</sup> The Legislative history of the Amendment further delineates that, due to recent attempts to prevent practitioners from "following subsistence practices traditionally used by their ancestors,"<sup>78</sup> it was necessary to "provide the State with power to protect these rights and to prevent any interference"<sup>79</sup> with them. The State was also granted regulatory authority "to prevent possible abuse as well as interference with these rights."<sup>80</sup> The Hawai'i Supreme Court's interpretation of this provision significantly expanded the scope of protections for traditional and customary rights.

### B. Judicial Interpretation of Native Hawaiian Rights Subsequent To Article XII, Section 7.

After the 1978 Constitutional Convention and the ratification of Article XII, Section 7, judicial interpretations of Native Hawaiian rights began to reflect the State's duty to affirm and protect traditional and customary uses.<sup>81</sup> Most recently, the Court re-examined the scope of the statutory and constitutional protection of Native Hawaiian rights in *PASH*.<sup>82</sup> *PASH* (a public interest group) and an individual Native Hawaiian (Angel Pilago), opposed the application of a Japanese-owned development corporation (Nansay) for a County-level Special Management Area ("SMA") Use Per-

mit to develop a resort complex in the *ahupua'a* of Kohanaiki, on the island of Hawai'i. After holding a public hearing, the Hawai'i County Planning Commission refused to hold a contested case hearing for *PASH* and Pilago on the grounds that their interests were not "clearly distinguishable from that of the general public."<sup>83</sup> Instead, the Planning Commission denied their request and issued Nansay an SMA permit.<sup>84</sup> *PASH* challenged this ruling in the Third Circuit Court, which reversed the Commission's decision and remanded the case to the Planning Commission for a contested case hearing.<sup>85</sup> On appeal, the

Intermediate Court of Appeals affirmed the circuit court decision with respect to *PASH* but reversed it with respect to Pilago.<sup>86</sup> After considering Nansay's appeal, the Hawai'i Supreme Court held that (1) the circuit court had jurisdiction to consider the claims, (2) *PASH* had standing, so a contested case hearing should be held, and (3) land patents in Hawai'i confirm only a limited property interest, as compared with Western land patents/concepts of property, whereby "Native Hawaiians will retain rights, with regard to undeveloped land, to pursue traditional activities."<sup>87</sup>

Upon examining Article XII, Section 7, and HRS 1-1 and 7-1, the Court observed that further inquiry into the extent that practices endured under State law were not precluded by either *Kalipi* or *Pele*.<sup>88</sup> After considering the practices at hand, the Court ruled that Article XII, Section 7 is binding on administrative agencies (in that case, the Hawai'i Planning Commission), conferring the obligation to protect traditional and customary rights previously limited to state and county governments.<sup>89</sup>

The Court devoted considerable attention to the extent of practices preserved under 1-1, noting that *Kalipi* specifically refused to decide the "ultimate scope of tra-

ditional rights under HRS 1-1."<sup>90</sup> The Court also distinguished the doctrine of custom in Hawai'i in several respects. First, contrary to the "time immemorial" standard used by English and American common law, traditional and customary practices in Hawai'i must be established in practice by November 25, 1892.<sup>91</sup>

Second, the Court articulated a three-point test for the doctrine of custom specifying first that a custom is *consistent when measured against other customs*; second, a practice is *certain in an objective sense*; and third, a traditional use is *exercised in a reasonable manner*.<sup>92</sup> The Court further explained that the balance leans in favor of establishment of a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it."<sup>93</sup>

Third, the Court declined to limit the exercise of traditional and customary rights to individuals of Native Hawaiian descent. In a footnote, the Court refused to decide whether descendants of citizens of the Kingdom of Hawai'i who were not of Native Hawaiian descent could assert rights protected by HRS 1-1.<sup>94</sup> The Court also "expressly reserved comment" on whether non-Hawaiian members of an *ohana* could claim rights under XII-7.<sup>95</sup>

Despite the fact that *PASH* affirmed *Kalipi* and *Pele*, it went on to highlight several nuances in traditional and customary rights. The Court expressly declined Nansay's invitation to overrule *Pele* and instead re-affirmed the decision, stating that the mandate of Article XII, Section 7, "normally associated with tenancy in an *ahupua'a*, may also apply to the exercise of rights beyond the physical boundaries of that particular *ahupua'a*."<sup>96</sup> Second, the decision recognized that Native Hawaiians have a unique claim to traditional and cus-

tomary rights under 1-1 and XII-7. Yet, the Court did not view this independent claim as foreclosing non-Hawaiians from exercising protected uses. Finally, the Court's decision emphasized the historical basis for traditional and customary rights, the role of background principles of property in evaluating current uses, and the distinction between Hawaiian and English or American custom.

Since the addition of Article XII, Section 7 in 1978, the Hawai'i Supreme Court's decisions increasingly reflect the State's solemn duty to preserve Native Hawaiian rights. This renewed commitment to Hawaiian principles and uses is not an abstract creation. It reflects the judiciary's respect for the populace's effort to acknowledge Hawai'i's unique history by enshrining it in a constitutional provision.

### III. LEGISLATIVE ATTEMPTS TO REGULATE NATIVE HAWAIIAN RIGHTS

The Court's interpretation of statutory and constitutional provisions relating to Native Hawaiian rights significantly increased the scope of protection for traditional and customary uses. Cases decided since the adoption of Article XII, Section 7 of the Constitution also exhibit the Court's willingness to fulfill its duty to affirm and protect these rights. Because the Supreme Court of the United States declined to review *PASH*, the Hawai'i Supreme Court's interpretation of Article XII, Section 7, and HRS 1-1 and 7-1, is final until it is modified by either the State or Federal Supreme Court.<sup>97</sup> Despite this finality, attempts have been made to limit the continued exercise of Native Hawaiian rights. In light of the statutory and constitutional protections for traditional and customary privileges, the legitimacy of recent regulatory attempts must be care-

fully examined.

