DO NATIVE HAWAI'ANS

HAVE A SPECIAL CLAIM TO

GEOTHERMAL RESOURCES IN HAWAII?

A Legal Analysis

Prepared for the Department of Planning

and Economic Development,

State of Hawaii

by

Robert M. Kamins, J.D.

November, 1980
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II. Is There a &quot;Native Hawaiian Right&quot; to Geothermal Fluids?</td>
<td>6</td>
</tr>
<tr>
<td>III. Are Geothermal Resources Held in Trust for Hawaiians?</td>
<td>19</td>
</tr>
<tr>
<td>IV. Who Benefits from Trust Proceeds and To What Extent?</td>
<td>37</td>
</tr>
<tr>
<td>V. Summary and Recommendation</td>
<td>43</td>
</tr>
<tr>
<td>Recommendation</td>
<td>46</td>
</tr>
<tr>
<td>Principal Sources</td>
<td>47</td>
</tr>
</tbody>
</table>
I. Introduction

The past decade has seen a resurgence of political activism by and on behalf of native Hawaiians, seeking redress for detriments experienced by the Polynesian population after the influx of other races in the 19th century. One indication of that activism is the demand upon Congress to appropriate funds to compensate the Hawaiian people for their social and economic losses, as certain Indian and Alaskan tribes have been indemnified. Another is the set of amendments to the Hawaii state constitution adopted in 1978 which established a new Office of Hawaiian Affairs, provided that the public lands of the state were held in trust for the benefit of native Hawaiians and the general public, and affirmed that the state will protect "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes" and


2Art. XII, §§ 5 and 6, now provide for an Office of Hawaiian Affairs, headed by a board of trustees elected by Hawaiian voters, to administer proceeds from the "lands, natural resources, minerals..." held in trust by the state.

3Art. XII, § 4 gives constitutional recognition to the public trust in lands created by Section 5 of the Admission Act, discussed in part III of this paper.
now possessed by descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778" [the year Captain Cook first arrived].

The relevant circumstances in Hawaii differ from those under which native peoples in other states of the Union have sought economic redress in at least two important ways. First, there were no treaties between the Hawaiians, as a people, and the Americans which could form the basis of a claim for reparations or indemnities. The disabilities suffered by the Polynesian population were essentially incurred before Hawaii became a territory of the U.S. in 1898. Their reduced status was continued by that transfer of sovereignty, not caused by it.

Second, the federal government has no extensive land holdings in Hawaii, other than military bases and national parks, from which to grant lands in compensation for past injuries. Consequently, there is bound to be an interest, as a possible source of compensation, in new resources which are or may be the property of the State of Hawaii. The recent discovery in Puna of geothermal resources, seemingly of great economic value, provide such a resource. Discussions of the development of geothermal reservoirs on the Island of Hawaii have evoked the assertion that native Hawaiians should get

---

4 Art. XII, § 7. This and the foregoing sections were all proposed by a 1978 constitutional convention and ratified at a popular election. Another convention proposal defining the terms "Hawaiian" and "native Hawaiian" were held to be not validly ratified. Kahalekai v. Doi, 60 Haw. 324 (1979).
a percentage of the royalties paid on well production. The most formal expression of a Hawaiian claim to geothermal resources, or the income from their exploitation, is in an amicus curiae brief in Robinson v. Ariyoshi, a potentially landmark case in water law now pending before the U.S. Court of Appeals for the Ninth Circuit.

An attempt to demonstrate that native Hawaiians have some special claim to geothermal resources might proceed on either of two theories. The first is that geothermal fluids, or the steam or heat from them, were among those natural resources access to which was guaranteed to descendants of the aboriginal population as part of the native Hawaiian rights preserved during the Great Mahele -- the division of estates which here created private ownership in land. As is well known, the government of Kamehameha III (Kauikeouli)

---

5 As at a public hearing held August 7, 1980 in Hilo to consider a request for a permit to drill exploratory wells in Puna. Hilo Tribune-Herald, August 8, 1980, p. 1. Recently the Republican candidate for the U.S. Senate from Hawaii was quoted as being concerned about geothermal development "because the issue of Hawaiian rights" has not been resolved. Honolulu Advertiser, Oct. 18, 1980, p. A-11.

6 Submitted for Ho'ala Kanawai, Inc. (Awakening The Law) by Mitsuo Uyehara and Mililani Trask, October 14, 1978.


8 No. 7432. The decision has been repeatedly postponed because of changes in the membership of the court.
under strong Western influence, in the mid-19th century replaced an essentially feudal land system in which outright ownership of land had no place with an allodial system generally based on the ownership concepts of Anglo-American common law. However, the declarations and statutes\(^9\) which brought about this radical change repeatedly acknowledged that some customary rights of access to natural resources were preserved for the native tenants of lands now held in fee by their old landlords and by their successors in title. The first theory could assert that the bundle of rights so protected includes rights to geothermal resources which remain in force today, more than a century after the Great Mahele.\(^{10}\)

\(^9\)Including statements in the 1839 Declaration of Rights, the Constitution of 1840, Principles Adopted by the Land Commission (1847), Joint Resolution on the Subject of Rights in Land (1846), Act of August 6, 1850, and Section 1477 of the 1859 Civil Code. These are discussed below at note 12.

\(^{10}\)Strictly speaking, the Great Mahele -- the division of lands between chiefs and landlords (konohiki) on the one hand and the sovereign (both as a private landlord and occupant of the throne) on the other, as recorded in the Mahele Book -- was completed between January 27 and March 7, 1848. (See Jon J. Chinen, The Great Mahele: Hawaii's Land Division of 1848, University Press of Hawaii, 1978). However, as sometimes used as a short-hand term for the establishment of a system of private landholding, the "Mahele" also includes the Kuleana Act of 1850 and other legislation under which land went into fee ownership during the entire second half of the nineteenth century, as narrated by Sanford Dole in Evolution of Hawaiian Land Tenures (reprinted in Hawaiian Historical Society Papers No. 3, December 5, 1892) and as cataloged by Louis Cannelora in The Origin of Hawaii Land Titles and of the Rights of Native Tenants (Security Title Corporation, Honolulu, 1974). Social effects of the Mahele are drawn by Marion Kelly, Changes in Land Tenure in Hawaii, 1778-1850 (Unpublished thesis in University of Hawaii Library, 1956).
The second possible theory is that, irrespective of other property rights preserved to native Hawaiians, they are the beneficiaries of a trust, the corpus of which includes geothermal resources. It is the primary purpose of this paper to examine each of these theories in the light of Hawaiian history and case law to ascertain if either provides the basis for making a prima facie case asserting ownership of geothermal resources by or on behalf of native Hawaiians. The secondary purpose is to state what group within the population are "native Hawaiians" in this context.

As noted above (note 4) a constitutional amendment defining "Hawaiian" and "native Hawaiian" was not validly ratified in 1978, but these definitions were provided by a 1979 statute. The meaning of the term is not critical for the first sections of this paper and is deferred until part IV.
II. Is There a "Native Hawaiian Right" to Geothermal Fluids?

The pre-European civilization of Hawaii incorporated a complex system of resource utilization, in part structured by kapus or prohibitions. To ensure that the commoner "tenants" who worked the land (hoa'ainas) had access to what was necessary for their livelihood and to produce the surplus needed to maintain the nobles (aliis), the landlords (konohiki) and priests, the hoa'aina were allowed to come on the lands of the konohiki. There, within reasonable limits set by custom, they could take firewood, timber and thatch for their huts, cordage for fishing lines, water for their taro and household needs, and other essential materials. These rights of access to such natural resources, embedded in the daily usages of a society without writing, were acknowledged in the early legal declarations printed by the government of Kamehameha III, even before the Mahele. The current

---

The Declaration of Rights of 1839, which preceded the first constitution (1840), provided the initial written acknowledgment that commoners had certain rights in the land: "...protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, and nothing whatever shall be taken from any individual except by express provision of the law."

The 1840 Constitution added that while all lands had belonged to Kamehameha I, founder of the line, "it was not his own private property. It belonged to chiefs and people in common, of whom Kamehameha I was the head, and had management of the landed property." (Emphasis supplied.)

In 1846, the extent of the "people's" rights in land were specified for the first time by a Joint Resolution on The Subject of Rights in Land, approved by Kamehameha III. "The rights of the hoa'aina in the land, consists of his own taro patches, and all other places which he himself cultivates
expression of those native Hawaiian rights, essentially un-
changed since its enactment in 1850, is now found in Section
7-1 of the Hawaii Revised Statutes and reads as follows:

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 ti leaf, from the land on which they live, for their own private use, but they 
shall not have a 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 water-courses, which individuals have made for their own use.13

for his own use, and if he wishes to extend his cultivation on unoccupied parts, he has the right to do so. He has also rights in the grass land, if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animal on the land, but not in such numbers as to prevent the konohiki from pasturing his. . . ." (L. 1847, p. 70; RLH 1925, II, p. 2193).

The 1850 Act Confirming Certain Resolutions of the King and Privy Council (August 6, 1850) revised the 1846 statement of hoa'aina rights, casting it substantially in the language which has continued to this day as the statute defining rights of "the people" in resources on the land, except that notice to or permission of the landlord was then required to come on his land. (L. 1850, p. 202; RLH 1925, II, p. 2141). The latter qualifications were deleted by an 1851 statute which noted that "many difficulties and complaints have arisen, from the bad feeling existing on account of the konohiki's forbidding the tenants on the lands enjoying the benefits that have been by law given them." (L. 1851, p. 98). As so amended, the statutory declaration of the rights of the people was codified (Sec. 1477, Civil Code of 1859) and has remained unchanged in the Hawaii Revised Statutes, now § 7-1, as shown in the text below.

13 Note that no right to take resources for commercial resale is given, nor any right to water from privately developed water sources.
Considering how vital water was to the Hawaiian society,\textsuperscript{14} which depended on irrigation and fishponds to feed a large population from relatively limited areas of cultivable land, it is not surprising to see that the statement of native rights spelled out, even redundantly -- rights of access to "drinking water, and running water...springs of water, running water." Ground water sources, such as those which may charge geothermal resources, are not mentioned, conjecturally because geothermal pools were not numerous, of great value, or generally available to commoners.\textsuperscript{15}

Arguably, it might be asserted that in the bundle of rights reserved to "the people" are rights to ground water, including the recently discovered geothermal resource, on the grounds that the reservation was generic and not exhaustively detailed in the statute. If an advocate were able to get past the specificity -- and seeming exclusivity -- of the language of Section 7-1, he may find a judicial

\textsuperscript{14}The great importance of water is reflected in the Hawaiian language in the many terms for the vital fluid. Wai means fresh water, wai puna spring water, kaha wai a stream, 'auwai water flowing in a ditch or channel, loko wai a freshwater pond, etc. Waiwai (literally the plural, or much water) means wealth or possession. The Hawaiian word for "law" is kanawai, literally "belonging-to-the-waters", connoting an equal division of water, i.e., justice. Handy and Handy, Native Planters in Old Hawaii, Bernice P. Bishop Museum Bulletin, No. 233 (Honolulu, 1957), pp. 57-8.

\textsuperscript{15}Research into the mythology and recorded oral history of Hawaii may reveal other uses of geothermal water or heat, but they are not known to specialists at the University of Hawaii or Bishop Museum. See note 20 for one historical reference.
fragment to support the assertion in an important Hawaii water case now pending on appeal. At question in McBryde Sugar Company v. Robinson 16 was the ownership of certain surface waters. The majority of the Hawaii Supreme Court, in an opinion strongly criticized by the minority, 17 found in the legislation which provided for the Mahele an intent to retain in the sovereign the power to enforce, even on estates granted into private ownership, the "usufruct of lands for the common good." The court went on to say:

We believe that the right to water is one of the most important usufructs of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants. 18

If the decision of the Hawaii Supreme Court is sustained, rather than the contrary holding of the U.S. District Court that grantees received rights to surplus water with their land grants, it could be argued that rights to geothermal water were also reserved to the people, along with

16 54 Haw. 174 (1973); 55 Haw. 260 (1974). The sugar companies which had been contesting their respective rights to water on Kauai took to the U.S. District Court for the District of Hawaii their plea that the Hawaii Supreme Court, in holding that the state owned so-called "surplus" waters, had taken their property in violation of the 14th amendment of the federal constitution; they prevailed in Robinson v. Ariyoshi, 441 F. Supp. 559 (1977). That decision is before the U.S. Court of Appeals for the Ninth Circuit.

17 In the first McBryde decision is a long dissenting and concurring opinion by Justice Marumoto. 54 Haw. 174 at 201. At a rehearing of the case, to the short dissent of Justice Marumoto was added a long, analytical dissent by Justice Levinson, who had switched from the majority in McBryde I, resulting in a 3-2 decision which retained the opinion that surplus waters were owned by the state. 55 Haw. 260 at 261 and 262.

18 54 Haw. 174 at 186.
the other rights concerning water specified in Section 7-1.

However, even if the Hawaii Supreme Court decision prevails, difficulties in extending its rule to geothermal resources would remain. McBryde and Section 7-1 both relate to surface waters and their accustomed use at the time of the Great Mahele. No record has been discovered of use by the Polynesians of Hawaii of geothermal waters, other than bathing in geothermal pools on the Island of Hawaii. Unless the broad notion of "usufruct" in McBryde can be expanded to include all resources in and under the land, even if unknown or unused in pre-Mahele Hawaii, that decision would not sustain an assertion of reservation of geothermal resources for all the people of Hawaii, let alone for those of Hawaiian blood.

