

# Water Rights and Responsibilities in the Twenty-first Century: a Foreword to the Proceedings of the 2001 Symposium on Managing Hawai‘i’s Public Trust Doctrine

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## I. INTRODUCTION

Modern water allocation decisions inevitably involve difficult choices among competing consumptive and natural uses that are highly valued by diverse but equally passionate sectors of the community.<sup>1</sup> Particularly in an island state like Hawai‘i, with its limited sources of fresh water, fragile environment, and unique economic challenges, debates over re-allocation of precious water resources and the merits of stream restoration are likely to become only more intense as human needs for economic uses of water increase and as ecological and cultural needs for instream use are more fully recognized.<sup>2</sup>

As indicated by the re-invigoration of the fundamental ancient water rights principle called the “public trust doctrine” in the landmark August 2000 decision of the Hawai‘i Supreme Court in the *Waiāhole* case,<sup>3</sup> for users and

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<sup>1</sup> See Robbie Dingeman, *Waiāhole Water Allocation Rejected: Ruling Called Windward Victory*, HONOLULU ADVERTISER, Aug. 23, 2000, at A1 (noting the *Waiāhole* water issues raised “complex and emotional questions about choosing between competing uses in an island community”).

<sup>2</sup> See *In re Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai‘i 97, 9 P.3d 409 (2000) [hereinafter “*Waiāhole*”] (noting that experts project a water shortage on O‘ahu in 2020, the court emphasized the “urgent need for planning and preparation . . . before more serious complications develop,” and the need to insure “judicious planning and regulation, rather than crisis management”).

<sup>3</sup> See *infra* notes 69-127 and accompanying text for a summary of the Hawai‘i Supreme Court’s specific discussion of the public trust doctrine in the *Waiāhole* case.

decision-makers alike, a dramatic paradigm shift in how water allocation decisions are made is required in order to find the wisest long-term course through this legal and policy thicket into the twenty-first century. The public trust doctrine directs us to engage ourselves in a new constructive public-private dialogue about the collective responsibilities that inhere in any water right, instead of engaging in intractable legal warfare over conflicting water "rights."

To facilitate this vital dialogue, this issue of the *Hawai'i Law Review* features the proceedings of the 2001 Symposium on "Managing Hawai'i's Public Trust Doctrine," recently held in a "packed auditorium"<sup>4</sup> on the University of Hawai'i campus. Co-sponsored by eleven Hawai'i governmental agencies and public organizations,<sup>5</sup> the Symposium attracted scholars, policy makers, managers, landowners, and community members from across the State. Their common interest was the quest to learn more about the modern water law public trust doctrine, to understand the contours of the Hawai'i Supreme Court's adaptation of that doctrine to Hawai'i water and natural resources law in the *Waiāhole* decision, and to participate in a constructive dialogue on the real world application of the doctrine.

To provide the historical and national context for Hawai'i's version of the longstanding common law doctrine, the Symposium opened with a keynote address by the leading authority on the doctrine, Professor Joseph Sax of the University of California at Berkeley, Boalt Hall School of Law.<sup>6</sup> To further set the foundation for discussing the practical implications of the doctrine, Jan Stuart Stevens, who counseled the State of California on these issues for four decades, discussed the lessons learned from California public trust cases, particularly the influential *Mono Lake*<sup>7</sup> decision.

The Symposium's two panels—comprised of Hawai'i government managers and leaders, attorneys for private and public water users, and community members—offered a lively and thoughtful discussion of the

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<sup>4</sup> Diana Leone, *Waiāhole Ruling Carries Wide Implications: A UH Gathering Gauges the Landmark Decision on Windward Water*, HONOLULU STAR-BULLETIN, Oct. 15, 2001, <http://starbulletin.com/2001/10/15/news/story5.html>.

<sup>5</sup> The co-sponsors for the Symposium were: Hawai'i State Department of Health; Hawai'i State Coastal Zone Management; Hawai'i State Office of Planning; Hawai'i State Office of Environmental Quality Control; Division of Aquatic Resources, Hawai'i State Department of Land and Natural Resources; Hawai'i County Planning Department; Department of Urban and Regional Planning, University of Hawai'i at Manoa; Natural Resources Section, Hawai'i State Bar Association; Native Hawaiian Bar Association; Hawai'i's Thousand Friends; and the Environmental Law Program, William S. Richardson School of Law, University of Hawai'i at Manoa.

<sup>6</sup> Professor Joseph Sax's biography is provided later in this Foreword. See *infra* Part III.