#### A. Recent Regulatory Efforts.

In response to the Court's affirmation of the pre-eminence of traditional and customary usage in *PASH*, several bills were introduced during the 1997 legislative session to dilute the impact of recent court decisions discussed in Part II above. Legislators focused on the "uncertainty" created by *PASH* and presented bills to "remedy the situation." These attempts to dilute the judiciary's rulings in the Legislature are most obvious in Senate Bill 8 ("SB 8") and House Bill 1920 ("HB 1920").<sup>98</sup>

##### 1. Senate Bill 8: Relating To Land Use.

SB 8 was pre-filed on January 15, 1997 by Senator Randy Iwase (D-district 18: Wahiawa, Mililani). This bill sought to provide private landowners with assurance of property title by instituting a process of determining and registering all traditional and customary uses exercised on a parcel of land.<sup>99</sup> SB 8 proposed that no traditional or customary practices could be legally exercised unless a practitioner was issued a Certificate of Registration of Native Hawaiian Right.<sup>100</sup> Individuals interested in continuing customary practices would have been required to initiate and complete a process of petitioning for and establishing any traditional and customary uses.

SB 8 attempted to amend HRS Chapter 205, extending the authority of the Land Use Commission ("LUC" or "Commission") to resolve all Native Hawaiian claims.<sup>101</sup> Practitioners would have borne the burden of establishing, by a clear preponderance of the evidence, that (1) they were a descendant of individuals inhabiting the Hawaiian islands prior to 1778 (via a genealogy chart), and (2) that the traditional and customary practice they wished

to continue was established on the identified parcel of land prior to November 25, 1892, by the petitioner's ancestors (via documents or records).<sup>102</sup> This information had to be supplemented with the petitioner's name, address, list of lineal descendants, and a description of the land on which s/he sought to continue practicing, and filed with the LUC.<sup>103</sup>

Within thirty days of filing, the Commission would have had to notify the landowner that a petition was received via certified mail or publication.<sup>104</sup> The landowner could respond to the petition and request a contested case hearing within a reasonable period.<sup>105</sup> If the landowner responded accordingly, a contested case hearing would have been held in conformity with the Hawai'i Administrative Procedure Act, HRS Chapter 91.<sup>106</sup> If the Landowner failed to respond, the Commission could issue a certificate granting the practitioner access "over, across, or upon the undeveloped land"<sup>107</sup> if the use was reasonable and would not "cause hardship to the landowner or pose an unreasonable restriction on the landowner's intended use of the property."<sup>108</sup>

The Commission might, however, impose conditions on the practitioner to prevent "unreasonable activities that may interfere, impede, or hinder the private landowner's use or possession of the undeveloped land."<sup>109</sup> The LUC could also terminate or modify certificates upon the petition of the landowner and a showing that the use caused hardship or was otherwise unreasonably restrictive.<sup>110</sup>

Petitions would only be considered for parcels of "undeveloped land."<sup>111</sup> SB 8 limited this definition to property upon which no structure or improvement existed, and no grading, grubbing, or building permit was issued. Paths, walkways, and greenways were considered improve-

ments and also made parcels ineligible for traditional and customary uses.<sup>112</sup> If an individual currently exercised traditional or customary uses on lands that did not fall within SB 8's definition of undeveloped land, that usage was not eligible for registration, and therefore could not be legally continued.

After being introduced and passing its first reading on January 15, 1997, SB 8 was referred to the Senate Committee on Water, Land, and Hawaiian Affairs.<sup>113</sup> Co-chairs for the Committee, Randy Iwase and Malama Solomon (D- district 1: Kohala, Kawaihae, Honoka'a, Laupahoehoe, Papaikou), scheduled the bill for a hearing on February 4, 1997. Although nearly forty individuals submitted written testimony, an additional twenty arrived at the hearing to give oral testimony. Several classes of high school students also attended, submitting petitions in opposition to SB 8.

Over 90% of the testimony presented at the hearing opposed the bill's passage. Of the individuals supporting SB 8, almost all mentioned the burden the *PASH* decision imposed on Hawai'i's landowners. Interestingly enough, only one large landowner (Estate of James Campbell) presented oral testimony in support of the bill. The remainder of the supporters represented development interests, title insurance firms, and construction companies.

A wide range of interests opposed the bill. Scholars and practitioners from the Native Hawaiian community presented vigorous opposition. Native Hawaiian rights and environmental lawyers and law students were also present. Finally, non-Hawaiian citizens concerned about SB 8's negative effects on all of Hawai'i's residents also encouraged the Senators to let the bill die in committee.

Due in part to the amount of testimony submitted, the co-chairs deferred action on SB 8. On Tuesday, February 11, 1997, Senator Iwase announced two amendments to the bill in Senate Draft One of SB 8: (1) adding the Office of Hawaiian Affairs as a party to all contested case hearings in order to help determine what uses were traditional and customary, and (2) allowing landowners and petitioners to make settlement agreements any time during the registration process. In a unanimous vote, the Senate Committee on Water, Land, and Hawaiian Affairs passed SB 8 that afternoon, referring the bill to the Senate Committee on Ways and Means.<sup>114</sup>

While the bill was pending in Ways and Means, a new coalition of powerful Hawaiian interests was formed in opposition to the bill.<sup>115</sup> Hula practitioners concerned about the impact of regulatory efforts like SB 8 on Hawaiian culture and lifestyles came together as *Ilio 'Ula o Kalani*.<sup>116</sup> On February 25, 1997, the coalition held a twenty-four-hour vigil at the State Capitol to demonstrate dissatisfaction with SB 8, urging the Ways and Means' co-chairs to let the bill die in committee.<sup>117</sup> On Wednesday, after the demonstrators refused to let Senators Iwase and Solomon explain their positions, Solomon killed the bill by ripping it to pieces in front of the crowd.<sup>118</sup> Some spectators were unimpressed by this display since Solomon voted in favor of SB 8 and was otherwise unwilling to stop the bill while it was in her committee.<sup>119</sup> Despite the fact that the legislature's attempt to enact SB 8 was short-lived, the same issues of customary rights were raised by HB 1920.

##### 2. House Bill 1920: Relating to Real Property.

HB 1920 was introduced on January 24, 1997, by Representative Calvin Say

(D- district 18: St. Louis Heights, Palolo, Kaimuki). The explicit purpose of the bill was to respond to recent Hawai'i Supreme Court decisions that "dramatically affected the nature of real property in Hawai'i."<sup>120</sup> Like SB 8, HB 1920 asserted that the "Court's affirmation of traditional and customary rights has clouded title and limited landowners' ability to use their property."<sup>121</sup> The bill further explained that the present uncertainty of land titles and property rights "poses a serious threat to the State's economic and social well-being."<sup>122</sup> HB 1920 sought to exercise the State's authority under Article XII, Section 7 of the State Constitution to "clarify and regulate"<sup>123</sup> the practice of traditional and customary uses.