An attempt to find unspecified rights, as to geothermal resources, in the language of Section 7-1 must also get around the earliest and still prevailing interpretation of those rights, in Oni v. Meek. In that 1858 case the Hawaii Supreme Court considered the claim of plaintiff Oni, a tenant residing on a portion of the same ahupua'a (basic Hawaiian

19 William Ellis, Journal of William Ellis (Chas. Tuttle Co., Rutland, 1979), p. 237, described a hot spring at Kawaihae, Hawaii as having "various medicinal qualities... ascribed to it by those who have used it," but from the context one cannot tell if the users are Hawaiians or other Europeans. Ellis did note, however, that the Polynesians cooked food and offerings to Pele by placing them "in the steaming chasms" or burying them in the hot earth near Kilauea.

20 2 Haw. 87 (1858).
land division) leased to the defendant. Oni was seeking damages for two horses, seized by Meek because they were grazing on his land. The trial court had allowed damages, but on appeal the Supreme Court reversed the judgment. It is the manner in which the high court wrote its decision that makes it important today.

Oni argued that by Hawaiian custom, he, as a tenant, was allowed pasturage on the kula lands (open fields) within the ahupua'a. Evidence was presented to show that horses had become numerous only about a dozen years before the controversy arose, and so Meek contended that pasturage was too recent a usage to qualify as a customary right.21

The court gave short space to this line of argument. Instead, it centered attention on the assertion that the 1846 legislative statement on the rights of the people gave tenants the right of pasturage within the ahupua'a. Justice Robertson took the opportunity to make a comprehensive statement on the nature and extent of what he termed "that entire revolution in the law affecting rights in land, and land titles"22 which had just taken place. The 1846 listing of rights, as well as all customary, unwritten rights in the land, the court

---

21 Id. at 89. The court might have found common law precedent for recognizing certain rights of the Hawaiian tenants in the English profits a prendre (or rights of common), those privileges of using the land of the lord, theoretically based on some ancient agreement between lord and feudal tenants, which by time had formed a prescriptive right, even though there was no written evidence of the original agreement. 4 Coke 37.

22 2 Haw. 87 at 92.
stated, were completely superseded by the statutes which accomplished the Mahele. All that remained of native Hawaiian rights were those privileges explicitly listed in statutes enacted after the land division of 1848. These the court identified as the statute preserving the fishing rights of the hoa'aina and the rights explicitly listed in the seventh section of the Act of August 6, 1850, now identified as Section 7-1, Hawaii Revised Statutes. Any other rights ceased to exist.

At this distance in time, it would appear that the sweeping interpretation thus given to the effects of Mahele legislation on native rights in land use might have been cut back in subsequent cases as obiter dicta, unnecessarily inserted by a court faced with an asserted claim -- to right of pasturage -- which it found to be historically unqualified to be a customary right. Oni v. Meek might have been decided on that narrow ground without the broad statement as to the radical effect of the 1850 statute. If that portion of the opinion had subsequently been labeled as dicta, there would be ground to argue, citing Hawaiian usages and using

23 The court applied the maxim expressio unius est exclusio alterius (the expression of one thing is the exclusion of another). Id. at 96.

24 Id. at 95. The social bargain struck in the Mahele, in the court's interpretation, was that the new order at once removed from the hoa'aina the duty of working for the king and konohiki and curtailed their rights as tenants to use resources of the konohiki's lands.
appropriate analogies, about Hawaiian rights broader than those listed in 7-1 and whether they include access to, or benefits from, subsurface resources such as geothermal reservoirs.

In fact, however, the broad doctrine of Oni was not curtailed in later decisions of the Hawaii Supreme Court or by the federal appellate courts. On the contrary, that doctrine was reinforced (again by Justice Robertson) in another landmark land case, Estate of His Majesty Kamehameha IV,\textsuperscript{25} where the court once more related its decision to its conclusion that the Mahele legislation which accomplished "that peaceful but complete revolution" in the government and land system of Hawaii had utterly displaced the old duties and privileges in land use.\textsuperscript{26} Subsequently, the broad doctrine of Oni v. Meek was cited as the law of Hawaii, notably in 1895,\textsuperscript{27} 1902,\textsuperscript{28}

\textsuperscript{25}2 Haw. 715 (1864).
\textsuperscript{26}Id. at 720-6.
\textsuperscript{27}Dowsett v. Maukeala, 10 Haw. 166. "In Oni v. Meek... this court held that the Act [of August 6, 1850] repealed the former legislation and the ancient tenure, but in the seventh section preserved to the people, whether hoa'ainas by ancient custom or kuleana holders, certain specific rights, as to take firewood, house timber, thatch, etc. for their own use." (At 170.)
\textsuperscript{28}Carter v. Ter. of Hawaii, 14 Haw. 465. The court quoted a characterization of Justice Robertson of the Oni court as "'our best authority' on early Hawaiian tradition, history and jurisprudence." (At 477.)
1922, 29 1947, 30 and 1966. 31

Against this judicial record, it would be difficult
to argue that Oni v. Meek is not dispositive of any claim
by native Hawaiians to rights in land not explicitly listed
in Section 7-1. Difficult, but not impossible to maintain.
As the Hawaii Supreme Court noted in one of its decisions
reinforcing Oni, property rights are inherently subject to
change "as changes in circumstances and of public opinion,
as well as other reasons affecting the public policy, are all
the while calling for changes in the law." 32 A court which
accepted a need to reverse prevailing doctrine on natural
resource use (such as the Oni court at the time of the Mahele
or the McBryde court of 1973) as sufficiently urgent to

29 Territory v. Gay, 26 Haw. 382. Cites Oni v. Meek
and Estate of Kamehameha IV as authoritative analysis of the
legislative intent and legal effects of the 1846-50 land
laws. (At 403.)

30 Gabriel v. Margah, 37 Haw. 571. Cites Oni v. Meek
for the rule on the implicit repeal of an earlier statute
by a conflicting later enactment. (At 574.)

31 Application of Robinson, 49 Haw. 429. The dissent
of Justice Cassidy cites Oni v. Meek as authority holding
that the Joint Resolution of November 7, 1846 became functus
on passage of the Kuleana Act of August 6, 1850, "if not
earlier." (At 452.)

32 Carter V. Ter. of Hawaii, 14 Haw. 465 (1902) at
475.
overcome the force of stare decisis\textsuperscript{33} might be convinced that the Oni doctrine with respect to the scope of Section 7-1 should be re-examined. However, even a court receptive to the argument that Oni be set aside to achieve justice would require a showing that: (i) the people of Hawaii before the Mahele made some use of geothermal fluids and steam, or (ii) the 1850 statute enacting the substance of Section 7-1 intended not merely to give the right to use the surface waters there referred to but a right to subsurface fluids as well, or (iii) the specified right to gather firewood was intended to extend to whatever fuel sources were available on or under the land, as they might change with the generations.

As already indicated, no evidence in support of any of these propositions was discovered. It may exist, but is certainly not conspicuous in the legislative records relating to the Great Mahele or in the fragmentary accounts of rights to resource use in pre-European Hawaii.\textsuperscript{34} And even if


\textsuperscript{34}The use of a thermal spring at Kawaihae early in the 19th century was noted by an early missionary. See footnote 19 above.
sufficient evidence to convince a court were discovered, there would remain the problem of showing that the right to have or use geothermal resources had been reserved to the native Hawaiian population, rather than to the people at large, or the government of Hawaii on behalf of the entire population. Those rights set forth in Section 7-1 are by that statute reserved to "the people", but the context indicates that the intended beneficiaries are those persons who live in the area of the konohiki grant; e.g. those dwelling in the ahupua'a of Waimanalo on Oahu could continue to come on the land of the ahupua'a, now owned in fee simple by their konohiki, to take firewood, thatch, water, etc. 35

This construction, limiting rights to the named resources to tenants 36 and others lawfully on the lands within

35 As originally enacted (Sec. 7 of Act of August 6, 1850) the statute read: "When the landlords have taken alodial title 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 ti leaf from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water courses which individuals have made for their own use." By Laws of 1851, p. 98, the underlined language was deleted, but the rest was unchanged to become the statute now incorporated as Section 7-1, Hawaii Revised Statutes.

36 Oni v. Meek, 2 Haw. 87 (1858).
the ahupua'a, seems unambiguously the law in Hawaii. The rights, then, are not to the population at large, or to native Hawaiians generally, but specific in each use to the ahupua'a against which the rights are asserted. Only tenants of the ahupua'a, meaning lawful occupants of any division of the ahupua'a, can claim the rights enumerated by Section 7-1. Against lands which did not comprise a konohiki award (such as those claimed by Kamehameha III or lands still owned by the state) these rights do not apply.

In McBryde, the Hawaii Supreme Court interpreted "the people" of Section 7-1 even more narrowly. In quoting the statute, the court without comment inserted its interpretation: "The people [meaning owners of land] also shall have a right to drinking water, and running water, and the right of way. . . ." 39

This offhand construction, if it were doctrine rather than obiter dicta, would further remove from the possible reach of Section 7-1 claims of most Hawaiians to natural resources, such as geothermal, for only landowners could qualify as beneficiaries of the statute. The main force of McBryde, its holding that "the ownership of water in natural

37 Dowsett v. Maukeala, 10 Haw. 166 (1895); also Hatton v. Piopio, 6 Haw. 334 (1882) for analogous holding with respect to fishing rights.


39 McBryde Sugar Co. v. Robinson, 54 Haw. 174 (1973) at 192.
watercourses, streams and rivers remained in the people of Hawaii for their common good," does, however, offer an element of support to a theory that natural resources, unless specifically granted away, remain the property of the state available to the native Hawaiian population. The vehicle for that theory, however, is not Section 7-1, but the doctrine of a trust in land, which will be examined in the next portion of this paper.

40 Id. at 187. A recent decision of the 3rd Circuit Court (South Hilo) on public access to the shoreline and mountains, illustrates how a tribunal may accept ancient Hawaiian custom as the basis for adjudicating contemporary rights. In Sportman's Club v. Okuna, the plaintiffs, representing "all residents of the state of Hawaii," were granted the right to cross the defendant's ranch along old trails leading to the beach and to upland hunting areas. The court, after hearing the testimony of 93-year old kamaaina witnesses, ruled that the right of public access established by ancient Hawaiian custom is still in force. Honolulu Advertiser, October 10, 1980, pp. A-1 and A-4.
III. Are Geothermal Resources Held in Trust for Hawaiians?

Even without the question of Hawaiian rights in geothermal resources, there is some uncertainty concerning their ownership in this state. A 1974 statute defined them as "mineral," thus seeking to bring them under the mineral rights routinely reserved by the successive Hawaiian regimes from the Mahele until the advent of the territorial government in 1900, and then again after 1955. However, during the first half of this century, the Territory issued a large number of land grants without the mineral reservation, which was again required by statute in 1963.

Two questions are presented by this history. First, are mineral reservations to be implied in the land grants made between 1900 and 1955? Second, does the 1974 definition of "mineral" to include "geothermal" apply retroactively to all mineral reservations, explicit or implied, made clear back to the Great Mahele?

---

41 Act 241, amending § 182-1, Hawaii Revised Statutes.
42 From 1900 to 1955, over 8,000 land patents were issued, all (or virtually all) without mineral reservations. Kenneth Lau, Mineral Rights & Mining Laws (Legislative Reference Bureau, University of Hawaii, Honolulu, 1957), p. 20.
43 Act 11, incorporated as § 182-2(b), Hawaii Revised Statutes.
44 And in the relatively few land patents issued without mineral reservations by the Kingdom, Provisional Government and Republic of Hawaii.
45 For a discussion of these questions see Robert Kamins, "Ownership of Geothermal Resources in Hawaii", 1 University of Hawaii Law Review 69 (1979).
Both questions can be argued in the affirmative. Considering the long period in which mineral rights were reserved to the sovereign (1848-1900), a court could find that the reservation had become well established public policy, and that, without statutory mandate, the territorial government acted beyond its powers in removing the reservation clause from its land patents. Alternatively, it might be held that the conditions concerning public land management imposed by the Hawaii Organic Act did not allow the Territory to dispose of mineral rights.

As to the retroactive application of the 1974 amendment of "mineral" to include geothermal resources, it can be readily argued that the amendment was merely an explanation of the term to take into account a kind of natural

46 The Laws of Kamehameha III, 1846, p. 99, required each royal patent, granting land in fee simple, to include the clause "reserving to the Hawaiian Government all mineral and metallic mines of every description." This portion of the statute was omitted from the Civil Code of 1859 and so held to be repealed. (In re Robinson, 49 Haw. 429, 421 P.2d 570 (1966)). Nevertheless, the mineral reservation clause, identically worded, was used with seemingly few exceptions until after Hawaii was annexed by the United States. In 1955, the Territory again began to insert the reservation in patents, but the statutory requirement to reserve minerals in lands sold or leased by the government was not re-enacted until 1963 (Act 11, Haw. Session Laws).

47 The territorial Attorney General opined that, in the absence of a statute prohibiting such alienation, mineral lands could be sold. (Opinion No. 379, 1906.) No opinion, however, addresses the question of whether mineral rights could be included in grants of land for agricultural, housing and other purposes.

48 Discussed in article cited in note 45 at pp. 72-3.
resource unknown -- at least as a commercially valuable asset -- when the mineral reservation was prescribed by statute. By this argument, "mineral" includes yet-to-be-discovered elements which partake of the quality of mineralness, just as "vehicle" inherently encompassed automobiles, even before the invention of the gasoline motor.

In any case, irrespective as to how these two questions are ultimately answered by the courts, the State of Hawaii has reserved the rights to some geothermal reservoirs, and if both questions are decided in the affirmative, it has them all. With respect to those geothermal rights which are reserved to the state, do native Hawaiians have any special claim as the beneficiaries of a trust imposed on state-owned natural resources?