<sup>7</sup> *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) [hereinafter "*Mono Lake*"].

decided and still-open questions surrounding the “Hawai‘i water resources trust” articulated in *Waiāhole* and explored the difficult questions of how the trust should be translated into on-the-ground decisions managing Hawai‘i’s water resources.

This Foreword describes the genesis of this important and timely Symposium, previews the presentations by the speakers, and provides biographies on all the speakers. For those readers less familiar with the public trust discussion in the *Waiāhole* decision, a summary of this aspect of the case is provided later in this Foreword. Readers are also encouraged to review the written essays of the panelists and related supplemental materials posted on the Hawai‘i Law Review’s web site at [www.hawaii.edu/uhreview](http://www.hawaii.edu/uhreview).

This dialogue on the public trust doctrine is both uniquely Hawaiian and universal. Despite the divergent views on how to prioritize water uses and the high stakes involved, as panelist Ken Kupchak, an attorney for private landowners, commented: “everybody’s still trying to see if we can get along with each other and I think that’s the Hawaiian way.”<sup>8</sup> Perhaps Hawai‘i’s approach can assist others on the U.S. mainland and around the globe who are also facing the imminent and urgent need to act early rather than react to water conflict. By publishing the transcript of this public forum, we hope to contribute to the efforts of our citizens and state agencies to fulfill the Hawai‘i Supreme Court’s mandate that future decisions about Hawai‘i’s water trust resources be “made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.”<sup>9</sup>

## II. THE SYMPOSIUM PROCEEDINGS

Although holding a public forum on an arcane legal doctrine is unusual, the Symposium organizers<sup>10</sup> believed that such an event was of vital importance given the prominent and explicit role that the public trust doctrine will play in the future of Hawai‘i water allocation decisions. As the cornerstone of the Hawai‘i Supreme Court’s lengthy August 2000 decision in the *Waiāhole* case—a proceeding of “unprecedented size, duration, and complexity”<sup>11</sup>—the

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<sup>8</sup> Unedited Transcript, Proceedings of the 2001 Symposium on Managing Hawai‘i’s Public Trust Doctrine 58, [www.hawaii.edu/uhreview/publictrust.htm](http://www.hawaii.edu/uhreview/publictrust.htm) (Oct. 6, 2001).

<sup>9</sup> *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455.

<sup>10</sup> The four Symposium Program Co-Chairs were: Jim Paul (Paul Johnson Park & Niles, attorney for Hawai‘i’s Thousand Friends in the *Waiāhole* case); Bill Tam (Alston Hunt Floyd & Ing; formerly Deputy Attorney General and counsel to the Water Commission (1987-97) in the *Waiāhole* case); Donna Wong (Executive Director, Hawai‘i’s Thousand Friends); and Denise E. Antolini, author of this Foreword.

<sup>11</sup> *Waiāhole*, 94 Hawai‘i at 110, 9 P.3d at 422.

public trust doctrine and its particular implications for governmental agencies as trustees deserved deeper scrutiny under the public spotlight.

In an effort to educate the broader community about the future import of the decision, the Symposium brought together a diverse and distinguished group of scholars, government leaders, managers, private users, and community voices.<sup>12</sup> Equally important to the discussion were the many individuals and organizations in an audience of over 200 people<sup>13</sup> who played large and small roles as decision-makers, management staff, counsel, and clients during the contested *Waiāhole* case.

With the generous support of a grant from the Hawai'i Community Foundation, the Symposium hosted the nation's two leading authorities on the public trust doctrine, Professor Sax and Mr. Stevens, both of whom were cited by the Hawai'i Supreme Court in the *Waiāhole* decision.<sup>14</sup>

In his keynote address, Professor Sax drew on his global experiences with water allocation and emphasized his central theme that "water is first and foremost a community resource whose fate tracks the community's needs as time goes on. Water [law] evolves in the common law tradition. Public trust law is common law founded on community water rights. But public trust law evolves to meet community needs."<sup>15</sup>

Professor Sax noted the convergence of modern efforts for watershed protection and restoration with the old English common law doctrines of riparian rights and natural flow, which presumed that water belonged in the watershed of origin.<sup>16</sup> He contrasted that approach to the western states' prior appropriation doctrine, which permitted water to be moved out of native water basins for industrial and municipal uses.<sup>17</sup> Although conflicting, these approaches responded to "the fundamental needs of the community at the time reflecting natural conditions, such as aridity, or the evolution of social

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<sup>12</sup> Hawai'i's public access television station *Olelo* taped the proceedings for broadcast. For a copy of the videotape, contact Donna Wong, Hawai'i's Thousand Friends at htf@lava.net.