Instead of establishing a registration process, HB 1920 created a declaratory cause of action that could be initiated in circuit court to "determine the nature and extent of customary and traditional practices in land."<sup>124</sup> Both landowners and petitioners were eligible to institute such actions.<sup>125</sup> Finally, any suit brought under HB 1920 would have been given preference over all other civil actions.<sup>126</sup>

Petitions filed by practitioners required the same types of evidence as SB 8: (1) name and address, (2) documentation proving that the petitioner descended from individuals inhabiting the Hawaiian islands prior to 1778 (via genealogy chart), (3) evidence establishing that the petitioner was lawfully occupying (as opposed to temporarily residing in) an *ahupua'a*, (4) a detailed description of the practice and areas utilized (including tax map parcel, and owner), (5) written or other evidence showing that the practice "pre-existed and was not terminated by the Mahele of 1848, continued to be exercised as of November 25, 1892, and has been customarily exercised by Native Hawaiians on the land identified."<sup>127</sup>



Petitions filed by landowners required: (1) name and address, (2) a specific and detailed description of the land (including tax map parcel/s), and (3) identification of all potential or actual persons eligible to claim a right to exercise traditional and customary practices in the land.<sup>128</sup>

After a summons was issued, potential claimants as well as known claimants who, after due diligence could not be served, could have been served by publication.<sup>129</sup> Notice had to be published in an English language newspaper of general circulation in the circuit where the action was filed, once a week for at least four weeks.<sup>130</sup> A copy of the summons also had to be posted on the land involved in the litigation.<sup>131</sup>

A default judgment would be issued against all individuals who failed to respond to the summons.<sup>132</sup> Trials would otherwise be set where petitions were contested.<sup>133</sup> Individuals claiming traditional and customary practices bore the burden of establishing their claim by a preponderance of the evidence.<sup>134</sup> Practitioners had to affirmatively demonstrate that their practice was "reasonable" and would not result in "actual harm" to other interests, in addition to substantiating the elements of their petition.<sup>135</sup>

At the conclusion of this process, courts were charged with determining the "nature and extent," if any, of customary and traditional practices.<sup>136</sup> HB 1920 further authorized courts to issue decrees with the effect of a final judgment.<sup>137</sup> The court could also impose conditions on existing uses, when the decree was issued, or in the future.<sup>138</sup>

HB 1920 additionally made certain types of land unavailable for traditional and customary uses: (1) all land zoned urban, (2) physically altered land, or parcels improved by grading, grubbing, landscaping, agricultural activities, (3) land covered by quiet title, and (4) land registered pursu-

ant to Chapter 501.<sup>139</sup>

Finally, HB 1920 purported not to affect the proceedings of any agency.<sup>140</sup> The bill explained that if an agency exercised discretionary authorization or granted a permit subject to traditional and customary practices (as established, or being decided under HB 1920), the agency fulfilled its constitutional duty to protect such rights.<sup>141</sup>

After the bill was introduced and passed its first reading, HB 1920 was assigned to the House Committee on Hawaiian Affairs. Chairman Ed Case (D-district 23: Manoa) scheduled a hearing on the bill on Thursday, February 13, 1997. Chairman Case began the hearing by reading Article XII, Section 7 of Hawai'i's Constitution, HRS 1-1, and excerpts from the *PASH* decision. Fifty-seven individuals submitted written testimony for the hearing: about one-third in favor and two-thirds in opposition to the bill. After testimony was received, the House Committee on Hawaiian Affairs deferred action on the bill indefinitely, and Chairman Case encouraged those in opposition and in support of the bill to get together and work out a solution.

Despite the fact that SB 8 and HB 1920 did not become law through the 1997 legislative session, the backlash against *PASH* continues.<sup>142</sup> After both bills were killed, two resolutions were introduced pertaining to the regulation of traditional and customary rights. House Concurrent Resolution 276 and House Resolution 197 ("HCR 276/HR 197") proposed that the Office of Planning of the Department of Business, Economic Development, and Tourism ("DBEDT") facilitate discussions of all interested parties and seek consensus on the appropriate regulation of traditional and customary rights under Article XII, Section 7. HCR 276/HR 197 was written and introduced by Representative Case. After being offered, the resolution was

heard and passed out of the Hawaiian Affairs Committee on March 20, 1997. The Hawaiian Affairs Committee amended the bill including the Department of Land and Natural Resources to assist DBEDT, and providing monthly progress reports to individuals interested in the discussions. The resolution was also approved by the House Committees on Judiciary and Finance without amendment and was adopted by the full House. The resolution also crossed over to the Senate, but was not scheduled for a hearing by Iwase or Solomon.<sup>143</sup>

Senate Concurrent Resolution 230, with identical text to Senate Resolution 114, was introduced on March 14 by the Senate Ways and Means Co-Chairs Carol Fukunaga (D-district 12: Tantalus) and Lehua Fernandez-Salling (D-district 7: Lihue, Hanapepe, Waimea, Ni'ihau). That resolution sought to fund a study of traditional and customary rights directed by the William S. Richardson School of Law at the University of Hawai'i at Manoa, in consultation with the community-at-large. The resolution requested the inclusion of *'Ilio 'Ula o Kalani*, and student groups representative of Native Hawaiian and other local interests. After being introduced, the resolution was referred to the Senate Committee on Water, Land and Hawaiian Affairs. Co-Chairs Randy Iwase and Malama Solomon did not schedule the resolution for a hearing and it died in committee.

Although Article XII, Section 7 allows for regulation of traditional and customary use rights, the necessity and compatibility of such regulation with local interests, culture, and law continues to be debated.<sup>144</sup> In light of the unsettled nature of this issue, an analysis of SB 8 and HB 1920 provides insight on what elements of regulation (if any) are acceptable and workable.

#### B. Analyzing SB 8 and HB 1920.

Although SB 8 and HB 1920 used different methods to regulate Native Hawaiian rights, these bills embodied many of the same concepts and utilized similar definitions and conditions. The following section analyzes four elements common to both bills before discussing two points on which they differ. SB 8 and HB 1920 will be simultaneously examined to determine whether they are (1) constitutional, (2) in compliance with HRS 1-1 and 7-1, and (3) socially and culturally appropriate.