An emerging common law doctrine of public trust can be traced in the decisions of the Hawaii Supreme Court, a doctrine which holds that the state, as trustee for the people, must safeguard their rights in certain natural resources. Historically, these resources were those of waterways, such as coast shores, tidelands and rivers, but in

48A Sax, "The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention," 68 Michigan Law Review 471 (1970). The doctrine has also been applied to protect wildlife, Geer v. Connecticut, 161 U.S. 519 (1896) and parklands, Stephenson v. County of Monroe, 43 App. Div. 2d 897, 351 N.Y.S. 2d 232 (1974). In Hawaii, the doctrine was first applied in 1899, when the Hawaii Supreme Court used it to deny a corporation the right to develop portions of Honolulu Harbor. King v. Oahu Ry. & Land Co., 11 Haw. 717. Tidewater lands were also held to be vested in the sovereign
a recent decision the Hawaii court also applied the doctrine in deciding that the state held title to new extensions of lava along the ocean front. Conceivably, it could be argued that under the doctrine of public trust newly discovered subsurface resources, such as geothermal reservoirs, should be treated as belonging to the people and held in trust for them by the state.

However, another kind of trust is more immediately available for argument on behalf of a claim by native Hawaiians to a natural resource such as geothermal reservoirs -- a trust in ceded lands. The latter derives not from the common law which created the public trust doctrine but from the legislation which transferred lands from Hawaii to the United States on annexation, and transferred them back to Hawaii on the granting of statehood.


State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977). An element in the decision was the disinclination of the court to have the owners of adjacent lands gain the benefit of a "windfall" of new lava extensions into the sea.
to the federal government absolute title to all its lands, consisting of approximately 1,700,000 acres. However, the U.S. did not merge these lands into the public domain of the federal government. Instead, and uniquely in the history of territorial acquisition by the U.S., it provided that the existing laws of the U.S. relative to public lands should not apply to those ceded by the Hawaiian government, but that the U.S. Congress should "enact special laws for their management and disposition." Further, all revenues from the ceded public lands (except those used by the federal or Hawaii governments) were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

The Organic Act of 1900, legislated by Congress to function as the basic law of the Territory, analogous to a state constitution, affirmed the special status of the ceded lands. It provided that they would remain in the "possession, use, and control" of the territorial government and that

---

50 The Treaty of Annexation (1897) states that the "Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government or crown lands. . . ." (Art. II). The Joint Resolution of the U.S. Congress which ratified the annexation (Public Resolution 51, July 7, 1898, 55th Congress, 2d Session, 30 Stat. 750), confirmed the transfer of the domain.


52 Treaty of Annexation, Art. II, and Joint Resolution 51 (3d para.).

53 Id.

54 Organic Act, § 91.
any funds derived from the public lands should be appropriated by Hawaii for "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation." All laws of Hawaii relating to public lands were continued in effect until Congress should have provided otherwise.

The effect of this federal legislation incident to transforming Hawaii from a sovereign republic to an American territory was to transfer title in the ceded lands to the U.S., but placing (or retaining) the beneficial interest in those lands in the people of Hawaii. A trust was thus created, with legal title to the lands in the federal government, the equitable title in the population of Hawaii, with the U.S. as trustee, and the territorial government as its agent.

Granting of statehood to Hawaii in 1959 reversed the transfer of title which accompanied annexation but retained the trust and made its terms more explicit. In the Admission Act, Congress granted back to the State of Hawaii all public lands

55 Id., § 73(e).
56 Id., § 73 (c).
57 The U.S. Attorney General found the basis of a trust in the limitation made by Congress in the Organic Act, directing the revenues from the ceded lands to the benefit, not of the population of the U.S. at large, but only to the inhabitants of Hawaii. 22 Ops. Att. Gen. 574 (Sept. 9, 1899) and 627 (Nov. 21, 1899).
lands in Hawaii to which it held title.\textsuperscript{58} However, Section 5(f) of the Act provided that the ceded lands then or later returned to Hawaii, and any income or proceeds from their sale

\ldots shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. \ldots\textsuperscript{59}

The Hawaii constitution adopted in 1959 contained the commandment that the state would comply by appropriate legislation with the provisions of the trust.\textsuperscript{60} In 1978,

\textsuperscript{58}Except lands set aside by Congress, the President or Governor of Hawaii for the use of the United States, or, out of lands then controlled by the U.S. under agreement by the Territory, parcels which might be selected by Congress or the President within five years of statehood. 73 Stat. 4, § 5. Other lands in Hawaii were set aside for support of the Department of Hawaiian Home Lands by the Hawaiian Homes Commission Act of 1920, accepted as a compact with the U.S. by the State and people of Hawaii under the state constitution (Art. XI). By § 5(b) of the Admission Act, all areas defined as "available lands" by the Hawaiian Homes Commission Act were also granted back to the state.

\textsuperscript{59}Emphasis supplied.

\textsuperscript{60}Originally, Art. XIV, § 7. Renumbered to Act. XVI, § 7 in 1978.
following the revelation that revenues from the corpus of
the trust had not been segregated and administered in conformity
with provisions of the trust, the constitutional provision
was extended to provide that such legislation "shall not
diminish or limit the benefits of native Hawaiians" under
the trust. Further emphasis on native Hawaiians as benefi-
ciaries of the ceded lands trust was given by a companion
amendment, which states:

The lands granted to the State of Hawaii by
Section 5(b) of the Admission Act . . .,
excluding therefrom lands defined as 'available lands' by the Hawaiian Homes Commission
Act, 1920, as amended, shall be held by the
State as a public trust for native Hawaiians
and the general public.

Other amendments established an Office of Hawaiian
Affairs to hold title to property set aside for "native
Hawaiians and Hawaiians", and to manage the "proceeds from

61 Problems previously surmised were documented by the
Financial Audit of the Department of Land and Natural Resources
(Legislative Auditor, State of Hawaii, Honolulu, January 1979)
which found that the Department, charged by statute with the
administration of the ceded lands, had intermingled revenues
from those and other public lands. Part of the difficulty
is that the Department had not identified those lands which
were ceded, seemingly a difficult task. Sheryl L. Miyahira,
Hawaii's Ceded Lands, unpublished manuscript on file in
University of Hawaii Law School Library, dated June 2, 1980,
pp. 37-38. Also see text below at notes 99 and 100.

62 Article XVI, § 6.

63 Article XII, § 4.

64 Article XII, § 5. The initial election of the
board of trustees which is to administer the Office was
conducted on November 4, 1980.
the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income...from that pro rata portion of the trust created by the Admission Act.

The trust in ceded lands is thus doubly provided for, established both by federal statute (the Admission Act) and by the Hawaii constitution. But neither legislative source states, except in a most general way, what the "ceded lands" corpus of the trust is, what is its extent and quality. The Treaty of Annexation and the Joint ("Newland ") Resolution which annexed Hawaii, from which the ceded lands derive, describes them merely as the "public, government or crown lands." The Hawaii Organic Act, which placed the corpus under the administration of the Territory, refers to it as "the public property ceded", and the Admission Act, which returned title to Hawaii, identifies the property subject to the trust as "the lands" and "public lands." The Hawaii Revised Statutes define "public lands" as "all lands or interest therein in the State classified as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date."

---

65 Article XII, § 6. What constitutes a pro rata share is discussed below at note 101.

66 30 Stat. 750.

67 At § 91.

68 At § 5(f).

69 Sec. 171-2.
None of these pieces of legislation indicate whether subsurface resources, such as geothermal fluids or steam, are part of the lands which are held in trust, or if subsurface rights severed from the surface estate remain in the corpus. Harking back to the history of mineral reservations briefly traced above, the following situations can be distinguished with respect to the status of mineral rights in Hawaii:

<table>
<thead>
<tr>
<th>Surface estate:</th>
<th>Privately owned</th>
<th>State owned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mineral rights:</td>
<td>Not reserved to State</td>
<td>Reserved to State</td>
</tr>
</tbody>
</table>

With respect to acreage now held by the state which had been returned pursuant to Section 5 of the Admission Act (the right-hand section of the preceding diagram), it seems clear that such trust lands do include resources underlying their surface. This would be true either under traditional common law doctrine, which holds that the owner of the soil owns "to the depths", or under an extension of ancient Hawaiian tradition, which recognized no cleavage between the various attributes of land and the resources associated with it. By Hawaii statute, the Department of Land and

70 See text at notes 41-48, supra.

71 Cujus est solum, ejus est usque ad coelum et ad inferos. ("To whomever the soil belongs, he owns also to the sky and to the depths.") 2 Blackstone Commentaries 18 (1902). City Mill Co. v. Honolulu Sewer & Water Comm., 30 Haw. 912 (1929) holds that with respect to artesian reservoirs owners of the overlying land shared in ownership of the basin below -- the correlative rights doctrine which modifies that of cujus est solum.
Natural Resources, which administers public lands, must hold in the public trust established by Section 5(f) all proceeds from the "sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii . . . and returned to the State of Hawaii . . . ." Such proceeds would include rents and royalties from geothermal leases on lands in the trust and they would be placed in the special land and development fund, for disposition in accordance with the provisions of Section 5(f).

The status of geothermal resources underlying lands which, as possibly it may be finally decided, the Hawaii government granted away without an effective reservation, also seems clear. Any claim by the state to mineral rights, including geothermal rights, respecting such lands would vanish with the holding that a reservation had not been made -- as may be the case with respect to grants made by

72 Sec. 171-48, Hawaii Revised Statutes. The statutes dealing with public lands define "land" to include "all interests therein and natural resources including water, minerals, and all such things connected with land, unless otherwise expressly provided." § 171-1.

73 Royalties on geothermal production on state lands, and on private lands held subject to a reservation of geothermal resources, are provided for by Rule 3 of the Regulations on Leasing of Geothermal Resources and Drilling for Geothermal Resources in Hawaii (Regulation 8, Department of Land and Natural Resources, Honolulu, 1978), p. 7.

74 Sec. 171-19, Hawaii Revised Statutes. The seven purposes there listed for which moneys in the fund may be spent do not explicitly include bettering the conditions of the Hawaiian people, as required by § 5(f) of the Admission Act. However, the statute states that it is subject to 5(f), and does allow spending from the special fund to reimburse the State's general fund for advances made. Thus, general fund expenditures could be made on behalf of native Hawaiians and then replaced from the special land and development fund, abiding by the provisions of § 5(f) and the letter of § 171-19.

29.
the Territory between 1900 and 1955. If the state does not hold mineral reservations on such land, necessarily geothermal resources underlying the land fall outside the corpus of the trust imposed by Section 5(f) of the Admission Act. It will require a court determination to ascertain which lands, if any, are in this category.

The center section of the diagram, which includes geothermal resources under surfaces title to which was granted, subject to an effective reservation of the resources to the government of Hawaii, presents a more difficult question. A mineral reservation is an incorporeal thing, at once the creation and the retention of the right to control and benefit from mineral substances which would otherwise have gone with the land, accomplished by inserting a reservation clause in the instrument of conveyance, here a grant or patent. Did those rights in minerals which were reserved go into the public lands trust, or do they lie outside the trust corpus?

It is helpful to distinguish among the periods of Hawaii's constitutional history. Beginning with the present, the period of statehood, it would appear that geothermal rights reserved by the State of Hawaii would come under the trust imposed by Section 5(f). The scope of the trust is broad, extending not only to the ceded lands returned to Hawaii, but also to "the proceeds from the sale or other disposition

75 See text at note 42 above. It can be argued that the territorial land commissioners acted beyond their lawful powers in conveying public lands without the mineral reservation. See source listed in note 45.
of any such lands and the income therefrom.\textsuperscript{76} The severance of rights to exploit minerals from rights over the surface of the land (the "surface estate") did not remove them, or income from them, outside the trust. If the State of Hawaii were to divert geothermal rights (or any other rights it created in conveying ceded lands into private ownership), the diversion would be a breach of the trust imposed by Section 5(f) and of the state constitutional provisions and statutes which augment it. Under Section 5(f) the United States could sue to remedy the breach.

The answer to the question of a trust over geothermal rights is less obvious with respect to the mineral reservations retained by the Territory of Hawaii on public lands conveyed into private hands between annexation and statehood. Assuming, for the discussion, that reservations of "minerals" made before 1974 apply to geothermal resources, are rights to reservoirs reserved by the Territory within the corpus of the trust in lands?

Analysis of this question requires a review of the language of the Congressional acts which established the trust. The Joint Resolution of annexation (Newland Resolution), to which the trust has been traced, provided that "all revenue from or proceeds of [the public lands and other public property ceded by the Republic]. . .shall be used solely

\textsuperscript{76}The Admission Act (73 Stat. 4), § 5(f).
for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." The Organic Act, to effect the purposes of the Resolution, required "all funds from the sale or lease or other disposal of public land" to be appropriated for the benefit of Hawaii inhabitants. Finally, the Admission Act requires that "the proceeds from the sale or other disposition" of the returned public lands be held in trust for the purposes specified in Section 5(f).

There is a continuity of purpose expressed here: all economic values derived from the public lands, as well as the lands themselves, were to be held in trust for the people of Hawaii. It can be readily argued that the severance of the mineral estate from the surface estate, in conveying public land subject to the mineral reservation, did not cause reserved rights to disappear from the trust res. They remained an asset of the trust capable of producing income in the future, much as public lands not currently in productive use. By this line of argument, mineral reservations imposed by the Territory on land sales it made as manager of the trust stayed in the trust and so remained after the Admission Act returned title and trusteeship to the government of Hawaii.

Does this argument equally apply to mineral reservations made by the Kingdom, Provisional Government and

77 Joint Resolution No. 51, 55th Congress, 2d Session, 1898.
78 Sec. 73(4e). Emphasis supplied.
79 Sec. 5(f). Emphasis supplied.