<sup>13</sup> Although not included in this published version of the proceedings due to space limitations, the prolific written questions from the audience provoked lively and informative discussion among the panelists. The full text of the question and answer portions of the proceedings and the full list of questions are included in the complete transcript of the Symposium posted at: <http://www.hawaii.edu/uhreview>.

<sup>14</sup> See *Waiāhole*, 94 Hawai'i at 129, 9 P.3d at 441 (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)); *id.* at 142, 9 P.3d at 455 (citing Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 223-25 (1980)).

<sup>15</sup> Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine 24.

<sup>16</sup> *Id.* at 25.

<sup>17</sup> *Id.* at 26.

goals.”<sup>18</sup> The role of the public trust doctrine is “the theoretical underpinning of a general legal superstructure that submits water rights and water uses to evolving community needs.”<sup>19</sup>

Tracing the American roots of this Roman doctrine to legal decisions in the 1800s, Professor Sax noted “[t]he trust is old, but its applications to water diversions and to environmental protection is often new.”<sup>20</sup> In recent decades, many states have placed greater weight on instream flow rights advocated by water resource agencies and federal land management agencies.<sup>21</sup> Professor Sax cautioned, however, that the public trust doctrine “is primarily a water doctrine and only instrumentally a land doctrine.”<sup>22</sup> The special importance of the public trust doctrine arises, he stated, because

[I]t invokes not just authority but a duty on the part of government to protect public rights. Agencies of the state have an affirmative obligation to come forward and to take on the burden of asserting and implementing the public trust. Moreover, the public trust is a continuing obligation. In trust waters there can be no such thing as a permanent, once-and-for-all allocation of trust waters or land. That principle is essential to acknowledge in government responsibilities to respond to changing public needs and changing roles for water in the economy.<sup>23</sup>

According to Professor Sax, the *Waiāhole* decision presented some issues that were distinctive or only incipient in other states—“such as the application of the trust to domestic use, to ground water without explicit reference to navigable waters, and references to native and traditional and customary uses.”<sup>24</sup> Moreover, he noted the decision indicated a level of judicial oversight—on such issues as burden of proof and the precautionary principle—not yet seen in other states.<sup>25</sup>

Yet, he concluded, a number of judicial decisions reflected a similar “judicial commitment in the states to protect public trust values,” and the Hawai‘i Supreme Court’s “[a]ctive implementation of the public rights in water reflecting contemporary public values, rather than those of an earlier

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 28.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 27.

<sup>22</sup> *Id.* at 28.

<sup>23</sup> *Id.* at 31.

<sup>24</sup> *Id.* at 33. Sax observed that the growing recognition of indigenous people’s water rights, which had been terminated or repudiated in the past, demonstrated that trust rights “do not expire simply because they have been unacknowledged for no matter how long a period of time.” *Id.* at 29.

<sup>25</sup> *Id.* at 33.

time, would put Hawai'i squarely in the mainstream of America's evolving water law system."<sup>26</sup>

Following Professor Sax's address, the first Symposium panel, moderated by Hawai'i's leading environmental mediator Peter Adler,<sup>27</sup> brought together five distinguished Hawai'i natural resource attorneys: Jim Paul (Paul Johnson Park & Niles),<sup>28</sup> Ken Kupchak (Damon Key Leong & Kupchak),<sup>29</sup> Tim Johns (Damon Estate),<sup>30</sup> Bill Tam (Alston Hunt Floyd & Ing),<sup>31</sup> and Gil Coloma-Agaran (Director, State of Hawai'i Department of Land and Natural Resources).<sup>32</sup>

Among eight "fundamental principles" of the public trust doctrine in the *Waiāhole* case, Jim Paul emphasized the duties of the State of Hawai'i as the trustee of the Hawai'i Water Resources Trust, the burden of proof now squarely on those seeking water use permits to prove "no significant harm to the public resource," and the similarity between the doctrine and Native Hawaiian and Native American notions of stewardship.<sup>33</sup>

Self-described "devil's advocate" Ken Kupchak raised a series of unresolved questions about the doctrine's application from the perspective of private landowners and offstream permittees, including constitutional concerns about taking without just compensation, the court's overruling of *City Mill*,<sup>34</sup> and the uncertainty for landowners posed by the doctrine's evolutionary nature.<sup>35</sup>

Tim Johns discussed two major themes: first, that public trust was "an intragenerational, as well as intergenerational, equity doctrine," and, second,

<sup>26</sup> *Id.*

<sup>27</sup> Mr. Adler served as the mediator for the interim stream restoration agreement in the *Waiāhole* case. See *infra* Part III for the biographies of all speakers.