The three criteria selected for analysis enable a thorough investigation by considering the effects and implications of federal laws in addition to principles unique to Hawai'i. These criteria also factor in the practical effects of current regulatory efforts. Beyond the legal issues, this analysis examines SB 8 and HB 1920 to determine if they are workable, affordable, and appropriate.

#### 1. Legal and Cultural Criticism of the Common Approaches of SB 8 and HB 1920.

Both SB 8 and HB 1920 attempted to restrict traditional and customary rights by limiting exercise to Native Hawaiians, *abupua'a* tenants, and undeveloped land, and establishing arduous methods of verifying a use. Although some criteria are necessary to distinguish between "legitimate" and "opportunistic" practitioners, the conditions imposed by both bills were inconsistent with Hawai'i's constitutional, statutory, and judicial standards. In addition, they were difficult, if not impossible, to satisfy.

##### a. *Restriction to Native Hawaiians*

SB 8 and HB 1920 limited the "legal" exercise of traditional and customary practices to ethnic Hawaiians.<sup>145</sup> Because Article XII, Section 7 of Hawai'i's Constitution protects the rights of "descendants of

Native Hawaiians[.]"<sup>146</sup> this restriction comported with the facial construction of the State Constitution. The legislative history of the Amendment and passages in *PASH*, however, contemplate the extension of traditional and customary rights to non-Hawaiians.<sup>147</sup>

Although Native Hawaiians are viewed as having a "different legal basis" for traditional and customary rights, the notion that certain customs and uses may be exercised by non-Hawaiians was also expressed in Article XII, Section 7's legislative history.<sup>148</sup> While discussing which rights vested in ethnic Hawaiians as opposed to non-Hawaiians, Frenchie De Soto, Chair of the Constitutional Convention's Committee on Hawaiian Affairs noted that "any right enjoyed by a Native Hawaiian is also truly enjoyed by those who are non-Hawaiian. If you are fortunate enough to marry a Hawaiian, certainly you may follow her right down to the beach."<sup>149</sup> Although Article XII, Section 7 of the Constitution provides special protection for traditional and customary uses exercised by ethnic Hawaiians, it does not foreclose non-Hawaiians from exercising protected uses.<sup>150</sup> SB 8 and HB 1920's reservation of customary rights for Native Hawaiians therefore mischaracterized Article XII, Section 7, and was open to constitutional challenge.

Furthermore, neither 1-1 or 7-1 specify that only Native Hawaiians are eligible to claim traditional and customary rights under either statute.<sup>151</sup> HRS 1-1 protects *customs* established by Hawaiian usage. Persons of various ethnic or racial backgrounds could arguably exercise uses protected by 1-1, if that custom was established in practice by November 25, 1892.<sup>152</sup>

In 1892, the Hawaiian Kingdom was inhabited by citizens of numerous ethnic

and national extractions. Regardless of their descent, subjects of the Hawaiian Kingdom may therefore have practiced, if not established, usage now considered traditional and customary. In *PASH*, the court declined to limit the exercise of customary use rights to Native Hawaiians, refusing to decide whether descendants of citizens of the Kingdom of Hawai'i who were not of Native Hawaiian extraction could assert rights under 1-1.<sup>153</sup> The Court also "expressly reserved comment" on whether the rights of non-Hawaiian members of an *'ohana* were protected by Article XII, Section 7.<sup>154</sup> SB 8 and HB 1920 therefore created a limitation that the Court charged with interpreting the Constitution declined to impose.<sup>155</sup>

Finally, the practical effects of limiting traditional and customary uses to Native Hawaiians would have severely limited the cultural practices of many island residents.<sup>156</sup> Mixed-race families could no longer engage in whole-group outings as non-Hawaiian members would be precluded from participating. In addition, local residents who enjoyed traditional pastimes like fishing or lei making would not have their practices protected as a matter of right.<sup>157</sup> Finally, non-Hawaiians trained in Hawaiian customs (like the hula) could not lawfully gather the items necessary for their continued practice.<sup>158</sup>

Supporters of the bills argued that clear guidelines were necessary for regulation.<sup>159</sup> In order to avoid conflict and confrontation between landowners and practitioners, lawmakers needed to determine who is entitled to continue customary practices.<sup>160</sup> Because these traditions are rooted in Hawaiian culture, a restriction to ethnic Hawaiians may seem appropriate. Yet this line of reasoning fails to consider other methods of preventing the inauthentic exercise of custom, like managing the *use* as opposed to the *user*.

## b. Restriction to *ahupua'a* tenants

SB 8 and HB 1920 also limited the exercise of traditional and customary uses to *ahupua'a* tenants.<sup>161</sup> Although this reservation was consistent with Article XII, Section 7's phrasing, "tenants of an *ahupua'a*," the limitation must be examined in light of the legislative history of the Amendment. Article XII, Section 7 sought to "preserve the small remaining vestiges of a quickly disappearing culture"<sup>162</sup> and "did not intend to have the section narrowly construed or ignored by the courts."<sup>163</sup>

The Hawai'i Supreme Court is responsible for interpreting the State Constitution.<sup>164</sup> In *Pele*, the Court held that "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."<sup>165</sup> SB 8 and HB 1920, therefore, contradict both the legislative history and the Court's interpretation of XII-7, which expanded traditional rights to non-resident tenants of an *ahupua'a*.<sup>166</sup>

Second, neither HRS 1-1 or 7-1 contain any limitation to *ahupua'a* tenants.<sup>167</sup> As discussed in the above section, 1-1 protects established uses independent of residency. Any confusion over this issue was clarified in *Pele* (later affirmed in *PASH*), when the Hawai'i Supreme Court sanctioned the exercise of traditional and customary rights by non-tenant occupants of an *ahupua'a*.<sup>168</sup> HRS 7-1 likewise protects rights of access, gathering, and water, without a residency requirement.<sup>169</sup> HB 1920 and SB 8's limitation of traditional and customary rights to *ahupua'a* tenants therefore imposed conditions inconsistent with the text and judicial interpretations of 1-1 and 7-1.

