

USE OF TRADITIONAL PRACTICES IN PRESENT-DAY LAW PUWALU 'EKOLU (THIRD CONFERENCE): OPENING REMARKS (DAY 1)

BY WILLIAM S. RICHARDSON

THIS PUWALU (CONFERENCE) BRINGS TOGETHER THOSE WHO WERE INVOLVED *in the first two Puwalu gatherings—cultural practitioners and teachers—with policymakers from the state and county level. The goal of this Third Puwalu is to find ways to incorporate traditional cultural practices—practices that often come from and are most closely associated with moku and ahupua`a—into natural and cultural resource management laws and policies throughout our islands. This is certainly a worthy goal—and a daunting task!*

In considering what I could add to this discussion, I thought that I could draw upon my experience as a judge in attempting to ensure that Hawaiian cultural practices and traditions were reflected in the Hawai'i Supreme Court's decisions and, thus, in the law of our state. As you know, our courts have recognized that Hawai'i's laws relating to land and natural resources are unique in that they are based, in part, upon Hawaiian tradition, custom, and usage. This means that in many cases, we can look to the practices of our ancestors as guidance in establishing present-day law. Thus, it might be useful today to review with you some of the decisions that established these principles.



Hawaiian woman catching opae (shrimp) with a dip net at Napoopoo in Hawai'i.



Hawaiian people using a dip net to fish in tide pools in Hawai'i (1890-1905).

One of the first was the 1968 case of *In re Ashford*—dealing with a shoreline boundary. Many original grants from the Mahele described shoreline boundaries in general terms, using phrases such as “ma ke kai,” “along the sea, shoreline, or seacoast.” The exact meaning of these phrases was not established until the *Ashford* case. In that case, the court determined that according to ancient Hawaiian tradition, custom, and usage, seaward boundaries described as “ma ke kai” are located along the upper reaches of the wash of waves, as evidenced by the edge of vegetation or by the line of debris left by the wash of waves.

This decision was followed in 1973 by *County of Hawai'i v. Sotomura* (1973), in which, we examined property that had been registered in Land Court with a description of the property using azimuth and distance measurements. We determined that even with property that had been so registered and described, the “upper reaches of the wash of the waves” standard should be used to determine the shoreline boundary. The *Sotomura* case also established that where a seaward boundary is evidenced by both a debris line and a vegetation line lying further mauka (inland), the boundary is presumed to be the vegetation line. This meant that more of the beach would be available for public use.



A Hawaiian canoe and fish baskets (ca. 1890). Photographed by Charles Furneaux.

In a subsequent decision, *In re Sanborn* (1977), we reaffirmed our earlier decisions and determined that the seaward boundary of a parcel registered by the Land Court lay at the more mauka vegetation and debris line. Moreover, we held that in construing Land Court decrees, natural monuments such as “along the high water mark” are controlling over azimuth and distance measurements.

Following this series of cases, our State Legislature then enacted laws on shoreline boundaries to reflect the court’s decisions, and the State Department of Land and Natural Resources enacted rules and regulations to implement the laws. I was delighted to see that recently, in interpreting these rules and regulations, our Hawai‘i Supreme Court looked to the *Ashford* and *Sotomura* decisions to provide guidance on where the shoreline should be located (*Diamond v. State*, October 2006). In that case, the Supreme Court reconfirmed public policy in *Sotomura*.

I believe that the shoreline boundary situation presents a good example of how traditional and customary practice and knowledge has been judicially recognized and then incorporated into state statutory law and eventually adopted as management policy.

In other areas of law, the Supreme Court has also looked to Hawaiian custom and practice:

In *Palama v. Sheehan* (1968), we found a right of access to a kuleana parcel based, in part, on language in early Hawai‘i deeds reserving the rights of native tenants and on the 1850 Kuleana Act reserving the “right of way” on all lands granted in fee simple.

In *McBryde Sugar Co. v. Robinson* (1973), we examined early Hawaiian water practices and determined that private ownership of such a precious resource was at odds with traditional Hawaiian practices. With this background, we looked at the intent of the

mid-eighteenth century laws surrounding the Mahele and transforming the communal land system into a private fee simple system. We found that the King intended to reserve the right to use water to himself *in trust* for the common good of all. Thus, we recognized that the public trust doctrine was consistent with Hawaiian practice and thought and adopted into our laws at the time of the Mahele itself.

In the 1978 case *In re Kamakana*, the court looked to Hawaiian practice and custom to determine that the grant of an ahupua‘a would naturally include the fishpond attached to the ahupua‘a—since Hawaiians viewed fishponds in the same way they viewed ‘āina.