<sup>28</sup> Mr. Paul served as counsel to Hawai'i's Thousand Friends in the *Waiāhole* case, focusing exclusively on the public trust doctrine throughout the contested case hearing and appeal. See *infra* Part III.

<sup>29</sup> See *infra* Part III.

<sup>30</sup> Mr. Johns became Deputy Director to the Hawai'i Commission on Water Resource Management after the Commission issued its decision and while the case was on appeal (May 1998 to January 1999), and then became Director of the Department of Land and Natural Resources ("DLNR"), sitting *ex officio* on the Water Commission, until December 2000.

<sup>31</sup> Mr. Tam served as Deputy Attorney General to the Commission from its inception in 1987 until just after the Commission's proposed decision was issued in September 1997, when he was abruptly dismissed by the Attorney General, the impropriety of which was addressed by the Hawai'i Supreme Court on appeal. *Waiāhole*, 94 Hawai'i at 126, 9 P.3d at 438. See *infra* Part III.

<sup>32</sup> In his capacity as the Director of DLNR, Mr. Coloma-Agaran chairs the Water Commission. See *infra* Part III.

<sup>33</sup> Symposium, *supra* note 15, at 34-35.

<sup>34</sup> *City Mill Co. v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929).

<sup>35</sup> Symposium, *supra* note 15, at 35-37.

that the procedural component of *Waiāhole* (in particular, the new burden of proof standards) were as important as the court's substantive rights discussions.<sup>36</sup> He suggested that future applications of the doctrine to land and other natural resources in Hawai'i may put Hawai'i on the "cutting edge."<sup>37</sup>

Bill Tam emphasized that Hawai'i's adoption of the public trust doctrine was not a recent innovation, but was adopted into Hawai'i law as early as 1892 when Hawai'i incorporated English common law principles in its state code.<sup>38</sup> Mr. Tam expressed confidence that the doctrine provided a useful way to sort through competing water uses<sup>39</sup> and that the doctrine was "uniquely suited" to Hawai'i's tradition and culture.<sup>40</sup>

Gil Coloma-Agaran discussed the need for state agencies to have additional resources in order to fulfill their trust responsibilities, particularly to gather the best scientific information.<sup>41</sup> He noted the importance of a thorough reading of the court's lengthy decision—especially the statement that "reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection to the unavoidable impairment of public instream uses and values"<sup>42</sup>—suggesting limits on the scope of the doctrine's preference for public over private uses.

Jan Stevens then addressed the Symposium, likening the dispute over water in the *Waiāhole* case to the long-standing battle on the U.S. mainland between the "water buffaloes" and the "ancient doctrinal beast capable of giving the water buffalo a good fight,"<sup>43</sup> the public trust doctrine. Stevens focused on the lessons for Hawai'i's application of the public trust doctrine that could be drawn from the California Supreme Court's landmark 1983 *Mono Lake* decision,<sup>44</sup> upon which the Hawai'i Supreme Court relied in *Waiāhole*. Stevens gave a compelling account of the legal and social dynamics of *Mono Lake*, which addressed the City of Los Angeles's longstanding diversions of water from the Owens Valley and the Mono Lake basin to provide domestic uses for southern California's rapidly expanding urban center. As a result of the diversions, the level of Mono Lake, once California's largest instate water body, eventually dropped by forty feet and experienced massive ecological changes.<sup>45</sup>

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<sup>36</sup> *Id.* at 38.

<sup>37</sup> *Id.* at 39.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 40.

<sup>40</sup> *Id.* at 41.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 42.

<sup>43</sup> *Id.* at 44.

<sup>44</sup> *Mono Lake*, 658 P.2d 709 (Cal. 1983).

<sup>45</sup> Symposium, *supra* note 15, at 45-46.

Stevens concluded that there are strong similarities between the *Mono Lake* case and the *Waiāhole* decision.