Bill supporters again responded that guidelines were necessary to resolve disagreements over legitimate exercises of customary rights.<sup>170</sup> Furthermore, a residency re-

quirement was utilized in *Kalipi* to prevent abuse of such rights. Specifically, the "extension of these rights to absentee landlords would be contrary to the intention of the framers in that the right would thereby be spread to those whose only association with the *ahupua'a* may be by virtue of an economic investment."<sup>171</sup> Despite this reasoning, *Kalipi* was clarified in *Pele* to accommodate the established practices of a community that gathered beyond the boundaries of the *ahupua'a*.<sup>172</sup>

Third, the social and cultural impacts of this condition are enormous.<sup>173</sup> Due to the rapid rate of development and tendency to focus urban growth in certain sections of an island, some *ahupua'a* have been completely developed, while others remain relatively untouched. Under SB 8 and HB 1920, Native Hawaiians living in fully developed areas like Honolulu would have been unable to legally exercise any traditional and customary rights. Because contemporary *ahupua'a* do not provide all of the products necessary to further subsistence, religious, and cultural practices, many practitioners go outside of their communities to gather necessary products.<sup>174</sup> To now use the concept of *ahupua'a* to limit the exercise of traditional and customary uses is a legal fiction that misconstrues pre-contact understandings and ways of living.

In addition, many Native Hawaiians moved to urban areas seeking employment or housing.<sup>175</sup> Should those individuals go back to the areas where they were raised, or visit family on other islands, they would not be eligible to join family members in customary practices.<sup>176</sup> SB 8 and HB 1920 do not address or account for these problems.

## c. Definition of development

SB 8 and HB 1920 restricted the exer-

cise of traditional and customary uses to undeveloped land. Both bills utilized similar definitions, allowing the continuance of custom only on parcels where (1) no structures exist, (2) no improvements were made, and (3) no grading or grubbing occurred.

Although Article XII, Section 7 authorizes the State to regulate traditional and customary uses, the legislative history explains the reasons for and extent of the State's authority. The Amendment was added in response to actions by "private landowners, large corporations, ranches, large estates, hotels and government entities"<sup>177</sup> which interfered with the exercise of traditional and customary rights. In light of those constraints, "reasonable regulation [wa]s necessary to prevent possible abuse as well as interference with these rights."<sup>178</sup>

Opponents of the bills may therefore argue that, although the State is empowered to regulate the exercise of Native Hawaiian rights, it should do so only to address potential or actual abuse.<sup>179</sup> Because such abuse has not been conclusively established, HB 1920 and SB 8 exceed the State's regulatory authority.<sup>180</sup> Proponents of the bills might respond that difficulty in securing title insurance and other complications in selling their property amounted to abuse, and that individual entitlements to exercise traditional and customary rights need to be explored.<sup>181</sup>

Second, neither HRS 1-1 or 7-1 restrict the exercise of traditional and customary practices to undeveloped land.<sup>182</sup> The Hawai'i Supreme Court in *Kalipi* expressly acknowledged that the undeveloped land limitation "is not, of course, found within the statute (7-1)."<sup>183</sup> Yet the Court used that limitation to avoid conflict between practitioners and landowners.<sup>184</sup> More recently, in *PASH* the Court declined the "temptation to place undue emphasis on

non-Hawaiian principles of land ownership,"<sup>185</sup> electing "not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed.'"<sup>186</sup> Instead, the need to make determinations on a case-by-case basis was emphasized.<sup>187</sup>

Opponents of the bills therefore argued that the standardized definitions for fully developed and undeveloped failed to reflect the Court's ruling on how such determinations should be made.<sup>188</sup> Bill supporters responded that a failure to provide a clear definition of "fully developed" clouds title.<sup>189</sup> If landowners are unclear as to the status of their land, transferring property may become onerous if parties unfamiliar with the exercise of traditional and customary uses in Hawai'i are skeptical of investing.

Third, the social and cultural impacts of using the proposed definition of development are extensive.<sup>190</sup> If land is considered "developed" when grading, grubbing, or building permits are issued or walkways exist, many areas where traditional and customary uses are now being exercised, without harm, will become legally unavailable. Instead of targeting problematic uses, SB 8 and HB 1920 summarily eliminate all uses in a given area, regardless of effect. As explained in the section above, this limitation also disproportionately impacted practitioners living in urban areas.

## d. Proving traditional and customary usage

The methods SB 8 and HB 1920 used to establish that a use was traditional and customary are difficult to reconcile with Article XII, Section 7.<sup>191</sup> The requirement of identifying rights with respect to a specific parcel of land conflicted with the legislative history of the constitutional provision classifying traditional and customary uses as "personal" rights.<sup>192</sup> Like the freedom

of speech and other fundamental rights, "[r]ather than being attached to the land, these rights are inherently held by Hawaiians and do not come with the land."<sup>193</sup> Because the legislature did not require all residents to register their inherent rights, SB 8 and HB 1920 singled out Native Hawaiians and imposed special hardships on them as a class.<sup>194</sup>

Second, the requirement of tracing actual use to 1892 is a questionable interpretation of 1-1.<sup>195</sup> Although the Hawai'i Supreme Court determined that a custom must be established by 1892 in order to be protected, it did not contemplate or require documentation of the use in question to that date.<sup>196</sup> It is therefore legally consistent with 1-1 to prove that a custom was generally established in practice prior to 1892 without being site-specific.

Due in part to the way Western concepts of private property were established in Hawai'i, the Court recognized that the right "to exercise traditional and customary practices remains intact notwithstanding arguable abandonment of a particular site."<sup>197</sup> In addition, the Court established a three-point test for the doctrine of custom in Hawai'i requiring (1) *consistency* as measured against other Hawaiian customs, (2) *certainty* in an objective sense, and (3) *reasonable* use.<sup>198</sup> Defining the *reasonable* use requirement, the Court further explained that the balance leans in favor of establishment in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it."<sup>199</sup> SB 8 and HB 1920's requirements for establishing a traditional use are therefore inconsistent with the current law.<sup>200</sup>

Third, the social and cultural impacts of establishing that a use was traditional and customary made the process overly burdensome.

Native Hawaiian culture is based on oral traditions. Yet, use of the Hawaiian language was discouraged from the 1800's into the twentieth century, and many Hawaiians are now unable to speak their native tongue.<sup>201</sup> Due in part to this loss of language, few individuals are able to trace their genealogy to 1778.<sup>202</sup> In addition, because the traditions were oral, the written documentation now needed to show that a use was "established" was not the norm. This lack of written documentation, when combined with the loss of language, creates a situation in which many Hawaiians cannot even make use of the few written sources that are available.

