Avoiding Trouble in Paradise
UNDERSTANDING HAWAI’I’S LAW AND INDIGENOUS CULTURE

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Whether you are a Kanaka Maoli (Native Hawaiian) whose ancestors have inhabited these islands since time immemorial or a first-time visitor, it doesn’t take long to understand that things in Hawai‘i are unique. The law is no exception. The sooner one understands Hawai‘i’s indigenous culture and legal framework, the easier things are—especially for those interested in doing business in Hawai‘i. As the examples below demonstrate, although Hawai‘i is now subject to U.S. jurisdiction, assuming that Hawai‘i’s law and culture mirror that of the continental United States is inaccurate, dangerous, and can lead to costly business consequences.

Because Hawai‘i is one of the most isolated archipelagos on the planet, it boasts incredible biodiversity and is home to many plants and animals that are found nowhere else in the world. These resources supported a rich indigenous culture as the islands were inhabited by Polynesians from other parts of the Pacific beginning about 300 A.D. For thousands of years, Native Hawaiians lived in reciprocity with their natural and cultural resources and relied on them to provide physical and spiritual sustenance. Native Hawaiians view land and other natural resources as a physical embodiment of various gods. Land was not an object to be bought or sold, but was a responsibility to be cared for in perpetuity. This relationship is best reflected in Mary Kawena Pukui’s traditional proverb: He ali‘i ka ‘aina, he kaua ke kanaka (The land is a chief, people are the stewards).

Traditions Affecting Today’s Business

The Native Hawaiian relationship with natural and cultural resources shaped the evolution of law in Hawaiian society. Hawaiian custom and usage was the law in the kingdom of Hawai‘i until a Declaration of Rights was promulgated in 1839. Oral traditions explain that Kanaka Maoli (Native Hawaiians) are descendants of Papa and Wakea, the Earthmother and Skyfather, and are closely related to the gods who created the Hawaiian Islands. Native Hawaiians, therefore, have kuleana: the cultural obligation to care for the land and its resources, as one would care for a close relative. Thus, resources were traditionally held in trust and managed for the common good. Private commercial use was limited to ensure that it would not negatively impact the welfare of the larger community.

The documented arrival of westerners in Hawai‘i beginning in 1778 brought about tremendous change, as foreign demands for goods strained the traditional subsistence economy. As pressures mounted both within and beyond native communities, oral traditions were reduced to written laws in an effort to preserve Hawaiian culture and lifestyles. With the establishment of a constitutional monarchy, the first written laws were created based on Hawaiian culture including traditional notions of resource management. The kingdom of Hawai‘i’s first constitution in 1840 included strong public trust principles, declaring that the land, along with its resources, “was not [the King’s] private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head and had the management of the landed property.”

Over time, Hawaiian custom and tradition was formalized into more Western-styled laws and concepts. In the mid-1840s, King Kau‘ikeōauli instituted a process that imposed fee simple land ownership. Culminating in the Māhele of 1848 and Kuleana Act of 1850, even these earliest distributions of land were subject to the rights of maka‘ainana, or native tenants, to continue subsistence lifestyles. These kuleana rights, as they have come to be known, include rights of access, traditional gathering of food resources, and fresh water for household purposes. Although these laws were intended to secure a land base for the Native Hawaiian people, less than half of one percent of Hawai‘i’s total land area was...
actually distributed to the maka‘āinana as a result of the Kuleana Act.

In 1893, the U.S. military backed a coup to overthrow Queen Lili‘uokalani, Hawaii’s last reigning sovereign, and Hawaii eventually became part of the United States. Although many questions remain regarding the propriety of and necessary restitution for the United States’ actions, various laws, such as the 1900 Organic Act, adopted Hawaiian kingdom law for the territory of Hawaii. Similarly, the 1959 Act admitting Hawaii as a U.S. state made “all Territorial laws in force in the Territory of Hawaii at the time of its admission into the Union... continue in force in the State of Hawaii.” Therefore, the state of Hawaii has unique statutes protecting Native Hawaiian traditional and customary rights that trace their origins to Hawaiian kingdom law.