32.
Republic of Hawaii prior to annexation? Were the reservations made between 1848 and 1898 in the aggregation of assets transferred to the U.S. on which the trust was imposed? The Newlands Resolution begins by acknowledging that by treaty the government of Hawaii had ceded title to all "public, government, or Crown lands, public buildings or edifices, ports, harbors....and all other public property of every kind and description."\(^{80}\) So comprehensive a statement of government property must surely include in its sweep the rights to minerals which the successive Hawaii governments had reserved in issuing patents to land. The Resolution then accepts and ratifies the cession of "all and singular the property and rights hereinbefore mentioned". Thus far, the mineral reservations were within the body of property rights transferred, which was the entire patrimony of the Republic, and were potentially subject to such conditions as the Congress might have established.\(^{81}\)

However, the next paragraph of the Resolution, which serves to impose the trust, addresses the limited subject of "public lands", rather than the wide range of property previously identified for cession. It is the public lands alone, and not other property, that the Resolution exempts from the existing laws of the United States, and it is only the public lands ("the same") whose revenues and proceeds

\(^{80}\)Joint Resolution No. 51, 55th Congress, 2d Session, 1898, introductory ("whereas") clause.

\(^{81}\)Id., second paragraph.
are dedicated to the benefit of the inhabitants of the Hawaiian Islands.82

The issue is thus narrowed to the question of whether "public lands", as they were understood to be constituted in 1898, included mineral rights held by the government of Hawaii with respect to surface estates already in private ownership.

Such an inference may be reasonable, but at this moment it could not be proven, or directly supported, by Hawaii case law. As the discussion of native Hawaiian rights in the preceding section of this paper suggests, the law respecting real property and rights to natural resources is now in a state of flux. The Hawaii Supreme Court in the past several years has tended to question and sometimes overrule its earlier decisions defining private and state interests in land.83 The United States District Court for the District of Hawaii has in two recent cases reached conclusions

82 Id., third paragraph.

contradictory to those of the Hawaii court regarding the extent of public ownership of land and water. The issue of rights to surface water is now before the U.S. Court of Appeals for the Ninth Circuit. The decision of that court, if broadly reasoned (and not reversed by the U.S. Supreme Court), may illuminate the general questions underlying this study: (i) what was the old Hawaii law, established by custom and usage as well as legislation, relating to natural resources, and (ii) how much of that law survived the Great Mahele?

Should the federal appellate courts, or the Hawaii Supreme Court, find that more native rights survived than was held in Oni v. Meek, or should those courts find additional clues in ancient Hawaii law as to the scope of a konohiki's dominion over "land", then reference points may be established by which to ascertain whether mineral rights were in the aggregation of property values designated "public lands" in the statutes which created the trust in ceded lands.

Analysis may also be aided by the recovery of old Hawaii case law. A project sponsored by the Chief Justice of Hawaii is now coding and indexing early decisions of the circuit.

---


86 See text above at note 20.
and district courts here, many of which have to be translated from Hawaiian. Those cases dealing with conflicts over land may provide additional understanding of what custom and usage was recognized before and after the Great Mahele with respect to control over water and other natural resources. From the old case law, and from that about to emerge, may come a clearer picture showing how the legislation of the Mahele impacted on native Hawaiian land law and what rights in natural resources accompanied the transfer of ceded lands into the land trust.
IV. Who Benefits from Trust Proceeds and to What Extent?

The preceding section has indicated that it is reasonable to assert that rights to geothermal resources held by the state are part of the corpus of the trust in lands on behalf of native Hawaiians and others, most clearly with respect to mineral reservations made since 1974 but possibly for all such reservations now held by the state irrespective of the date of their origin. The final questions to be examined are who is a "native Hawaiian" for this purpose and what share of proceeds from geothermal and other trust assets will go to native Hawaiians?

Section 5(f) of the Admission Act of 1959, it will be recalled, provided that the ceded lands, "together with the proceeds from the sale or other disposition of such lands and the income therefrom", were to be held by the State as a public trust for the following five purposes:

(i) support of the public schools;

(ii) betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act;

(iii) development of farm and home ownership;

(iv) making public improvements; and

(v) providing lands for public use. 87

The Hawaiian Homes Commission Act, a federal statute which the Hawaii state constitution adopted as a law of the

87 73 Stat. 4.
state and as a compact with the United States, defines "native Hawaiian" as any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. If theories of European landings or shipwrecks in Hawaii prior to the recorded visits of Captain Cook are dismissed as romantic inventions, only those of at least half Polynesian Hawaiian ancestry qualify as beneficiaries under the second purpose of Section 5(f).

The Hawaii Constitutional Convention of 1978 attempted to restate the beneficiaries of the ceded land trust (or any trust which may derive from it) in a series of amendments to the state constitution. One amendment, ratified by popular vote, provides that the lands granted by the United States shall be held by the state as a public trust "for native Hawaiians and the general public", a severe condensation of the five beneficial purposes set forth in Section 5(f). A second amendment, also ratified, established an Office of Hawaiian Affairs (O.H.A.) to hold title to all property "now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians." Under this provision, some of the ceded lands might possibly be put

88 Now Art. XII, Hawaii Constitution.
89 Sec. 201(7), Hawaiian Homes Commission Act, 1920, (42 Stat. 108).
90 Incorporated as Article XII, § 4. Of course the provisions of Section 5(f), laid down by Congress as part of the conditions for granting statehood, are not affected by conflicting language in the Hawaii constitution.
91 Article XII, § 5.
under the new Office, if that were compatible with Section 5(f), and so become available to benefit "Hawaiians" as well as "native Hawaiians." A third amendment defined the terms "Hawaiian" and "native Hawaiian", but was held to be not validly ratified at the election of November 7, 1978 because it, and certain other proposed amendments, were not adequately described on the ballot. 92

However, the state legislature in a statute implementing the constitutional establishment of the O.H.A., provided these definitions of ethnicity. "Native Hawaiian" is defined as in the Hawaiian Homes Commission Act (i.e., to be one of at least half blood from the races inhabiting these islands before 1778), but with the proviso that "the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." 93

"Hawaiian" was defined by the legislature to mean descendants, of whatever blood mixture, of those aboriginal peoples. 94 Hawaiians as well as native Hawaiians are stated


93 Act 196, Session Laws of 1979, incorporated as § 10-2, Hawaii Revised Statutes. The underscored language presumably is intended to bar descendants of pre-Cook interlopers, if any could establish such lineage, while the last phrase bars native Hawaiians who reside elsewhere.

94 Id., § 10-2(5).
to be the beneficiaries\(^{95}\) of the public trust to be administered by the O.H.A., and the Board is empowered to administer the proceeds from "lands, natural resources, minerals" for both native Hawaiians and Hawaiians, including all income and proceeds from a pro rata share of receipts from the Section 5(f) trust of ceded lands.\(^{96}\)

From the foregoing, it might appear as if the constitutional provisions and statutes establishing the O.H.A. could be interpreted as attempting indirectly to bring Hawaiians of less than 50 per cent aboriginal blood into the same category of beneficiaries of Section 5(f) as those qualifying as "native Hawaiians." However, another section of the statute states that a pro rata share of all funds derived from the ceded land trust is to be used solely "for the betterment of the conditions of native Hawaiians,"\(^{97}\) thus repeating the language of Section 5(f), which singles out for special consideration those of half Hawaiian blood or more.

The share of funds derived from the public land trust going to the O.H.A. was set at 20 per cent by a 1980 statute.\(^{98}\)

The rationale for the allocation apparently is that Section

\(^{95}\text{Id.}, \S\ 10-2(6).\) The statute, however, does not state what those benefits are.

\(^{96}\text{Id.}, \S\ 10-5(1).\)

\(^{97}\text{Id.}, \S\ 10-3(1).\) Emphasis supplied.

\(^{98}\text{Act 273, Session Laws of Hawaii 1980.}\)
5(f) enumerates five purposes for which trust proceeds may be used and therefore the betterment of the conditions of native Hawaiians, as one of those purposes, rates one-fifth.

A recent letter opinion from the office of the Attorney General to the Lieutenant Governor of Hawaii noted that the constitutional amendments providing for the establishment and funding of the O.H.A. reflected a concern that "no specific portion of the funds derived from the public land trust was held and used solely for the betterment of conditions of native Hawaiians." 99 Instead, the practice of the State had been to channel revenues from the trust, "by and large," to the Department of Education, on the assumption that this satisfied the requirements of Section 5(f). 100 In reply to the inquiry of the Lieutenant Governor, the Attorney General confirmed that under the constitutional and statutory provisions just cited 20 per cent of all funds derived from the public land trust must go to the O.H.A. and be used solely for the betterment of conditions of "native Hawaiians," and not for any other purposes. 101 It follows, that of the mineral lease rents, royalty payments and other revenue which the State may receive into the trust fund from geothermal development, 20 per cent would go to the O.H.A. for the benefit of persons of half or more Hawaiian blood, while

100 Id.
101 Id. at p. 4.
the other 80 per cent would be available to the state for expenditure on behalf of the population at large, including native Hawaiians and those of lesser percentages of Hawaiian ancestry.
V. Summary and Recommendation

This paper has examined two legal theories which might be advanced in support of a claim by ethnic Hawaiians that they have a special claim to geothermal resources or state revenues derived therefrom. The first theory is that rights of Hawaiians to the land and its resources, predating the Great Mahele and surviving the establishment of a fee simple regime in land ownership, may provide the basis for such a claim. However, the early case of *Oni v. Meeks*\(^\text{102}\) established a rule holding that the legislation affecting the Great Mahele replaced the broad and unspecified traditional rights to natural resources with those limited rights granted by statute (Section 7-1, Hawaii Revised Statutes) and the latter makes no mention of rights to subsurface elements, such as geothermal fluids.

Opinions of the Hawaii Supreme Court since statehood suggest that the court may be receptive to arguments on behalf of a less constrictive interpretation of native Hawaiian rights, or of claims on behalf of the state in which the Hawaiians may share.\(^\text{103}\) It would require a repudiation of *Oni v. Meeks*, however, to reach the conclusion that native rights extend to geothermal reservoirs.

\(^\text{102}\)See discussion of text at note 20.

\(^\text{103}\)Especially in McBryde *v.* Robinson, *In re Ashford*, *County of Hawaii v. Sotomura*, *In re Sanbord*, and *State v. Zimring*, discussed above at note 83. Also see note 40.
More likely to succeed is the theory that there is a public trust imposed on the State's rights to geothermal resources, of which the native Hawaiian population is a beneficiary. Section 5(f) of the Admission Act provides that the ceded lands granted back to Hawaii on attaining statehood shall be held in trust to accomplish five public purposes, one of which is the betterment of the conditions of native Hawaiians, defined to be those of half or more Hawaiian blood. Within the corpus of the trust clearly are the rights to geothermal resources under lands which were returned to the State after 1959 and are still owned by the government.

Less clear is the inclusion of geothermal rights reserved by the Hawaii government from its conveyances of land to private owners prior to statehood. The Territorial government, it may be argued, retained in the category of public lands (which it administered under the Organic Act as agent for the U.S. and which became subject to the public trust under the Admission Act) not only lands still in the public domain but also rights to subsurface resources reserved from lands it had sold or traded away. By further extension back into history, it may be argued that when the sovereign Republic of Hawaii ceded its public lands to the U.S. in 1898, that patrimony, which ultimately became the corpus of the public trust described in Section 5(f) of the Admission Act, included all mineral reservations held by the successive Hawaii regimes back to the Great Mahele.

There is now uncertainty as to whether geothermal
resources are to be included in mineral reservations made prior to 1974, when the statutory definition of "mineral" was amended to include "geothermal". Resolution of that question-- and thus determination by the courts whether all or only some of the geothermal resources of Hawaii have been reserved to the state-- may depend on two kinds of information which would inform the Hawaii Supreme Court. One is ascertaining from early decisions of Hawaii trial courts, now being translated and analyzed, what the rights of the people and of the government in land use were conceived to be, just prior to and during the Great Mahele. The second is the outcome of a basic water case, Robinson v. Ariyoshi, 104 now being reviewed by the Ninth Circuit Court.

Proceeds received by the state from whatever geothermal reservations come under the land trust will go to the special fund, one fifth of which is earmarked for the Office of Hawaiian Affairs recently created by constitutional amendment and statute, 105 to be spent for the betterment of native Hawaiians. However, the extent of geothermal resources subject to this dedication will not be known until the uncertainties of the law relating to the corpus of the trust have been resolved. That resolution, and the consequent settling of political and social policy questions which the legal uncertainty may have created for geothermal development, will be furthered by gaining a clearer understanding.

104 See text above at notes 84 and 85.

105 See text above at notes 90-101.
of how underground resources related to the land were used and controlled when the public land trust was being created in Hawaii.

Recommendations.

To remove the existing uncertainty as to the extent of effective reservations by the State of geothermal resources, and thereby ascertain how much of these resources may generate funds available for the betterment of native Hawaiians, the following actions are recommended:

1. The State of Hawaii should seek a decision in the courts of the state, by declaratory judgment or otherwise, of its claim to own all geothermal resources in the state.

2. In preparing its case, the State should analyze early Hawaii trial court opinions dealing with the land and its resources, to establish the separation of surface and subsurface estates when the public land trust was created, thus supporting the proposition that the mineral rights exclusion was universal, even when not expressed in the land patent or grant.

3. Further analysis be made of the reach of the conclusion set forth above, that geothermal resources fall within the trust imposed on public lands in Hawaii, one-fifth of the trust income being earmarked for the benefit of native Hawaiians through the budget of the Office of Hawaiian Affairs.
PRINCIPAL SOURCES

A. Books and Articles


7. Dole, Sanford, Evolution of Hawaiian Land Tenures (Hawaiian Historical Papers, December 5, 1892).

8. Handy, Edward and Elizabeth, Native Planters in Old Hawaii (Bishop Museum, 1972).


B. Legislation

1. Declaration of Rights of 1839, Kamehameha III.


3. Laws of Kamehameha III, Vol. 1,107, re-enacted as Art. 4, Ch. 7, Pt. 1 of An Act to Organize the Executive Departments of the Hawaiian Islands, 1845-46.