Due to development, many families moved from their original *kuleana* (if they ever received one) and cannot establish use of a specific parcel to 1892. In pre-contact society, *maka'ainana* were "free to leave and take up residence in another *ahupua'a*, thereby transferring their vested rights, such as fishing, to a new area."<sup>203</sup> The continuous use and residency requirements imposed by SB 8 and HB 1920 are thus inconsistent with both Hawaiian history and the legislative intent of Article XII, Section 7, classifying customary rights as "personal." Native Hawaiian rights are firmly rooted in Hawai'i's culture and history.<sup>204</sup> These statutes were not invented by legislators on the eve of statehood or in the Constitutional Convention, but instead are part of the background principles of property law in these islands.<sup>205</sup> Current interpretations must respect and reflect that unique history.

Supporters of SB 8 and HB 1920 responded that objective criteria were necessary to expedite the resolution of claims.<sup>206</sup> In light of the many unresolved issues in *PASH*, guidelines were needed "which [would] permit those Native Hawaiians who rightfully possess these rights and all land owners to have a defined and efficient system in order to determine and resolve any differences as to the

existence, nature and location of such Native Hawaiian Rights.<sup>207</sup> The criteria for proving that a use was customary (*i.e.* establishing continued usage on a specific site) were arguably necessary to make such determinations. According to proponents, this process meant that traditional and customary rights would not be available in the same extent as pre-contact society.<sup>208</sup> These arguments are difficult to justify, however, in light of the legislative intent and judicial interpretation that the protection of traditional and customary rights was "necessary to insure the survival of those who in 1851, sought to live in accordance with the ancient ways. They thus remain, to the extent provided in the statute, available to those who wish to continue those ways."<sup>209</sup>

## 2. *Separate Issues.*

Although SB 8 and HB 1920 shared many similarities in their attempts to restrict traditional and customary use rights, several distinguishing points must be noted. The method of regulation employed by both bills and agency exception under HB 1920 will therefore be analyzed separately.

### a. *Methods of Regulating Native Hawaiian Rights*<sup>210</sup>

While SB 8 and HB 1920 employed many of the same concepts, their methods of regulation differed. SB 8 proposed that the Land Use Commission resolve Native Hawaiian Claims and issue certificates if it determined that a traditional and customary use was established.<sup>211</sup> Meanwhile, individuals could not legally exercise customary practices without a certificate.<sup>212</sup> The imposition of that condition so dramatically altered the status and practice of traditional and customary rights that it subjected SB 8 to due process challenges.

Both the State and Federal Constitutions prohibit government bodies from denying citizens life, liberty or property without due

process of the law.<sup>213</sup> These provisions provide substantive guarantees that individuals will not be deprived of an interest without the opportunity to present a defense.<sup>214</sup> Procedural protections are also mandated to ensure that rights will not be unfairly divested.<sup>215</sup> The inability to legally exercise traditional and customary uses until a hearing is held, and the extinguishment of rights if a practitioner did not respond to or complete the claims process, thus violated due process.<sup>216</sup>

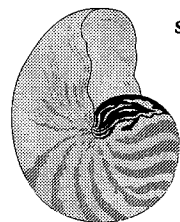
In addition, the procedure for determining and registering traditional and customary rights, did not provide adequate assurances that those rights would not be extinguished unjustly. The U.S. Supreme Court articulated a three-part test to determine the constitutional sufficiency of a process. To satisfy this test, claimants must determine if: (1) private interests are at stake, (2) the risk of erroneous decision making compared with the probable value of additional safeguards, and (3) the scope of the government's interest.<sup>217</sup> Because the traditional and customary rights of Native Hawaiians are targeted by SB 8, the first element of the test is satisfied. Second, the Land Commission does not have sufficient expertise to consider the intricate legal and social principles necessary to determine whether a use is protected, thus creating a significant risk of erroneous decision making.<sup>218</sup> Finally, the possible effect of recent court decisions did not create a government interest sufficient to justify the enormous fiscal and administrative burdens of the proposed process.<sup>219</sup> Since Native Hawaiians face the risk of losing their traditional and customary rights permanently, a fair and expedited process is absolutely necessary.<sup>220</sup> SB 8's substantive and procedural inadequacies thus make it constitutionally unacceptable.<sup>221</sup>

In addition to due process, the Federal and State Constitutions also prohibit the taking of property without just com-

pensation.<sup>222</sup> Property may be considered "taken" if it is permanently and physically occupied by the government or regulated to a point where the landowner is deprived of all economically beneficial use of that parcel.<sup>223</sup> Landowners in Hawai'i may therefore argue that State protections for traditional and customary practices are equivalent to a regulatory taking.

In evaluating the takings argument, several factors must be considered. First, the right of practitioners to reasonably access and/or gather on a specific parcel of undeveloped land does not deprive an owner of all economically beneficial use. The Hawai'i Supreme Court first stated in *Kalipi* and again noted in *PASH* that "Article XII, Section 7 does not require the preservation"<sup>224</sup> of lands where traditional and customary practices occur. Since the protection of traditional and customary uses by the State Constitution does not require that lands remain undeveloped, landowners cannot establish that Article XII, Section 7 deprives them of all beneficial use.<sup>225</sup>

Second, the United States Supreme Court recognized two instances that will never amount to a regulatory taking: (1) the regulation of nuisances, and (2) regulations that were "part of the state's background principles of real property."<sup>226</sup> Hawai'i's background principles of real property are the genesis of traditional and customary uses.<sup>227</sup> HRS 1-1 and 7-1, and Article XII, Section 7 merely reflect concepts of pre-contact land tenure, codified by the Kingdom, Provisional Government, Territory, and now the State of Hawai'i. Traditional and customary usage is not merely a background principle, it supersedes other Western principles of property in Hawai'i.<sup>228</sup> In holding that the recognition of traditional and customary



rights did not constitute a judicial taking, the Court in *PASH* explained that a takings claim placed "undue reliance on western understanding of property law that are not universally applicable in Hawai'i."<sup>229</sup> Finally, should the Land Use Commission modify or terminate traditional and customary practices, they would have to establish that such action was necessary to further a compelling state interest, or compensate practitioners for taking their traditional and customary rights.<sup>230</sup>

Article XII, Section 7, requires the State to reaffirm and protect "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes[.]"<sup>231</sup> While this provision allows for limited regulation,<sup>232</sup> "the State does not have the unfettered discretion to regulate the rights of *ahupua'a* tenants out of existence."<sup>233</sup> Because SB 8's definition of undeveloped land extinguished a practitioner's ability to continue practices on certain types of property, it blatantly contradicted the State's mandate of protection. In addition, the authorization of the Land Commission to terminate certain traditional and customary uses was equally inconsistent with the constitutional mandate.