**Codified Traditions**

Hawaii Revised Statute § 1-1 is an example of the enduring interplay between traditional law and Western law. It codifies custom in Hawaii, adopting English and American common law except as modified by Hawaiian custom and tradition, or the judicial precedents of the kingdom of Hawaii. Thus, the statute gives great deference to Hawaiian traditional custom and usage, which comprised Hawaii law from the first arrival of Polynesian voyagers until the Declaration of Rights was passed in 1839.

Another example of this blending of legal ideas and cultures is Hawaii Revised Statutes § 7-1, which adopts wholesale section 7 of the 1850 Kuleana Act. That provision was intended to preserve the rights of maka‘āinana, or native tenants, to continue subsistence lifestyles, by conferring rights to gather specific items for personal use, access other portions of the ahupua‘a (traditional land division) for various purposes, and secure water for domestic use. Today, section 7-1 and other laws continue to confer special rights to kuleana land owners, regardless of whether they are Native Hawaiian.

In addition to existing statutory provisions, in 1978, Hawaii’s state constitution was amended to transform protections for Native Hawaiian rights and practices into a constitutional mandate. Article XII § 7 placed an affirmative duty on state and county agencies to preserve and protect Native Hawaiian rights:

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 rights of the State to regulate such rights.

In adopting this provision, Hawaii’s constitutional framers recognized that Native Hawaiians’ “sustenance, religious and cultural practices... are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and value systems,” and, thus, provided yet another vehicle to “preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights.”

**Traditional Rights and Shifting Sands**

Early cases interpreting Hawaii Revised Statutes § 1-1 and § 7-1 and Article XII § 7 of Hawaii’s constitution began to delineate the scope of protections for traditional and customary Hawaiian uses and uphold the continued exercise of these rights in contemporary society. More recent decisions have focused on the state and counties’ duties to protect and preserve Native Hawaiian culture and the extent to which agencies must consider and safeguard such rights.

In *Ka Pa‘akai O Ka Aina v. Land Use Comm’n*, 94 Haw. 31 (2000), the Hawaii Supreme Court considered a Native Hawaiian group’s appeal of a state land use commission’s decision to reclassify approximately 1,000 acres on the Big Island of Hawaii’s Kona Coast to enable a luxury development of homes, golf courses, and commercial space. In vacating the commission’s decision and bringing the development to a halt, the court ruled that
state agencies are "obligated to protect the reasonable exercise of customary and traditionally exercised rights of Hawaiians," and "may not act without independently considering the effect of their actions on Hawaiian traditions and practices." In order to better fulfill this mandate, the court outlined an "analytical framework . . . to effectuate the State's obligation to protect Native Hawaiian customary and traditional practices while reasonably accommodating competing private interests."

The court detailed a three-prong test for decisions impacting traditional rights and resources, which requires specific findings regarding (1) the identity and scope of cultural, historical, and natural resources in the affected area, including the extent to which traditional and customary rights and practices are exercised in that area; (2) the extent to which those resources, rights, and practices will be affected by the proposed action; and (3) feasible action, if any, to reasonably protect Native Hawaiian rights and practices. Importantly, "[s]pecific considerations regarding the extent of customary and traditional practices and the impairment and feasible protection of those uses must first be made before [approval] is granted." Especially relevant to business interests, the court also ruled that agencies cannot delegate their constitutional obligation to an applicant for a permit or other approval; instead, the agency must discharge its duty via the analytical framework articulated by the court.

As demonstrated above, Hawai'i's legal landscape includes strong protections for the traditional and customary rights of its indigenous people. Lawmakers from both the kingdom of Hawai'i and the state specifically designed provisions to enable Native Hawaiians to continue traditional practices, which are critical to maintaining native culture and identity in contemporary society. Moreover, those examples are just the tip of an iceberg. Given Native Hawaiians' historical ties to the land, natural resources are also cultural resources. Myriad laws at the county, state, and federal levels acknowledge and protect native rights and interests in specific contexts spanning everything from water resource management to historic preservation.