Both cases involve the reallocation of water from large and costly structures, built around the turn of the century to accommodate growing urban needs. In both cases, the court expressed a much broader view of the powers of the state, under the public trust doctrine, than did the administrative agency charged with administering water rights. And in both cases a number of parties and amici reflected a sort of who's who of all the economic, political and environmental powers of the state.<sup>46</sup>

Stevens suggested that the legal complexities of the public trust doctrine are formidable but not insurmountable, and that California courts and agencies have been able to consider the impacts of water allocation decisions on public trust values. Although not a "cure-all for the resolution of competing water uses,"<sup>47</sup> he concluded that the public trust doctrine provides "some salutary guidelines and protections for resources that were sadly neglected in past allocations of water."<sup>48</sup>

The second Symposium panel, moderated by Kem Lowry, Chair of the University of Hawai'i's Department of Urban and Regional Planning, discussed the challenges for implementing the doctrine "on the ground." Panelists included Chris Yuen (County of Hawai'i Planning Director), State Senator Colleen Hanabusa, Bill Devick (Director, State of Hawai'i, Department of Land and Natural Resources, Division of Aquatic Resources), Charlene Hoe (community water rights advocate from windward O'ahu and member of Hakipu'u 'Ohana), and Colin Kippen (Deputy Administrator, State of Hawai'i Office of Hawaiian Affairs).

Chris Yuen explored the implications of the *Waiāhole* decision for land use and natural resource issues pending before county and state agencies.<sup>49</sup> He noted that, although the Hawai'i State Constitution states that "all public natural resources are a public trust,"<sup>50</sup> the public trust doctrine would not be "imported wholesale into all public natural resources."<sup>51</sup> Nonetheless, the "overall direction" of the *Waiāhole* decision was to direct resource managers to ensure the "long-term health" of these broadly defined resources,<sup>52</sup> including such challenges as protection of *mauka* (upland) forests critical to ground water recharge.<sup>53</sup>

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<sup>46</sup> *Id.* at 49.

<sup>47</sup> *Id.* at 50.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 52.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*



Department of Land and Natural Resources (“DLNR”) administrator Bill Devick characterized the public trust doctrine as both “a tool” and “a philosophy”<sup>54</sup> that can be used “to shift the balance in decision-making towards protection and conservation, thinking about the future, rather than simple immediate, economic advantage.”<sup>55</sup> He lamented, however, the lack of good scientific information necessary to make such progress.<sup>56</sup>

State Senator Colleen Hanabusa focused on the challenges facing the shared trustee roles of the Hawai‘i State Legislature, Water Commission, and Hawai‘i Supreme Court. She emphasized the practical and political pressures on the Legislature in fulfilling its trustee obligations and, sounding a pessimistic note, offered little hope of new funding from the Legislature to address these issues.<sup>57</sup>

Office of Hawaiian Affairs (“OHA”) Administrator Colin Kippen addressed the complementary relationship between the public trust doctrine and Native Hawaiian rights and values, calling the *Waiāhole* decision “seminal” and “long overdue.”<sup>58</sup> Seizing on the Hawai‘i Supreme Court’s passive umpire analogy, he stated: “No more are we going to stand for umpires cemented behind home plate. [Agencies] have to get out there, [and] ask the questions . . . .”<sup>59</sup>

Community water advocate Charlene Hoe shared insights from her personal history of grass-roots community involvement in water rights in Hawai‘i over the past thirty years.<sup>60</sup> She explained the frustration the community encountered in attempting to reassert appurtenant rights for *lo‘i kalo* (taro cultivation), a frustration that led to the successful community effort at the Hawai‘i Constitutional Convention in 1978 to add new amendments to protect water and other natural resources, including the mandate to create the State Water Code.<sup>61</sup> Despite the length of time it took to implement the new code, Hoe felt that the need to preserve water resources “in perpetuity” was the common hopeful thread among the competing voices.<sup>62</sup>

Professor Sax concluded the Symposium with some parting wisdom on the application of the public trust doctrine in Hawai‘i.<sup>63</sup> Contrary to the view of some critics, he felt that the Hawai‘i Supreme Court’s decision, viewed

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<sup>54</sup> *Id.* at 53.

<sup>55</sup> *Id.* at 53-54.

<sup>56</sup> *Id.* at 54.

<sup>57</sup> *Id.* at 54-55.

<sup>58</sup> *Id.* at 56.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 57.

<sup>61</sup> *Id.* at 58-59.

<sup>62</sup> *Id.* at 59.