The social and cultural impacts of SB 8's method of regulating traditional and customary uses were also administratively burdensome and expensive.<sup>234</sup> If every Native Hawaiian registered every right that s/he exercises with respect to every piece of property affected, the fiscal and logistical burdens of administering the registration process would be colossal. If each Hawaiian petitioned for five or ten uses, the Commission would have to adjudicate hundreds of thousands of contested case hearings. Should the Commission's decision be appealed to the courts through the Hawai'i Administrative Procedure Act, HRS § 91, this process of gaining "assurance of title" would have been even more arduous.

Whether or not the Land Commission was the proper body to adjudicate those claims was also questionable.<sup>235</sup> One of the Commission's directives is to "preserve, protect and encourage the development of land . . . for . . . uses for which they are best suited."<sup>236</sup> If Native Hawaiian rights were limited to undeveloped land, the registration and preservation of those rights would pose a serious conflict of interest for a Commission directed with facilitating development. At the February 4 hearing, Esther Ueda (Chair of the LUC) testified in opposition to SB 8, explaining that the Commission lacked the budget and expertise to adjudicate traditional claims.<sup>237</sup>

Finally, the need to initiate the registration process posed by SB 8 was questionable.<sup>238</sup> Not all landowners feel that traditional and customary rights are an encumbrance on title nor wish to know what, if any, uses are being exercised on their property. It may be more appropriate to place the burden of establishing the non-existence of traditional and customary uses on landowners seeking such clarification.

Although HB 1920 created a cause of action as opposed to a registration scheme, it was subject to the same constitutional challenges. Because decrees modifying and/or extinguishing traditional and customary practices could be issued if practitioners did not respond to newspaper notices, HB 1920 bore substantive due process imperfections similar to SB 8. However, the fact that a circuit court (as opposed to the Land Commission) determined whether or not a right existed, may have provided sufficient procedural safeguards to absolve HB 1920 from procedural due process challenges. Additionally, the ability of the courts to modify or terminate rights could trigger the same takings claims discussed in relation to SB 8.<sup>239</sup>

Additional social impacts created by HB 1920, however, must be considered.<sup>240</sup> Because Native Hawaiians have the lowest socioeconomic status of all ethnic groups in the state

(lacking the financial resources to initiate and/or pursue a court action), HB 1920 disadvantaged both petitioners and landowners of lower socio-economic status, and would have resulted in claims being settled by people who can afford to pursue traditional and customary rights as opposed to those who are entitled to them.

### b. *Agency Exemptions Under HB 1920*

The agency exemption in § 10 of the House bill HB 1920 was a second distinguishing factor between SB 8 and HB 1920. HB 1920 did not prevent landowners from proceeding with land use matters before State and County agencies.<sup>241</sup> Yet, the bill provided that agencies fulfilled their obligation to protect traditional and customary uses under Article XII, Section 7 of the Hawai'i Constitution if they exercised authority subject to customs "subsequently established or proceeding under this chapter."<sup>242</sup> If passed, HB 1920 would have placed all responsibility for settling traditional and customary uses with the circuit courts, allowing agencies to act without independently considering the effect of their actions on Hawaiian traditions (if they acknowledged claims proceeding or settled pursuant to the bill). In light of the Hawai'i Supreme Court's holding in *PASH* that State agencies (as opposed to just the State government) are obligated to uphold Article XII, Section 7,<sup>243</sup> HB 1920 blatantly attempted to circumvent the Court's interpretation of the Constitution (by removing the affirmative burden placed on State agencies).

Section 10 of the bill also worked against the preservation of traditional and customary rights. HB 1920 prohibited the exercise of traditional and customary uses on fully developed land.<sup>244</sup> Therefore, customary uses were not sanctioned on any parcel where "the natural state has been physically altered, through activities including farming . . . landscaping, grubbing, dredging, or grading."<sup>245</sup> In addition to the significant reduction in areas avail-



able for use, HB 1920 allowed agencies to make more lands unavailable (by issuing new development permits) without considering the impact of its action on any Hawaiian traditions not yet "settled" by a circuit court. The bill's agency exemption thus enabled the extinguishment of customary uses, seriously contradicting the intent, wording, and judiciary's interpretation of Article XII, Section 7.

SB 8 and HB 1920's attempt to regulate the exercise of traditional and customary uses under Article XII, Section 7 was both legally and socially insufficient. Although the bills ostensibly sought to protect the exercise of traditional and customary rights while providing additional security for landowners, they resulted in the reduction or elimination of rights with negligible benefits. In light of the fact that the legislative backlash against *PASH* is likely to resume next legislative session, and significant human and financial resources are necessary to pursue case-by-case determinations, an examination of two other bills introduced during the 1997 session provide examples of amenable alternatives.

#### C. Alternative Regulatory Efforts.

Senate Bill 454 ("SB 454") and House Bill 1536 ("HB 1536") attempted to reconcile traditional and customary rights with contemporary land use through a public access provision and cultural impact statement. Instead of creating a system for defining and regulating existing uses, both bills attempted to preserve existing rights where a land use was about to be altered via State approval.

SB 454 amended HRS § 198D, Hawai'i's statewide trail and access system. SB 454 proposed the addition of a new chapter conditioning any State or county-level land use approval on the provision of public access.<sup>246</sup> Before amendments to dis-

tract boundaries, development or community plans, zoning changes, permit, or use approvals were granted, the agency had to "ensure that public access by right-of-way or easement was provided free and unimpeded to the shoreline, mountain, or other recreational, cultural, or natural resource."<sup>247</sup> Public notice of the access and parking was also required.<sup>248</sup>

SB 454 was a pragmatic approach to ensuring access for both traditional and non-traditional uses. Instead of requiring the registration or adjudication of all uses upon risk of extinguishment, public access was guaranteed when a landowner sought to change the current designation or use of a parcel. This approach was more practical and less costly because it incorporated the access provision into an already existing system of review. In addition, it complied with constitutional and statutory mandates while avoiding due process and equal protection challenges. By protecting uses as opposed to individuals, SB 454 also respected the Court's interpretation of HRS 1-1 without imposing standards on issues where the Court reserved judgment (*i.e.* individuals eligible to exercise protected uses under 1-1).