10. The Hawaii State Constitution, as amended through 1979.


C. Hawaii Cases and Opinion

1. Oni v. Meek, 2 Haw. 87 (1858).

2. Estate of Kamehameha IV, 2 Haw. 715 (1864).


48.


DO NATIVE HAWAIINIANS
HAVE A SPECIAL CLAIM TO
GEOTHERMAL RESOURCES IN HAWAII?

A Legal Analysis

Prepared for the Department of Planning
and Economic Development,
State of Hawaii

by

Robert M. Kamins, J.D.

November, 1980
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II. Is There a &quot;Native Hawaiian Right&quot; to Geothermal Fluids?</td>
<td>6</td>
</tr>
<tr>
<td>III. Are Geothermal Resources Held in Trust for Hawaiians?</td>
<td>19</td>
</tr>
<tr>
<td>IV. Who Benefits from Trust Proceeds and To What Extent?</td>
<td>37</td>
</tr>
<tr>
<td>V. Summary and Recommendation</td>
<td>43</td>
</tr>
<tr>
<td>Recommendation</td>
<td>46</td>
</tr>
<tr>
<td>Principal Sources</td>
<td>47</td>
</tr>
</tbody>
</table>
I. Introduction

The past decade has seen a resurgence of political activism by and on behalf of native Hawaiians, seeking redress for detriments experienced by the Polynesian population after the influx of other races in the 19th century. One indication of that activism is the demand upon Congress to appropriate funds to compensate the Hawaiian people for their social and economic losses, as certain Indian and Alaskan tribes have been indemnified.\(^1\) Another is the set of amendments to the Hawaii state constitution adopted in 1978 which established a new Office of Hawaiian Affairs,\(^2\) provided that the public lands of the state were held in trust for the benefit of native Hawaiians and the general public,\(^3\) and affirmed that the state will protect "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes" and


\(^2\)Art. XII, §§ 5 and 6, now provide for an Office of Hawaiian Affairs, headed by a board of trustees elected by Hawaiian voters, to administer proceeds from the "lands, natural resources, minerals..." held in trust by the state.

\(^3\)Art. XII, § 4 gives constitutional recognition to the public trust in lands created by Section 5 of the Admission Act, discussed in part III of this paper.
now possessed by descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778" [the year Captain Cook first arrived].

The relevant circumstances in Hawaii differ from those under which native peoples in other states of the Union have sought economic redress in at least two important ways. First, there were no treaties between the Hawaiians, as a people, and the Americans which could form the basis of a claim for reparations or indemnities. The disabilities suffered by the Polynesian population were essentially incurred before Hawaii became a territory of the U.S. in 1898. Their reduced status was continued by that transfer of sovereignty, not caused by it.

Second, the federal government has no extensive land holdings in Hawaii, other than military bases and national parks, from which to grant lands in compensation for past injuries. Consequently, there is bound to be an interest, as a possible source of compensation, in new resources which are or may be the property of the State of Hawaii. The recent discovery in Puna of geothermal resources, seemingly of great economic value, provide such a resource. Discussions of the development of geothermal reservoirs on the Island of Hawaii have evoked the assertion that native Hawaiians should get

4Art. XII, § 7. This and the foregoing sections were all proposed by a 1978 constitutional convention and ratified at a popular election. Another convention proposal defining the terms "Hawaiian" and "native Hawaiian" were held to be not validly ratified. Kahalekai v. Doi, 60 Haw. 324 (1979).
a percentage of the royalties paid on well production. The most formal expression of a Hawaiian claim to geothermal resources, or the income from their exploitation, is in an amicus curiae brief in Robinson v. Ariyoshi, a potentially landmark case in water law now pending before the U.S. Court of Appeals for the Ninth Circuit.

An attempt to demonstrate that native Hawaiians have some special claim to geothermal resources might proceed on either of two theories. The first is that geothermal fluids, or the steam or heat from them, were among those natural resources access to which was guaranteed to descendants of the aboriginal population as part of the native Hawaiian rights preserved during the Great Mahele -- the division of estates which here created private ownership in land. As is well known, the government of Kamehameha III (Kauikeouli)

5 As at a public hearing held August 7, 1980 in Hilo to consider a request for a permit to drill exploratory wells in Puna. Hilo Tribune-Herald, August 8, 1980, p. 1. Recently the Republican candidate for the U.S. Senate from Hawaii was quoted as being concerned about geothermal development "because the issue of Hawaiian rights" has not been resolved. Honolulu Advertiser, Oct. 18, 1980, p. A-11.

6 Submitted for Ho'ala Kanawai, Inc. (Awakening The Law) by Mitsuo Uyehara and Mililani Trask, October 14, 1978.


8 No. 7432. The decision has been repeatedly postponed because of changes in the membership of the court.
under strong Western influence, in the mid-19th century replaced an essentially feudal land system in which outright ownership of land had no place with an allodial system generally based on the ownership concepts of Anglo-American common law. However, the declarations and statutes\(^9\) which brought about this radical change repeatedly acknowledged that some customary rights of access to natural resources were preserved for the native tenants of lands now held in fee by their old landlords and by their successors in title. The first theory could assert that the bundle of rights so protected includes rights to geothermal resources which remain in force today, more than a century after the Great Mahele.\(^{10}\)

---

\(^9\) Including statements in the 1839 Declaration of Rights, the Constitution of 1840, Principles Adopted by the Land Commission (1847), Joint Resolution on the Subject of Rights in Land (1846), Act of August 6, 1850, and Section 1477 of the 1859 Civil Code. These are discussed below at note 12.

\(^{10}\) Strictly speaking, the Great Mahele -- the division of lands between chiefs and landlords (konohiki) on the one hand and the sovereign (both as a private landlord and occupant of the throne) on the other, as recorded in the Mahele Book -- was completed between January 27 and March 7, 1848. (See Jon J. Chinen, The Great Mahele: Hawaii's Land Division of 1848, University Press of Hawaii, 1978). However, as sometimes used as a short-hand term for the establishment of a system of private landholding, the "Mahele" also includes the Kuleana Act of 1850 and other legislation under which land went into fee ownership during the entire second half of the nineteenth century, as narrated by Sanford Dole in Evolution of Hawaiian Land Tenures (reprinted in Hawaiian Historical Society Papers No. 3, December 5, 1892) and as cataloged by Louis Cannelora in The Origin of Hawaii Land Titles and of the Rights of Native Tenants (Security Title Corporation, Honolulu, 1974). Social effects of the Mahele are drawn by Marion Kelly, Changes in Land Tenure in Hawaii, 1778-1850 (Unpublished thesis in University of Hawaii Library, 1956).
The second possible theory is that, irrespective of other property rights preserved to native Hawaiians, they are the beneficiaries of a trust, the corpus of which includes geothermal resources. It is the primary purpose of this paper to examine each of these theories in the light of Hawaiian history and case law to ascertain if either provides the basis for making a prima facie case asserting ownership of geothermal resources by or on behalf of native Hawaiians. The secondary purpose is to state what group within the population are "native Hawaiians" in this context.

As noted above (note 4) a constitutional amendment defining "Hawaiian" and "native Hawaiian" was not validly ratified in 1978, but these definitions were provided by a 1979 statute. The meaning of the term is not critical for the first sections of this paper and is deferred until part IV.
II. Is There a "Native Hawaiian Right" to Geothermal Fluids?

The pre-European civilization of Hawaii incorporated a complex system of resource utilization, in part structured by kapus or prohibitions. To ensure that the commoner "tenants" who worked the land (hoa'ainas) had access to what was necessary for their livelihood and to produce the surplus needed to maintain the nobles (alii), the landlords (konohiki) and priests, the hoa'aina were allowed to come on the lands of the konohiki. There, within reasonable limits set by custom, they could take firewood, timber and thatch for their huts, cordage for fishing lines, water for their taro and household needs, and other essential materials. These rights of access to such natural resources, embedded in the daily usages of a society without writing, were acknowledged in the early legal declarations printed by the government of Kamehameha III, even before the Mahele. 12 The current

12 The Declaration of Rights of 1839, which preceded the first constitution (1840), provided the initial written acknowledgment that commoners had certain rights in the land: "...protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, and nothing whatever shall be taken from any individual except by express provision of the law."

The 1840 Constitution added that while all lands had belonged to Kamehameha I, founder of the line, "it was not his own private property. It belonged to chiefs and people in common, of whom Kamehameha I was the head, and had management of the landed property." (Emphasis supplied.)

In 1846, the extent of the "people's" rights in land were specified for the first time by a Joint Resolution on The Subject of Rights in Land, approved by Kamehameha III. "The rights of the hoa'aina in the land, consists of his own taro patches, and all other places which he himself cultivates
expression of those native Hawaiian rights, essentially un-
changed since its enactment in 1850, is now found in Section
7-1 of the Hawaii Revised Statutes and reads as follows:

Where the landlords have obtained, or may
hereafter obtain, alodial 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 ti leaf, from the land on which they
live, for their own private use, but they
shall not have a 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 water-courses,
which individuals have made for their own
use.13

for his own use, and if he wishes to extend his cultivation
on unoccupied parts, he has the right to do so. He has also
rights in the grass land, if there be any under his care,
and he may take grass for his own use or for sale, and may
also take fuel and timber from the mountains for himself.
He may also pasture his horse and cow and other animal on
the land, but not in such numbers as to prevent the konohiki
from pasturing his..." (L. 1847, p. 70; RLH 1925, II,
p. 2193).

The 1850 Act Confirming Certain Resolutions of the
King and Privy Council (August 6, 1850) revised the 1846 state-
ment of hoa'aina rights, casting it substantially in the language
which has continued to this day as the statute defining rights
of "the people" in resources on the land, except that notice
to or permission of the landlord was then required to come on
latter qualifications were deleted by an 1851 statute which
noted that "many difficulties and complaints have arisen,
from the bad feeling existing on account of the konohiki's
forbidding the tenants on the lands enjoying the benefits that
have been by law given them." (L. 1851, p. 98). As so amended,
the statutory declaration of the rights of the people was codi-
fied (Sec. 1477, Civil Code of 1859) and has remained unchanged
in the Hawaii Revised Statutes, now § 7-1, as shown in the text
below.

13 Note that no right to take resources for commercial
resale is given, nor any right to water from privately developed
water sources.

7.
Considering how vital water was to the Hawaiian society,\textsuperscript{14} which depended on irrigation and fishponds to feed a large population from relatively limited areas of cultivable land, it is not surprising to see that the statement of native rights spelled out, even redundantly -- rights of access to "drinking water, and running water...springs of water, running water." Ground water sources, such as those which may charge geothermal resources, are not mentioned, conjecturally because geothermal pools were not numerous, of great value, or generally available to commoners.\textsuperscript{15}

Arguably, it might be asserted that in the bundle of rights reserved to "the people" are rights to ground water, including the recently discovered geothermal resource, on the grounds that the reservation was generic and not exhaustively detailed in the statute. If an advocate were able to get past the specificity -- and seeming exclusivity -- of the language of Section 7-1, he may find a judicial

\textsuperscript{14}The great importance of water is reflected in the Hawaiian language in the many terms for the vital fluid. Wai means fresh water, wai puna spring water, kaha wai a stream, 'auwai water flowing in a ditch or channel, loko wai a freshwater pond, etc. Waiwai (literally the plural, or much water) means wealth or possession. The Hawaiian word for "law" is kanawai, literally "belonging-to-the-waters", connoting an equal division of water, i.e., justice. Handy and Handy, Native Planters in Old Hawaiian, Bernice P. Bishop Museum Bulletin, No. 233 (Honolulu, 1957), pp. 57-8.

\textsuperscript{15}Research into the mythology and recorded oral history of Hawaii may reveal other uses of geothermal water or heat, but they are not known to specialists at the University of Hawaii or Bishop Museum. See note 20 for one historical reference.
fragment to support the assertion in an important Hawaii water case now pending on appeal. At question in McBryde Sugar Company v. Robinson\textsuperscript{16} was the ownership of certain surface waters. The majority of the Hawaii Supreme Court, in an opinion strongly criticized by the minority,\textsuperscript{17} found in the legislation which provided for the Mahele an intent to retain in the sovereign the power to enforce, even on estates granted into private ownership, the "usufruct of lands for the common good." The court went on to say:

\begin{quote}
We believe that the right to water is one of the most important usufructs of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants.\textsuperscript{18}
\end{quote}

If the decision of the Hawaii Supreme Court is sustained, rather than the contrary holding of the U.S. District Court that grantees received rights to surplus water with their land grants, it could be argued that rights to geothermal water were also reserved to the people, along with

\textsuperscript{16}54 Haw. 174 (1973); 55 Haw. 260 (1974). The sugar companies which had been contesting their respective rights to water on Kauai took to the U.S. District Court for the District of Hawaii their plea that the Hawaii Supreme Court, in holding that the state owned so-called "surplus" waters, had taken their property in violation of the 14th amendment of the federal constitution; they prevailed in Robinson v. Ariyoshi, 441 F. Supp. 559 (1977). That decision is before the U.S. Court of Appeals for the Ninth Circuit.

\textsuperscript{17}In the first McBryde decision is a long dissenting and concurring opinion by Justice Marumoto. 54 Haw. 174 at 201. At a rehearing of the case, to the short dissent of Justice Marumoto was added a long, analytical dissent by Justice Levinson, who had switched from the majority in McBryde I, resulting in a 3-2 decision which retained the opinion that surplus waters were owned by the state. 55 Haw. 260 at 261 and 262.

\textsuperscript{18}54 Haw. 174 at 186.
the other rights concerning water specified in Section 7-1.

However, even if the Hawaii Supreme Court decision prevails, difficulties in extending its rule to geothermal resources would remain. McBryde and Section 7-1 both relate to surface waters and their accustomed use at the time of the Great Mahele. No record has been discovered of use by the Polynesians of Hawaii of geothermal waters, other than bathing in geothermal pools on the Island of Hawaii. Unless the broad notion of "usufruct" in McBryde can be expanded to include all resources in and under the land, even if unknown or unused in pre-Mahele Hawaii, that decision would not sustain an assertion of reservation of geothermal resources for all the people of Hawaii, let alone for those of Hawaiian blood.