In *Kalipi v. Hawaiian Trust Co., Ltd.* (1982), we determined that gathering rights are protected by three sources in Hawai‘i law:

- first, the Kuleana Act, now codified as HRS § 7-1;
- second, an 1892 law, HRS § 1-1, recognizing Hawaiian usage as an important exception to the common law; and
- finally, in Article XII, section 7, of the State Constitution protecting the traditional and customary rights of ahupua‘a tenants.

The court held that lawful residents of an ahupua‘a may, for the purpose of practicing Native Hawaiian customs and traditions, enter undeveloped lands within the ahupua‘a to gather firewood, house-timber, aho cord, thatch, or kī leaf, all items enumerated in the Kuleana Act. The court also stated that pursuant to Article XII, § 7, of the Constitution, courts are obligated “to preserve and enforce such traditional rights.”

We further stated that HRS § 1-1 ensures the continuation of Native Hawaiian customs and traditions not specifically enumerated in HRS § 7-1 that may have been practiced in certain ahupua‘a “for so long as no actual harm is done thereby.” We noted that the “retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm.”

Thus, with regard to shoreline boundaries, kuleana access, water resources, ownership of fishponds, and gathering rights, the court consistently looked to traditional and customary Native Hawaiian practice and use. These cases have also formed the basis for legislation, rules and regulations, and further judicial decisions.

One of the difficult questions courts have had to face in these kinds of cases is determining exactly what the Hawaiian practice or custom was and how it is expressed today. Long ago, our courts recognized that in ancient times certain people were taught the names and boundaries of each land division and that these people were repositories for this special kind of knowledge. So, the courts have allowed these kama‘āina witnesses to testify in land and boundary cases.



Spear fisherman near Hana, Maui (ca. 1890).

In modern times, and in the cases I just discussed, we have allowed kama'āina witnesses to testify to the location of shoreline boundaries according to ancient Hawaiian tradition, custom, and usage; to the location of trails used by kūpuna; and more recently to gathering practices in specific areas such as Wao Kele O Puna on the Islands of Hawai'i. The courts have looked to "experts" in Hawaiian language—to mānaleo—to help determine the true meaning of certain phrases in Land Commission Awards and early deeds.

As all of you realize, traditional and customary practices can only be recognized by the courts and by policymakers if the practices remain vibrant and healthy and relevant to the lives of our people. We can only call upon mānaleo to interpret the Hawaiian language in old deeds and laws if our language continues to live; we can only find someone to testify as to the path used by hula folk who gather lehua and palapalai fern if hula continues to live, and the lehua and palapalai thrive; we will only know the right way to pick limu without killing off this resource if those who know teach those who are willing to learn.

This is why I was so encouraged to learn of the declarations and commitments made in the first two Puwalu held earlier this year. This first Puwalu of traditional practitioners called on the Hawaiian people "to begin the process to uphold and continue



Torch fishing with a dip net (1919). Photograph by Tai Sing Loo.

Hawaiian traditional land and ocean practices into the governance and education of the Hawaiian Archipelago." The second Puwalu, which included both practitioners and educators, met to "deliberate on how to incorporate traditional Hawaiian practices and knowledge into the daily education of Hawai'i's children." This third Puwalu tackles the difficult issues of how to incorporate traditional and customary practices into decisions and policies at the county and state levels.

For policymakers, I believe that you have the burden of balancing many different and apparently competing interests. You must balance the past and the future; the rights of the collective and individual; public interests and private interests; use of a resource with the risk that the use may deplete the resource; and Hawaiian customs and traditions with Western law.

You must make difficult decisions, but if you make those decisions with the counsel and advice from traditional practitioners and those who are most closely affected by and connected to a particular resource or area, your decisions will be sound. If you make your decisions based on traditional concepts of ahupua'a resource management, while being cognizant of the effects of your management decisions on the larger moku and on the entire archipelago, your decisions will result in a healthy and thriving resource and community. The



Weloka fishpond at Pearl Harbor, O'ahu (ca. 1910). Photograph by Stokes.



Hawaiian people cutting up a captured turtle, Hilo, Hawai'i (ca. 1890-1905).

best possible outcome for the resource, the Hawaiian people and all the people of Hawai'i.

As all of you continue your deliberations, I know that you will remember that whatever our individual interests and goals, we are linked together and to this land. Each of us struggles, in their own way, to retain within us the learning and wisdom of our ancestors. We walk that delicate balance between two worlds—the modern and sometimes impersonal society that surrounds us, and the highly personal and ancient culture we carry within us. The times ahead present great challenges and possibilities for Hawaiians. I believe that we can meet these challenges, if we maintain our link with the past and our hope for the future.

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