For example, Hawai'i Revised Statutes ch. 343 (HEPA), the state equivalent of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., is Hawai'i's preeminent law protecting the environment. HEPA establishes a framework—via environmental assessments (EAs) and more detailed environmental impact statements (EISs)—to ensure that state agencies adequately consider and address the impacts of proposed actions before resources are committed or actions are otherwise allowed to proceed. As with NEPA, HEPA requires the consideration of environmental impacts. In addition, in determining the severity of an effect, including whether a more comprehensive EIS must be completed, HEPA § 343-2 requires consideration of the cultural impacts of a proposed action, including impacts on the "cultural practices of the community and State."

Incorporate Culture into Business

Hawaiian culture is the piko (center or source) of the islands' social fabric and continues to permeate all aspects of life in Hawai'i. Native Hawaiian traditional and customary rights and practices continue to persevere. Given that reality, anyone exploring business options in Hawai'i must thoroughly understand applicable county, state, and federal laws and be particularly aware of distinct cultural overlays.

What does this mean for those interested in pursuing business options in Hawai'i? A whole lot, especially for anyone contemplating urban or commercial development impacting natural or cultural resources. Here are four tips to successfully doing business in Hawai'i.

First, preparation is the best approach: make sure to understand what the law is and what you need to do to comply. The black letter law is important, but it may not necessarily tell you what to expect in practical terms. Seek assistance from local counsel and cultural experts familiar with the issues that will affect your proposal as early as possible in the process—before significant investments are made—to allow sufficient budgeting, retention of experts, appropriate phasing of any permits or project plans, and possibly even a decision not to proceed with a project. Without sufficient planning, the consequences can be expensive.

Second, once you understand what the law is, comply. Don't bury your head in the sand, no matter how beautiful it is; be proactive in fulfilling your obligations. That isn't always easy. Many agencies at the state and coun-

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way to achieve business objectives. It’s not unusual for lawsuits over natural and cultural resources to drag on for decades; one such case is now on its third appeal and in its fourteenth year of litigation.

And finally, it’s a small world, and, in Hawai‘i, it is even smaller community. In Hawai‘i, you deal with the same agencies, staff, attorneys, and community groups, over and over again. And, similar to the continental United States, people compare notes. Your reputation is everything and the way you conduct your business is critical. The bottom line is: by complying with the law ahead of time, you can expedite your project while also helping to avoid potential lawsuits and ill will.

The Not-so-super Superferry

The Hawai‘i Superferry is a perfect example of how not to do business in Hawai‘i. In 2004, Hawai‘i Superferry, Inc., filed an application with the State Public Utilities Commission (PUC) to operate a ferry service between O‘ahu and the islands of Maui, Kaua‘i, and Hawai‘i. Although a ferry service operated between some of the smaller islands before Superferry docked, Hawai‘i did not have a passenger boat service of comparable size and scale (Superferry is capable of carrying almost 1,000 passengers and 300 cars at one time). The PUC approved the application on December 30, 2004, but conditioned that approval on Superferry complying with all applicable federal and state laws, including HEPA, Hawai‘i’s EIS law.

In 2005, Superferry received a federal loan guarantee of $143 million, which was also conditioned on Superferry receiving “all the governmental and environmental clearances necessary to commence and complete the shoreline improvements.” In March 2005, the State Department of Transportation (DOT) exempted Superferry from complying with HEPA, despite the fact that DOT expected to spend $40 million in harbor improvements for Maui, Kaua‘i, and Hawai‘i Islands, which is usually an automatic trigger for preparation of an EA or
EIS. Mere days after DOT's exemption, Superferry also received a categorical exclusion, which excused it from complying with NEPA, HEPA's federal counterpart.