An attempt to find unspecified rights, as to geothermal resources, in the language of Section 7-1 must also get around the earliest and still prevailing interpretation of those rights, in Oni v. Meek. In that 1858 case the Hawaii Supreme Court considered the claim of plaintiff Oni, a tenant residing on a portion of the same ahupua'a (basic Hawaiian

19 William Ellis, Journal of William Ellis (Chas. Tuttle Co., Rutland, 1979), p. 237, described a hot spring at Kawaihæ, Hawaii as having "various medicinal qualities... ascribed to it by those who have used it," but from the context one cannot tell if the users are Hawaiians or other Europeans. Ellis did note, however, that the Polynesians cooked food and offerings to Pele by placing them "in the steaming chasms" or burying them in the hot earth near Kilauea.

20 2 Haw. 87 (1858).
land division) leased to the defendant. Oni was seeking damages for two horses, seized by Meek because they were grazing on his land. The trial court had allowed damages, but on appeal the Supreme Court reversed the judgment. It is the manner in which the high court wrote its decision that makes it important today.

Oni argued that by Hawaiian custom, he, as a tenant, was allowed pasturage on the kula lands (open fields) within the ahupua'a. Evidence was presented to show that horses had become numerous only about a dozen years before the controversy arose, and so Meek contended that pasturage was too recent a usage to qualify as a customary right. 21

The court gave short space to this line of argument. Instead, it centered attention on the assertion that the 1846 legislative statement on the rights of the people gave tenants the right of pasturage within the ahupua'a. Justice Robertson took the opportunity to make a comprehensive statement on the nature and extent of what he termed "that entire revolution in the law affecting rights in land, and land titles" 22 which had just taken place. The 1846 listing of rights, as well as all customary, unwritten rights in the land, the court

21 Id. at 89. The court might have found common law precedent for recognizing certain rights of the Hawaiian tenants in the English profits a prendre (or rights of common), those privileges of using the land of the lord, theoretically based on some ancient agreement between lord and feudal tenants, which by time had formed a prescriptive right, even though there was no written evidence of the original agreement. 4 Coke 37.

222 Haw. 87 at 92.
stated, were completely superseded by the statutes which accomplished the Mahele. All that remained of native Hawaiian rights were those privileges explicitly listed in statutes enacted after the land division of 1848.23 These the court identified as the statute preserving the fishing rights of the hoa'aina and the rights explicitly listed in the seventh section of the Act of August 6, 1850, now identified as Section 7-1, Hawaii Revised Statutes. Any other rights ceased to exist.24

At this distance in time, it would appear that the sweeping interpretation thus given to the effects of Mahele legislation on native rights in land use might have been cut back in subsequent cases as obiter dicta, unnecessarily inserted by a court faced with an asserted claim -- to right of pasturage -- which it found to be historically unqualified to be a customary right. Oni v. Meek might have been decided on that narrow ground without the broad statement as to the radical effect of the 1850 statute. If that portion of the opinion had subsequently been labeled as dicta, there would be ground to argue, citing Hawaiian usages and using

23 The court applied the maxim expressio unius est exclusio alterius (the expression of one thing is the exclusion of another). Id. at 96.

24 Id. at 95. The social bargain struck in the Mahele, in the court's interpretation, was that the new order at once removed from the hoa'aina the duty of working for the king and konohiki and curtailed their rights as tenants to use resources of the konohiki's lands.
appropriate analogies, about Hawaiian rights broader than those listed in 7-1 and whether they include access to, or benefits from, subsurface resources such as geothermal reservoirs.

In fact, however, the broad doctrine of *Oni* was not curtailed in later decisions of the Hawaii Supreme Court or by the federal appellate courts. On the contrary, that doctrine was reinforced (again by Justice Robertson) in another landmark land case, *Estate of His Majesty Kamehameha IV*,25 where the court once more related its decision to its conclusion that the Mahele legislation which accomplished "that peaceful but complete revolution" in the government and land system of Hawaii had utterly displaced the old duties and privileges in land use.26 Subsequently, the broad doctrine of *Oni v. Meek* was cited as the law of Hawaii, notably in 1895,27 1902,28

25 2 Haw. 715 (1864).
26 Id. at 720-6.
27 Dowsett v. Maukeala, 10 Haw. 166. "In *Oni v. Meek*... this court held that the Act [of August 6, 1850] repealed the former legislation and the ancient tenure, but in the seventh section preserved to the people, whether hoa'ainas by ancient custom or kuleana holders, certain specific rights, as to take firewood, house timber, thatch, etc. for their own use." (At 170.)
28 Carter v. Ter. of Hawaii, 14 Haw. 465. The court quoted a characterization of Justice Robertson of the *Oni* court as "'our best authority' on early Hawaiian tradition, history and jurisprudence." (At 477.)
Against this judicial record, it would be difficult to argue that *Oni v. Meek* is not dispositive of any claim by native Hawaiians to rights in land not explicitly listed in Section 7-1. Difficult, but not impossible to maintain. As the Hawaii Supreme Court noted in one of its decisions reinforcing *Oni*, property rights are inherently subject to change "as changes in circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the law."32 A court which accepted a need to reverse prevailing doctrine on natural resource use (such as the *Oni* court at the time of the Mahele or the McBryde court of 1973) as sufficiently urgent to

---

29 Territory v. Gay, 26 Haw. 382. Cites *Oni v. Meek* and *Estate of Kamehameha IV* as authoritative analysis of the legislative intent and legal effects of the 1846-50 land laws. (At 403.)

30 Gabriel v. Margah, 37 Haw. 571. Cites *Oni v. Meek* for the rule on the implicit repeal of an earlier statute by a conflicting later enactment. (At 574.)

31 Application of Robinson, 49 Haw. 429. The dissent of Justice Cassidy cites *Oni v. Meek* as authority holding that the Joint Resolution of November 7, 1846 became functus on passage of the Kuleana Act of August 6, 1850, "if not earlier." (At 452.)

32 Carter V. Ter. of Hawaii, 14 Haw. 465 (1902) at 475.
overcome the force of stare decisis\textsuperscript{33} might be convinced that the Oni doctrine with respect to the scope of Section 7-1 should be re-examined. However, even a court receptive to the argument that Oni be set aside to achieve justice would require a showing that: (i) the people of Hawaii before the Mahele made some use of geothermal fluids and steam, or (ii) the 1850 statute enacting the substance of Section 7-1 intended not merely to give the right to use the surface waters there referred to but a right to subsurface fluids as well, or (iii) the specified right to gather firewood was intended to extend to whatever fuel sources were available on or under the land, as they might change with the generations.

As already indicated, no evidence in support of any of these propositions was discovered. It may exist, but is certainly not conspicuous in the legislative records relating to the Great Mahele or in the fragmentary accounts of rights to resource use in pre-European Hawaii.\textsuperscript{34} And even if


\textsuperscript{34}The use of a thermal spring at Kawaihae early in the 19th century was noted by an early missionary. See footnote 19 above.
sufficient evidence to convince a court were discovered, there would remain the problem of showing that the right to have or use geothermal resources had been reserved to the native Hawaiian population, rather than to the people at large, or the government of Hawaii on behalf of the entire population. Those rights set forth in Section 7-1 are by that statute reserved to "the people", but the context indicates that the intended beneficiaries are those persons who live in the area of the konohiki grant; e.g. those dwelling in the ahupua'a of Waimanalo on Oahu could continue to come on the land of the ahupua'a, now owned in fee simple by their konohiki, to take firewood, thatch, water, etc. 35

This construction, limiting rights to the named resources to tenants 36 and others lawfully on the lands within

35 As originally enacted (Sec. 7 of Act of August 6, 1850) the statute read: "When the landlords have taken alodial title 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 ti leaf from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water courses which individuals have made for their own use." By Laws of 1851, p. 98, the underlined language was deleted, but the rest was unchanged to become the statute now incorporated as Section 7-1, Hawaii Revised Statutes.

36 Oni v. Meek, 2 Haw. 87 (1858).
the ahupua'a, seems unambiguously the law in Hawaii. The rights, then, are not to the population at large, or to native Hawaiians generally, but specific in each use to the ahupua'a against which the rights are asserted. Only tenants of the ahupua'a, meaning lawful occupants of any division of the ahupua'a, can claim the rights enumerated by Section 7-1. Against lands which did not comprise a konohiki award (such as those claimed by Kamehameha III or lands still owned by the state) these rights do not apply.

In McBryde, the Hawaii Supreme Court interpreted "the people" of Section 7-1 even more narrowly. In quoting the statute, the court without comment inserted its interpretation: "The people [meaning owners of land] also shall have a right to drinking water, and running water, and the right of way. . . ."39

This offhand construction, if it were doctrine rather than obiter dicta, would further remove from the possible reach of Section 7-1 claims of most Hawaiians to natural resources, such as geothermal, for only landowners could qualify as beneficiaries of the statute. The main force of McBryde, its holding that "the ownership of water in natural

37 Dowssett v. Maukeala, 10 Haw. 166 (1895); also Hatton v. Piopio, 6 Haw. 334 (1882) for analogous holding with respect to fishing rights.


39 McBryde Sugar Co. v. Robinson, 54 Haw. 174 (1973) at 192.
watercourses, streams and rivers remained in the people of Hawaii for their common good," does, however, offer an element of support to a theory that natural resources, unless specifically granted away, remain the property of the state available to the native Hawaiian population. The vehicle for that theory, however, is not Section 7-1, but the doctrine of a trust in land, which will be examined in the next portion of this paper.

40 Id. at 187. A recent decision of the 3rd Circuit Court (South Hilo) on public access to the shoreline and mountains, illustrates how a tribunal may accept ancient Hawaiian custom as the basis for adjudicating contemporary rights. In Sportman's Club v. Okuna, the plaintiffs, representing "all residents of the state of Hawaii," were granted the right to cross the defendant's ranch along old trails leading to the beach and to upland hunting areas. The court, after hearing the testimony of 93-year old kamaaina witnesses, ruled that the right of public access established by ancient Hawaiian custom is still in force. Honolulu Advertiser, October 10, 1980, pp. A-1 and A-4.
III. Are Geothermal Resources Held in Trust for Hawaiians?

Even without the question of Hawaiian rights in geothermal resources, there is some uncertainty concerning their ownership in this state. A 1974 statute defined them as "mineral," thus seeking to bring them under the mineral rights routinely reserved by the successive Hawaiian regimes from the Mahele until the advent of the territorial government in 1900, and then again after 1955. However, during the first half of this century, the Territory issued a large number of land grants without the mineral reservation, which was again required by statute in 1963.

Two questions are presented by this history. First, are mineral reservations to be implied in the land grants made between 1900 and 1955? Second, does the 1974 definition of "mineral" to include "geothermal" apply retroactively to all mineral reservations, explicit or implied, made clear back to the Great Mahele?

41 Act 241, amending § 182-1, Hawaii Revised Statutes.

42 From 1900 to 1955, over 8,000 land patents were issued, all (or virtually all) without mineral reservations. Kenneth Lau, Mineral Rights & Mining Laws (Legislative Reference Bureau, University of Hawaii, Honolulu, 1957), p. 20.

43 Act 11, incorporated as § 182-2(b), Hawaii Revised Statutes.

44 And in the relatively few land patents issued without mineral reservations by the Kingdom, Provisional Government and Republic of Hawaii.

45 For a discussion of these questions see Robert Kamins, "Ownership of Geothermal Resources in Hawaii", 1 University of Hawaii Law Review 69 (1979).
Both questions can be argued in the affirmative. Considering the long period in which mineral rights were reserved to the sovereign (1848-1900), a court could find that the reservation had become well established public policy, and that, without statutory mandate, the territorial government acted beyond its powers in removing the reservation clause from its land patents. Alternatively, it might be held that the conditions concerning public land management imposed by the Hawaii Organic Act did not allow the Territory to dispose of mineral rights.

As to the retroactive application of the 1974 amendment of "mineral" to include geothermal resources, it can be readily argued that the amendment was merely an explanation of the term to take into account a kind of natural

---

46 The Laws of Kamehameha III, 1846, p. 99, required each royal patent, granting land in fee simple, to include the clause "reserving to the Hawaiian Government all mineral and metallic mines of every description." This portion of the statute was omitted from the Civil Code of 1859 and so held to be repealed. (In re Robinson, 49 Haw. 429, 421 P.2d 570 (1966)). Nevertheless, the mineral reservation clause, identically worded, was used with seemingly few exceptions until after Hawaii was annexed by the United States. In 1955, the Territory again began to insert the reservation in patents, but the statutory requirement to reserve minerals in lands sold or leased by the government was not re-enacted until 1963 (Act 11, Haw. Session Laws).

47 The territorial Attorney General opined that, in the absence of a statute prohibiting such alienation, mineral lands could be sold. (Opinion No. 379, 1906.) No opinion, however, addresses the question of whether mineral rights could be included in grants of land for agricultural, housing and other purposes.

48 Discussed in article cited in note 45 at pp. 72-3.
resource unknown -- at least as a commercially valuable asset -- when the mineral reservation was prescribed by statute. By this argument, "mineral" includes yet-to-be-discovered elements which partake of the quality of mineralness, just as "vehicle" inherently encompassed automobiles, even before the invention of the gasoline motor.

In any case, irrespective as to how these two questions are ultimately answered by the courts, the State of Hawaii has reserved the rights to some geothermal reservoirs, and if both questions are decided in the affirmative, it has them all. With respect to those geothermal rights which are reserved to the state, do native Hawaiians have any special claim as the beneficiaries of a trust imposed on state-owned natural resources?