A second alternative for protecting traditional and customary uses was the incorporation of cultural impacts into environmental assessments ("EA") and impact statements ("EIS"). HB 1536 sought to amend HRS § 343, the Hawai'i Environmental Policy Act, by adding Native Hawaiian culture and resources as a criteria for evaluating effects.<sup>249</sup> Agencies would have been required to consider the impacts of any action on Hawaiian culture and resources as part of an EA or EIS.

HB 1536 was an effective means of preserving both customary uses, and the resources necessary to continue those practices. HB 1536 therefore comported with

Article XII, Section 7 and HRS 1-1's protection of custom. The bill was also practical in the sense that it incorporated an examination of protected uses into an existing process structured to assess the social and environmental effects of proposed actions. Like SB 454, HB 1536 initiated review only at the behest of a landowner seeking to change an existing use or designation. This provision allowed for some community self-regulation while ensuring protection of traditional and customary uses.

Both SB 454 and HB 1536 presented workable alternatives for complying with the State's statutory and constitutional protections for traditional and customary uses. They are not perfect solutions, as communities will ultimately have to come together and address the needs and concerns of both practitioners and landowners in their own context. SB 454 and HB 1536 do, however, represent alternative legislative methods of addressing issues relating to traditional and customary rights while minimizing social and cultural impacts and without circumventing years of carefully developed judicial precedent.

#### CONCLUSION

The regulatory efforts presented in SB 8 and HB 1920 fell short of the legal standards established by Article XII, Section 7 of the State Constitution, and HRS 1-1 and 7-1. Their attempts to clarify and regulate traditional and customary uses substantially deviated from both the historical background and contemporary practice of those rights. In addition, their understanding of private property concepts did not adequately consider Hawai'i's unique history and concepts relating to land tenure and property ownership.

Both bills dealt with traditional and customary rights as an encumbrance on title. This characterization was not readily appar-

ent in light of the Hawai'i Supreme Court's ruling that the "issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by Western concepts of property."<sup>250</sup> The Court's conclusion that the "Western concept of exclusivity is not universally applicable in Hawai'i"<sup>251</sup> further diminished the legitimacy of any State objective in promulgating SB 8 or HB 1920.

If a landowner's ability to completely exclude others from his/her property was never firmly established in Hawai'i, SB 8 and HB 1920 attempted to address an issue that was already resolved. Although access for traditional and customary uses may conflict with some landowners' misconceptions of what their rights are, such contentions are based on personal and intellectual idiosyncrasies, not legal rights.

Instead of regulating traditional and customary uses, a more effective approach to calming this agitation may be to educate landowners about what their certificates of title actually convey. This is not to suggest that traditional and customary uses are beyond all regulation, or that landowners are unjustified in feeling upset if they are mistaken. This suggestion merely proposes that title holders recognize the established limitations to land patents in Hawai'i, and stop fueling the backlash against *PASH*.

*(D. Kapua Sproat is a third year student at the William S. Richardson School of Law. Ms. Sproat is currently pursuing an Environmental and Natural Resources Certificate with an emphasis in Native Hawaiian Rights.)*

*Ms. Sproat is being recognized for her outstanding effort in Professor Denise Antolini's environmental law second-year seminar class. In addition to the inclusion of a condensed version of her article in this issue of Ka Nu Hou, Ms. Sproat received a scholarship from the Section.)*

## WHAT HAS YOUR BOARD BEEN UP TO?

The Board of Directors of the Real Property and Financial Services Section holds its meetings at the HSBA offices on the third Friday of each month. Members of the Section are welcome to attend. The following is a brief summary of Board Minutes for June and July:

#### June Meeting:

- A telephone conference call procedure was set-up for the neighbor island Board members so that they can attend Board meetings without flying to Honolulu.
- The new Section Web Site is: <http://www.hsba.org/section/rpfs/index.html>. There are a number of useful items on the Web Site, including summaries of recently passed legislation.

#### July Meeting:

- It was decided that the Annual Meeting of the Section would be held at lunch during the first week of December at the Plaza Club. The speaker has not yet been selected.
- The Board voted unanimously to increase the Section's UH Law School awards for the best land use/real property seminar paper and best environmental seminar paper from \$300 to \$400 each.

## HAWAII REAL ESTATE LAW SEMINAR

December 9th - 10th

We are pleased to announce that our Section will co-sponsor the Hawaii Real Estate Law Seminar in conjunction with the HSBA annual convention. Some of the foremost authorities on real property law in Hawaii will participate in a 2-day panel. In addition to the seminar, a 3-volume manual will be unveiled at the HSBA Convention and will be available for purchase. Some of the topics in the manual include Foreign Investors and Special Reporting Laws, Traditional Hawaii Land Law, Quiet Title and Partition, Representations and Warranties, Federal, State and County Land Use Laws, Condominiums, Coops and Planned Unit Developments, Default and Bankruptcy and Hazardous Waste Liability.

Specific information about this seminar will be provided in the upcoming months.



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**CALENDAR OF EVENTS**

Oct 31	Litigation Update Hawaiian Electric Training Center 1001 Bishop Street Pacific Tower, 8th Floor Registration: 8:00 a.m. Seminar: 8:30 - 10:00 a.m.	Dec 9	Hawaii Real Estate Law HSBA Annual Convention Sheraton Waikiki - Maui Room Registration: 8:00 a.m. Seminar: 9:00 a.m.-4:30 p.m. Lunch: Noon-1:30 p.m.
Nov 18	Land Use Seminar Judge S.J. Plager - Keynote Speaker Japanese Cultural Center Registration: 8:00 a.m. Seminar: 8:30 a.m. - 4:3 p.m.	Dec 10	Hawaii Real Estate Law (Continued) Sheraton Waikiki-Maui Room Registration: 8:00 a.m. Seminar: 9:00-4:30 p.m. Lunch: Noon-2:00 p.m.
Nov 21	Board of Directors' Meeting 12:00 HSBA Office	Dec 19	Board of Directors' Meeting 12:00 HSBA Office
Dec 4	Section Annual Meeting Plaza Club - Coronet Room Jan Sullivan, Director DLU Guest Speaker 11:30 a.m.	Dec 22	Deadline to submit articles for January newsletter
		Jan 15	Board of Directors' Meeting 12:00 HSBA Office
		Feb 20	Board of Directors' Meeting 12:00 HSBA Office

(For further information regarding seminars, please call HICLE at 956-6551)