To make a very long story short, citizen groups that included Native Hawaiian and environmental interests were outraged at the refusal to require an EA or EIS and expressed concerns about the impacts of Superferry's operations on, among other things, the cultural practices of the larger community. In particular, many Native Hawaiians on Maui and Kaua'i believed that Superferry would facilitate the exploitation of cultural resources on the less developed neighbor islands by transporting people (and their trucks, boats, and other equipment) without sufficient regulations or inspections. In fact, a burgeoning population has already depleted and completely wiped out many cultural resources on O'ahu. Myriad other concerns were also expressed, including transporting invasive species that could usurp native plants and animals, traffic congestion, and whale strikes. After repeated requests for Superferry to comply with HEPA by completing an EA fell on deaf ears, the Sierra Club, Maui Tomorrow, and the Kahului Harbor Coalition sued. In July 2005, the Maui Circuit Court ruled in favor of the Superferry. The matter was appealed and, in August 2007, the Hawai'i Supreme Court ruled that an EA was necessary and remanded the case back to the lower court.

Despite the Hawai'i Supreme Court's decision and pleas from the public, Superferry began regularly scheduled operations mere days after the Supreme Court's ruling. This sparked public protests, including native practitioners, fishermen, surfers, and body boarders forming a human blockade to prevent the Superferry from docking on Kaua'i. In September 2007, the Maui Circuit Court issued a temporary restraining order barring the use of Kahului Harbor and sinking the Superferry's hopes. In a political whirlwind, the law was amended in a special session of the Hawai'i legislature to allow the Superferry to sail once again.

Political gamesmanship aside, the not-so-super Superferry debacle is a painful lesson for everyone. Had Superferry officials simply completed an EA or EIS considering and accounting for the impacts of its proposed business venture back in 2004, much heartache could have been avoided and the significant financial and other resources wasted on litigation could have been put to better use. Now, as a result of its actions, many people throughout Hawai'i continue to protest Superferry operations and refuse to patronize it. Although Superferry is operating between O'ahu and Maui, as of the date of this publication, Superferry has not returned to Kaua'i.

In the meantime, cultural practitioners' worst fears have already materialized as the exploitation of cultural resources seemed to immediately accompany ferry service. As just one example, on one of the Superferry's first commercial trips, people from O'ahu illegally appropriated three truckloads of ima stones (special stones used for traditional underground ovens) from a Maui stream. This theft would likely have been successful if not for a court-ordered injunction temporarily halting the ferry service and stranding the trucks. Who knows what else has occurred since service resumed.

Get It Right the First Time

Only time will tell what the future holds for the Superferry. But you can help determine what the future holds for your own business ventures in Hawai'i or other indigenous communities. Be the captain of your destiny by proactively doing your homework and complying with existing laws protecting natural and cultural resources. Hawai'i can remain a paradise in many respects if people understand and appreciate Hawai'i's laws and indigenous culture. After all, those are some of the things that make life and business in Hawai'i truly special.

National Public Service Award

The Section's Committee on Pro Bono is seeking nominations for its 2009 National Public Service Award. The Award will be presented at the Section's Spring Meeting to be held in Vancouver, BC, April 15-18, 2009. The Award recognizes significant pro bono legal services which demonstrate a commitment to providing services to the poor in a business context.

Two National Public Service Awards will be presented: one recognizing the pro bono contributions of an individual and one recognizing the pro bono contributions of a law firm or corporate law department.

Nominations for the Award may be submitted by individuals, firms, or corporate law departments who provide business legal services to the poor or to organizations that serve the poor. Award recipients must have:

* Demonstrated dedication to the development or delivery of pro bono business legal services,
* Contributed significant work toward developing innovative approaches to the delivery of pro bono business legal services, or
* Provided sustained pro bono business counsel to organizations and/or micro-entrepreneurs in aid of community development.

Nominations are due no later than Friday, January 16, 2009. For more information about the National Public Service Award and the nomination process, please visit the Section's Web site at www.abaprobono.org/NPSA.html or contact Alisa M. O'Connor at oconnora@ralchteret.org.