An emerging common law doctrine of public trust can be traced in the decisions of the Hawaii Supreme Court, a doctrine which holds that the state, as trustee for the people, must safeguard their rights in certain natural resources. Historically, these resources were those of waterways, such as coast shores, tidelands and rivers, but in

---

48A Sax, "The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention," 68 Michigan Law Review 471 (1970). The doctrine has also been applied to protect wildlife, Geer v. Connecticut, 161 U.S. 519 (1896) and parklands, Stephenson v. County of Monroe, 43 App. Div. 2d 897, 351 N.Y.S. 2d 232 (1974). In Hawaii, the doctrine was first applied in 1899, when the Hawaii Supreme Court used it to deny a corporation the right to develop portions of Honolulu Harbor. King v. Oahu Ry. & Land Co., 11 Haw. 717. Tidewater lands were also held to be vested in the sovereign

21.
a recent decision the Hawaii court also applied the doctrine in deciding that the state held title to new extensions of lava along the ocean front.\textsuperscript{49} Conceivably, it could be argued that under the doctrine of public trust newly discovered subsurface resources, such as geothermal reservoirs, should be treated as belonging to the people and held in trust for them by the state.

However, another kind of trust is more immediately available for argument on behalf of a claim by native Hawaiians to a natural resource such as geothermal reservoirs -- a trust in ceded lands. The latter derives not from the common law which created the public trust doctrine but from the legislation which transferred lands from Hawaii to the United States on annexation, and transferred them back to Hawaii on the granting of statehood.


\textsuperscript{49} State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977). An element in the decision was the disinclination of the court to have the owners of adjacent lands gain the benefit of a "windfall" of new lava extensions into the sea.
to the federal government absolute title to all its lands, consisting of approximately 1,700,000 acres. However, the U.S. did not merge these lands into the public domain of the federal government. Instead, and uniquely in the history of territorial acquisition by the U.S., it provided that the existing laws of the U.S. relative to public lands should not apply to those ceded by the Hawaiian government, but that the U.S. Congress should "enact special laws for their management and disposition." Further, all revenues from the ceded public lands (except those used by the federal or Hawaii governments) were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

The Organic Act of 1900, legislated by Congress to function as the basic law of the Territory, analogous to a state constitution, affirmed the special status of the ceded lands. It provided that they would remain in the "possession, use, and control" of the territorial government and that

---

50 The Treaty of Annexation (1897) states that the "Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government or crown lands. . . ." (Art. II). The Joint Resolution of the U.S. Congress which ratified the annexation (Public Resolution 51, July 7, 1898, 55th Congress, 2d Session, 30 Stat. 750), confirmed the transfer of the domain.


52 Treaty of Annexation, Art. II, and Joint Resolution 51 (3d para.).

53 Id.

54 Organic Act, § 91.
any funds derived from the public lands should be appropriated by Hawaii for "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation." All laws of Hawaii relating to public lands were continued in effect until Congress should have provided otherwise.

The effect of this federal legislation incident to transforming Hawaii from a sovereign republic to an American territory was to transfer title in the ceded lands to the U.S., but placing (or retaining) the beneficial interest in those lands in the people of Hawaii. A trust was thus created, with legal title to the lands in the federal government, the equitable title in the population of Hawaii, with the U.S. as trustee, and the territorial government as its agent.

Granting of statehood to Hawaii in 1959 reversed the transfer of title which accompanied annexation but retained the trust and made its terms more explicit. In the Admission Act, Congress granted back to the State of Hawaii all public

55 Id., § 73(e).
56 Id., § 73 (c).
57 The U.S. Attorney General found the basis of a trust in the limitation made by Congress in the Organic Act, directing the revenues from the ceded lands to the benefit, not of the population of the U.S. at large, but only to the inhabitants of Hawaii. 22 Ops. Att. Gen. 574 (Sept. 9, 1899) and 627 (Nov. 21, 1899).
lands in Hawaii to which it held title. However, Section 5(f) of the Act provided that the ceded lands then or later returned to Hawaii, and any income or proceeds from their sale

...shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread basis as possible[,][] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. ... 

The Hawaii constitution adopted in 1959 contained the commandment that the state would comply by appropriate legislation with the provisions of the trust. In 1978, 

58 Except lands set aside by Congress, the President or Governor of Hawaii for the use of the United States, or, out of lands then controlled by the U.S. under agreement by the Territory, parcels which might be selected by Congress or the President within five years of statehood. 73 Stat. 4, § 5. Other lands in Hawaii were set aside for support of the Department of Hawaiian Home Lands by the Hawaiian Homes Commission Act of 1920, accepted as a compact with the U.S. by the State and people of Hawaii under the state constitution (Art. XI). By § 5(b) of the Admission Act, all areas defined as "available lands" by the Hawaiian Homes Commission Act were also granted back to the state.

59 Emphasis supplied.

following the revelation that revenues from the corpus of the trust had not been segregated and administered in conformity with provisions of the trust,61 the constitutional provision was extended to provide that such legislation "shall not diminish or limit the benefits of native Hawaiians" under the trust.62 Further emphasis on native Hawaiians as beneficiaries of the ceded lands trust was given by a companion amendment, which states:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act. . ., excluding therefrom lands defined as 'available lands' by the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.63

Other amendments established an Office of Hawaiian Affairs to hold title to property set aside for "native Hawaiians and Hawaiians",64 and to manage the "proceeds from

61Problems previously surmised were documented by the Financial Audit of the Department of Land and Natural Resources (Legislative Auditor, State of Hawaii, Honolulu, January 1979) which found that the Department, charged by statute with the administration of the ceded lands, had intermingled revenues from those and other public lands. Part of the difficulty is that the Department had not identified those lands which were ceded, seemingly a difficult task. Sheryl L. Miyahira, Hawaii's Ceded Lands, unpublished manuscript on file in University of Hawaii Law School Library, dated June 2, 1980, pp. 37-38. Also see text below at notes 99 and 100.

62Article XVI, § 6.

63Article XII, § 4.

64Article XII, § 5. The initial election of the board of trustees which is to administer the Office was conducted on November 4, 1980.
the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income. . . from that pro rata portion of the trust" created by the Admission Act.

The trust in ceded lands is thus doubly provided for, established both by federal statute (the Admission Act) and by the Hawaii constitution. But neither legislative source states, except in a most general way, what the "ceded lands" corpus of the trust is, what is its extent and quality. The Treaty of Annexation and the Joint ("Newland") Resolution which annexed Hawaii, from which the ceded lands derive, describes them merely as the "public, government or crown lands." The Hawaii Organic Act, which placed the corpus under the administration of the Territory, refers to it as "the public property ceded," and the Admission Act, which returned title to Hawaii, identifies the property subject to the trust as "the lands" and "public lands." The Hawaii Revised Statutes define "public lands" as "all lands or interest therein in the State classified as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date."  

---

65 Article XII, § 6. What constitutes a pro rata share is discussed below at note 101.

66 30 Stat. 750.
67 At § 91.
68 At § 5(f).
69 Sec. 171-2.
None of these pieces of legislation indicate whether subsurface resources, such as geothermal fluids or steam, are part of the lands which are held in trust, or if subsurface rights severed from the surface estate remain in the corpus. Harking back to the history of mineral reservations briefly traced above, the following situations can be distinguished with respect to the status of mineral rights in Hawaii:

<table>
<thead>
<tr>
<th>Surface estate:</th>
<th>Privately owned</th>
<th>State owned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mineral rights:</td>
<td>Not reserved to State</td>
<td>Reserved to State</td>
</tr>
</tbody>
</table>

With respect to acreage now held by the state which had been returned pursuant to Section 5 of the Admission Act (the right-hand section of the preceding diagram), it seems clear that such trust lands do include resources underlying their surface. This would be true either under traditional common law doctrine, which holds that the owner of the soil owns "to the depths", or under an extension of ancient Hawaiian tradition, which recognized no cleavage between the various attributes of land and the resources associated with it. By Hawaii statute, the Department of Land and

---

70 See text at notes 41-48, supra.

71 Cujus est solum, ejus est usque ad coelum et ad inferos. ("To whomever the soil belongs, he owns also to the sky and to the depths.") 2 Blackstone Commentaries 18 (1902). City Mill Co. v. Honolulu Sewer & Water Comm., 30 Haw. 912 (1929) holds that with respect to artesian reservoirs owners of the overlying land shared in ownership of the basin below -- the correlative rights doctrine which modifies that of cujus est solum.
Natural Resources, which administers public lands, must hold in the public trust established by Section 5(f) all proceeds from the "sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii...and returned to the State of Hawaii...". Such proceeds would include rents and royalties from geothermal leases on lands in the trust and they would be placed in the special land and development fund, for disposition in accordance with the provisions of Section 5(f).

The status of geothermal resources underlying lands which, as possibly it may be finally decided, the Hawaii government granted away without an effective reservation, also seems clear. Any claim by the state to mineral rights, including geothermal rights, respecting such lands would vanish with the holding that a reservation had not been made -- as may be the case with respect to grants made by

72 Sec. 171-48, Hawaii Revised Statutes. The statutes dealing with public lands define "land" to include "all interests therein and natural resources including water, minerals, and all such things connected with land, unless otherwise expressly provided." § 171-1.

73 Royalties on geothermal production on state lands, and on private lands held subject to a reservation of geothermal resources, are provided for by Rule 3 of the Regulations on Leasing of Geothermal Resources and Drilling for Geothermal Resources in Hawaii (Regulation 8, Department of Land and Natural Resources, Honolulu, 1978), p. 7.

74 Sec. 171-19, Hawaii Revised Statutes. The seven purposes there listed for which moneys in the fund may be spent do not explicitly include bettering the conditions of the Hawaiian people, as required by § 5(f) of the Admission Act. However, the statute states that it is subject to 5(f), and does allow spending from the special fund to reimburse the State's general fund for advances made. Thus, general fund expenditures could be made on behalf of native Hawaiians and then replaced from the special land and development fund, abiding by the provisions of § 5(f) and the letter of § 171-19.
the Territory between 1900 and 1955. If the state does not hold mineral reservations on such land, necessarily geothermal resources underlying the land fall outside the corpus of the trust imposed by Section 5(f) of the Admission Act. It will require a court determination to ascertain which lands, if any, are in this category.

The center section of the diagram, which includes geothermal resources under surfaces title to which was granted, subject to an effective reservation of the resources, to the government of Hawaii, presents a more difficult question. A mineral reservation is an incorporeal thing, at once the creation and the retention of the right to control and benefit from mineral substances which would otherwise have gone with the land, accomplished by inserting a reservation clause in the instrument of conveyance, here a grant or patent. Did those rights in minerals which were reserved go into the public lands trust, or do they lie outside the trust corpus?

It is helpful to distinguish among the periods of Hawaii's constitutional history. Beginning with the present, the period of statehood, it would appear that geothermal rights reserved by the State of Hawaii would come under the trust imposed by Section 5(f). The scope of the trust is broad, extending not only to the ceded lands returned to Hawaii, but also to "the proceeds from the sale or other disposition

75 See text at note 42 above. It can be argued that the territorial land commissioners acted beyond their lawful powers in conveying public lands without the mineral reservation. See source listed in note 45.
of any such lands and the income therefrom." 76 The severance of rights to exploit minerals from rights over the surface of the land (the "surface estate") did not remove them, or income from them, outside the trust. If the State of Hawaii were to divert geothermal rights (or any other rights it created in conveying ceded lands into private ownership), the diversion would be a breach of the trust imposed by Section 5(f) and of the state constitutional provisions and statutes which augment it. Under Section 5(f) the United States could sue to remedy the breach.

The answer to the question of a trust over geothermal rights is less obvious with respect to the mineral reservations retained by the Territory of Hawaii on public lands conveyed into private hands between annexation and statehood. Assuming, for the discussion, that reservations of "minerals" made before 1974 apply to geothermal resources, are rights to reservoirs reserved by the Territory within the corpus of the trust in lands?

Analysis of this question requires a review of the language of the Congressional acts which established the trust. The Joint Resolution of annexation (Newland Resolution), to which the trust has been traced, provided that "all revenue from or proceeds of [the public lands and other public property ceded by the Republic]. . .shall be used solely

---

76 The Admission Act (73 Stat. 4), § 5(f).
for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.\textsuperscript{77} The Organic Act, to effect the purposes of the Resolution, required "all funds from the sale or lease or other disposal of public land" to be appropriated for the benefit of Hawaii inhabitants.\textsuperscript{78}

Finally, the Admission Act requires that "the proceeds from the sale or other disposition\textsuperscript{79}" of the returned public lands be held in trust for the purposes specified in Section 5(f).

There is a continuity of purpose expressed here: all economic values derived from the public lands, as well as the lands themselves, were to be held in trust for the people of Hawaii. It can be readily argued that the severance of the mineral estate from the surface estate, in conveying public land subject to the mineral reservation, did not cause reserved rights to disappear from the trust res. They remained an asset of the trust capable of producing income in the future, much as public lands not currently in productive use. By this line of argument, mineral reservations imposed by the Territory on land sales it made as manager of the trust stayed in the trust and so remained after the Admission Act returned title and trusteeship to the government of Hawaii.

Does this argument equally apply to mineral reservations made by the Kingdom, Provisional Government and

\textsuperscript{77}Joint Resolution No. 51, 55th Congress, 2d Session, 1898.

\textsuperscript{78}Sec. 73(4e). Emphasis supplied.

\textsuperscript{79}Sec. 5(f). Emphasis supplied.
Republic of Hawaii prior to annexation? Were the reservations made between 1848 and 1898 in the aggregation of assets transferred to the U.S. on which the trust was imposed? The Newlands Resolution begins by acknowledging that by treaty the government of Hawaii had ceded title to all "public, government, or Crown lands, public buildings or edifices, ports, harbors. . .and all other public property of every kind and description."\(^{80}\) So comprehensive a statement of government property must surely include in its sweep the rights to minerals which the successive Hawaii governments had reserved in issuing patents to land. The Resolution then accepts and ratifies the cession of "all and singular the property and rights hereinbefore mentioned". Thus far, the mineral reservations were within the body of property rights transferred, which was the entire patrimony of the Republic, and were potentially subject to such conditions as the Congress might have established.\(^{81}\)

However, the next paragraph of the Resolution, which serves to impose the trust, addresses the limited subject of "public lands", rather than the wide range of property previously identified for cession. It is the public lands alone, and not other property, that the Resolution exempts from the existing laws of the United States, and it is only the public lands ("the same") whose revenues and proceeds

\(^{80}\) Joint Resolution No. 51, 55th Congress, 2d Session, 1898, introductory ("whereas") clause.

\(^{81}\) Id., second paragraph.
are dedicated to the benefit of the inhabitants of the Hawaiian Islands. 82

The issue is thus narrowed to the question of whether "public lands", as they were understood to be constituted in 1898, included mineral rights held by the government of Hawaii with respect to surface estates already in private ownership.

Such an inference may be reasonable, but at this moment it could not be proven, or directly supported, by Hawaii case law. As the discussion of native Hawaiian rights in the preceding section of this paper suggests, the law respecting real property and rights to natural resources is now in a state of flux. The Hawaii Supreme Court in the past several years has tended to question and sometimes overrule its earlier decisions defining private and state interests in land. 83 The United States District Court for the District of Hawaii has in two recent cases reached conclusions

82 Id., third paragraph.

contradictory to those of the Hawaii court regarding the extent of public ownership of land and water.\textsuperscript{84} The issue of rights to surface water is now before the U.S. Court of Appeals for the Ninth Circuit.\textsuperscript{85} The decision of that court, if broadly reasoned (and not reversed by the U.S. Supreme Court), may illuminate the general questions underlying this study: (i) what was the old Hawaii law, established by custom and usage as well as legislation, relating to natural resources, and (ii) how much of that law survived the Great Mahele?

Should the federal appellate courts, or the Hawaii Supreme Court, find that more native rights survived than was held in Oni v. Meek,\textsuperscript{86} or should those courts find additional clues in ancient Hawaii law as to the scope of a konohiki’s dominion over "land", then reference points may be established by which to ascertain whether mineral rights were in the aggregation of property values designated "public lands" in the statutes which created the trust in ceded lands.

Analysis may also be aided by the recovery of old Hawaii case law. A project sponsored by the Chief Justice of Hawaii is now coding and indexing early decisions of the circuit


\textsuperscript{85}Robinson v. Ariyoshi, No. 7432 (1980).

\textsuperscript{86}See text above at note 20.
and district courts here, many of which have to be translated from Hawaiian. Those cases dealing with conflicts over land may provide additional understanding of what custom and usage was recognized before and after the Great Mahele with respect to control over water and other natural resources. From the old case law, and from that about to emerge, may come a clearer picture showing how the legislation of the Mahele impacted on native Hawaiian land law and what rights in natural resources accompanied the transfer of ceded lands into the land trust.
IV. Who Benefits from Trust Proceeds and to What Extent?

The preceding section has indicated that it is reasonable to assert that rights to geothermal resources held by the state are part of the corpus of the trust in lands on behalf of native Hawaiians and others, most clearly with respect to mineral reservations made since 1974 but possibly for all such reservations now held by the state irrespective of the date of their origin. The final questions to be examined are who is a "native Hawaiian" for this purpose and what share of proceeds from geothermal and other trust assets will go to native Hawaiians?

Section 5(f) of the Admission Act of 1959, it will be recalled, provided that the ceded lands, "together with the proceeds from the sale or other disposition of such lands and the income therefrom", were to be held by the State as a public trust for the following five purposes:

(i) support of the public schools;
(ii) betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act;
(iii) development of farm and home ownership;
(iv) making public improvements; and
(v) providing lands for public use. 87

The Hawaiian Homes Commission Act, a federal statute which the Hawaii state constitution adopted as a law of the

87 73 Stat. 4.
state and as a compact with the United States, defines "native Hawaiian" as any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. If theories of European landing or shipwrecks in Hawaii prior to the recorded visits of Captain Cook are dismissed as romantic inventions, only those of at least half Polynesian Hawaiian ancestry qualify as beneficiaries under the second purpose of Section 5(f).

The Hawaii Constitutional Convention of 1978 attempted to restate the beneficiaries of the ceded land trust (or any trust which may derive from it) in a series of amendments to the state constitution. One amendment, ratified by popular vote, provides that the lands granted by the United States shall be held by the state as a public trust "for native Hawaiians and the general public", a severe condensation of the five beneficial purposes set forth in Section 5(f). A second amendment, also ratified, established an Office of Hawaiian Affairs (O.H.A.) to hold title to all property "now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians." Under this provision, some of the ceded lands might possibly be put

88 Now Art. XII, Hawaii Constitution.
89 Sec. 201(7), Hawaiian Homes Commission Act, 1920, (42 Stat. 108).
90 Incorporated as Article XII, § 4. Of course the provisions of Section 5(f), laid down by Congress as part of the conditions for granting statehood, are not affected by conflicting language in the Hawaii constitution.
91 Article XII, § 5.
under the new Office, if that were compatible with Section 5(f), and so become available to benefit "Hawaiians" as well as "native Hawaiians." A third amendment defined the terms "Hawaiian" and "native Hawaiian", but was held to be not validly ratified at the election of November 7, 1978 because it, and certain other proposed amendments, were not adequately described on the ballot. 92

However, the state legislature in a statute implementing the constitutional establishment of the O.H.A., provided these definitions of ethnicity. "Native Hawaiian" is defined as in the Hawaiian Homes Commission Act (i.e., to be one of at least half blood from the races inhabiting these islands before 1778), but with the proviso that "the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." 93

"Hawaiian" was defined by the legislature to mean descendants, of whatever blood mixture, of those aboriginal peoples. 94 Hawaiians as well as native Hawaiians are stated

93 Act 196, Session Laws of 1979, incorporated as § 10-2, Hawaii Revised Statutes. The underscored language presumably is intended to bar descendants of pre-Cook interlopers, if any could establish such lineage, while the last phrase bars native Hawaiians who reside elsewhere.
94 Id., § 10-2(5).
to be the beneficiaries of the public trust to be administered by the O.H.A., and the Board is empowered to administer the proceeds from "lands, natural resources, minerals" for both native Hawaiians and Hawaiians, including all income and proceeds from a pro rata share of receipts from the Section 5(f) trust of ceded lands.

From the foregoing, it might appear as if the constitutional provisions and statutes establishing the O.H.A. could be interpreted as attempting indirectly to bring Hawaiians of less than 50 per cent aboriginal blood into the same category of beneficiaries of Section 5(f) as those qualifying as "native Hawaiians." However, another section of the statute states that a pro rata share of all funds derived from the ceded land trust is to be used solely "for the betterment of the conditions of native Hawaiians," thus repeating the language of Section 5(f), which singles out for special consideration those of half Hawaiian blood or more.

The share of funds derived from the public land trust going to the O.H.A. was set at 20 per cent by a 1980 statute. The rationale for the allocation apparently is that Section

95 Id., § 10-2(6). The statute, however, does not state what those benefits are.

96 Id., § 10-5(1).

97 Id., § 10-3(1). Emphasis supplied.

5(f) enumerates five purposes for which trust proceeds may be used and therefore the betterment of the conditions of native Hawaiians, as one of those purposes, rates one-fifth.

A recent letter opinion from the office of the Attorney General to the Lieutenant Governor of Hawaii noted that the constitutional amendments providing for the establishment and funding of the O.H.A. reflected a concern that "no specific portion of the funds derived from the public land trust was held and used solely for the betterment of conditions of native Hawaiians." 99 Instead, the practice of the State had been to channel revenues from the trust, "by and large," to the Department of Education, on the assumption that this satisfied the requirements of Section 5(f). 100 In reply to the inquiry of the Lieutenant Governor, the Attorney General confirmed that under the constitutional and statutory provisions just cited 20 per cent of all funds derived from the public land trust must go to the O.H.A. and be used solely for the betterment of conditions of "native Hawaiians," and not for any other purposes. 101 It follows, that of the mineral lease rents, royalty payments and other revenue which the State may receive into the trust fund from geothermal development, 20 per cent would go to the O.H.A. for the benefit of persons of half or more Hawaiian blood, while

100 Id.
101 Id. at p. 4.
the other 80 per cent would be available to the state for expenditure on behalf of the population at large, including native Hawaiians and those of lesser percentages of Hawaiian ancestry.
V. Summary and Recommendation

This paper has examined two legal theories which might be advanced in support of a claim by ethnic Hawaiians that they have a special claim to geothermal resources or state revenues derived therefrom. The first theory is that rights of Hawaiians to the land and its resources, predating the Great Mahele and surviving the establishment of a fee simple regime in land ownership, may provide the basis for such a claim. However, the early case of Oni v. Meeks\(^{102}\) established a rule holding that the legislation affecting the Great Mahele replaced the broad and unspecified traditional rights to natural resources with those limited rights granted by statute (Section 7-1, Hawaii Revised Statutes) and the latter makes no mention of rights to subsurface elements, such as geothermal fluids.

Opinions of the Hawaii Supreme Court since statehood suggest that the court may be receptive to arguments on behalf of a less constrictive interpretation of native Hawaiian rights, or of claims on behalf of the state in which the Hawaiians may share.\(^{103}\) It would require a repudiation of Oni v. Meeks, however, to reach the conclusion that native rights extend to geothermal reservoirs.

---

\(^{102}\) See discussion of text at note 20.

More likely to succeed is the theory that there is a public trust imposed on the State's rights to geothermal resources, of which the native Hawaiian population is a beneficiary. Section 5(f) of the Admission Act provides that the ceded lands granted back to Hawaii on attaining statehood shall be held in trust to accomplish five public purposes, one of which is the betterment of the conditions of native Hawaiians, defined to be those of half or more Hawaiian blood. Within the corpus of the trust clearly are the rights to geothermal resources under lands which were returned to the State after 1959 and are still owned by the government.

Less clear is the inclusion of geothermal rights reserved by the Hawaii government from its conveyances of land to private owners prior to statehood. The Territorial government, it may be argued, retained in the category of public lands (which it administered under the Organic Act as agent for the U.S. and which became subject to the public trust under the Admission Act) not only lands still in the public domain but also rights to subsurface resources reserved from lands it had sold or traded away. By further extension back into history, it may be argued that when the sovereign Republic of Hawaii ceded its public lands to the U.S. in 1898, that patrimony, which ultimately became the corpus of the public trust described in Section 5(f) of the Admission Act, included all mineral reservations held by the successive Hawaii regimes back to the Great Mahele.

There is now uncertainty as to whether geothermal
resources are to be included in mineral reservations made prior to 1974, when the statutory definition of "mineral" was amended to include "geothermal". Resolution of that question--and thus determination by the courts whether all or only some of the geothermal resources of Hawaii have been reserved to the state--may depend on two kinds of information which would inform the Hawaii Supreme Court. One is ascertaining from early decisions of Hawaii trial courts, now being translated and analyzed, what the rights of the people and of the government in land use were conceived to be, just prior to and during the Great Mahele. The second is the outcome of a basic water case, Robinson v. Ariyoshi, 104 now being reviewed by the Ninth Circuit Court.

Proceeds received by the state from whatever geothermal reservations come under the land trust will go to the special fund, one fifth of which is earmarked for the Office of Hawaiian Affairs recently created by constitutional amendment and statute,105 to be spent for the betterment of native Hawaiians. However, the extent of geothermal resources subject to this dedication will not be known until the uncertainties of the law relating to the corpus of the trust have been resolved. That resolution, and the consequent settling of political and social policy questions which the legal uncertainty may have created for geothermal development, will be furthered by gaining a clearer understanding

---

104 See text above at notes 84 and 85.
105 See text above at notes 90-101.
of how underground resources related to the land were used and controlled when the public land trust was being created in Hawaii.

Recommendations.

To remove the existing uncertainty as to the extent of effective reservations by the State of geothermal resources, and thereby ascertain how much of these resources may generate funds available for the betterment of native Hawaiians, the following actions are recommended:

1. The State of Hawaii should seek a decision in the courts of the state, by declaratory judgment or otherwise, of its claim to own all geothermal resources in the state.

2. In preparing its case, the State should analyze early Hawaii trial court opinions dealing with the land and its resources, to establish the separation of surface and subsurface estates when the public land trust was created, thus supporting the proposition that the mineral rights exclusion was universal, even when not expressed in the land patent or grant.

3. Further analysis be made of the reach of the conclusion set forth above, that geothermal resources fall within the trust imposed on public lands in Hawaii, one-fifth of the trust income being earmarked for the benefit of native Hawaiians through the budget of the Office of Hawaiian Affairs.
PRINCIPAL SOURCES

A. Books and Articles


7. Dole, Sanford, Evolution of Hawaiian Land Tenures (Hawaiian Historical Papers, December 5, 1892).

8. Handy, Edward and Elizabeth, Native Planters in Old Hawaii (Bishop Museum, 1972).


B. Legislation

1. Declaration of Rights of 1839, Kamehameha III.
3. Laws of Kamehameha III, Vol. 1,107, re-enacted as Art. 4, Ch. 7, Pt. 1 of An Act to Organize the Executive Departments of the Hawaiian Islands, 1845-46.
4. An Act Confirming Certain Resolutions...Granting to the Common People Allodial Titles for Their Own Lands and House Lots and Certain Other Privileges, Laws of 1850.
10. The Hawaii State Constitution, as amended through 1979.

C. Hawaii Cases and Opinion

1. Oni v. Meek, 2 Haw. 87 (1858).
2. Estate of Kamehameha IV, 2 Haw. 715 (1864).