<sup>63</sup> *Id.* at 59-60.

properly as a “strong commitment to such a doctrine and a willingness in an energetic way to see that it’s enforced,”<sup>64</sup> could empower, rather than detract from, legislative authority, and “energize administrative agencies” to act and try new approaches.<sup>65</sup> He also addressed the salient takings issue, suggesting the key inquiries of any eventual U.S. Supreme Court review would be the breadth of the state’s own view of the doctrine and the historical grounding of that view in the state’s unique history.<sup>66</sup> Ending on an optimistic note, Sax wished Symposium participants “good luck,” observing that Hawai‘i now had some “newly recognized and powerful tools . . . and a lot of knowledgeable and committed people to work on [these issues].”<sup>67</sup>

The Symposium was, indeed, designed to be a beginning, not an end to the dialogue. The vital water allocation issues addressed in the Hawai‘i Supreme Court’s decision resonate on all of the other major Hawaiian islands and are still far from settled, even in the *Waiāhole* case itself.<sup>68</sup> During the same week as the Symposium, the Water Commission heard arguments on a hearing officer’s recommendations in the remanded *Waiāhole* case.<sup>69</sup> Although the Commission decision on remand has not yet been issued, there is little doubt that these important legal and public policy issues will continue to evolve through future decisions by agencies and courts. Intelligent critique and constructive discussion of these decisions must continue, and new efforts must

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<sup>64</sup> *Id.* at 60.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 60-61.

<sup>67</sup> *Id.* at 61.

<sup>68</sup> In his dissent, Justice Ramil predicted that the majority’s opinion would “generate litigation by applicants arguing that their particular use of water is a public trust use or value.” *Waiāhole*, 94 Hawai‘i at 191, 9 P.3d at 503.

<sup>69</sup> The Water Commission appointed former Commission Chair Dr. Lawrence Miike as the hearings officer to address the issues remanded by the Hawai‘i Supreme Court. On August 1, 2001, Dr. Miike issued his 159-page Proposed Legal Framework, Findings of Fact, and Decision and Order, *In re Water User Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing*, Case No. CCH-0A95-1 (Aug. 1, 2001) (on file with author). Although Dr. Miike’s decision only briefly addressed the public trust doctrine, *see id.* at 10-12, disagreed with some of the court’s conclusions, *see id.* at 99 (discussing interim instream flow standards), and ruled against the windward parties’ interests on several issues, he ultimately concluded that, because of the Commission’s duty “as trustee, and in the interest of precaution, . . . the margins of safety” should be adopted by increasing the quantities of water restored to the windward streams. *See id.* at 33. In addition to the six million gallons per day (“mgd”) added to Waiāhole and its tributary Waianu Sream by the Commission’s 1997 decision, Dr. Miike proposed adding 3.9 more mgd to these streams and Waikāne Stream. *See id.* at 140-41. Dr. Miike’s order also reduced offsteam uses (plus system loss) from 14.03 allowed by the Commission to 12.29 mgd. *Id.* at 142.

be made to engage the hearts and minds of all sectors of Hawai'i's diverse community in this vital dialogue.

### III. BIOGRAPHIES OF SPEAKERS

PETER ADLER, Ph.D., was the Executive Director of the Hawai'i Justice Foundation for ten years. He led the Alternative Dispute Resolution program for the Hawai'i Supreme Court, founded the Neighborhood Justice Center in Honolulu, and taught at the University of Hawai'i. He consults throughout the United States and the world on mediation, conflict resolution, and training. He is a graduate of Roosevelt University (B.A., History and English); University of Missouri (M.S., Sociology); and Union Institute (Ph.D., Sociology).

GILBERT S. COLOMA-AGARAN is the Chairperson of the Hawai'i Board of Land and Natural Resources and Hawai'i Commission on Water Resource Management. He earlier served as Director of the Hawai'i Department of Labor and Deputy Director of the Department of Commerce and Consumer Affairs. He is a graduate of Yale (B.A., History) and Boalt Hall School of Law, University of California, Berkeley (J.D.; Associate Editor, *California Law Review*).

BILL DEVICK is the Administrator of the Division of Aquatic Resources, Hawai'i Department of Land and Natural Resources, and formerly Program Manager, Division of Aquatic Resources. Mr. Devick has also served as an ecologist and aquatic biologist with the State of Hawai'i. He is a graduate of Augustana College (B.A., Biology); he pursued post graduate work at the University of Colorado, University of Alaska, University of Oregon, Institute of Marine Biology, and Management Development Leadership Academy, State of Hawai'i.

SENATOR COLLEEN HANABUSA is the Hawai'i State Senator for the Twenty-first Senatorial District, Vice-President of the Hawai'i State Senate, and Vice-Chair of the Senate Ways and Means Committee. In the past, she has served as Chair, Senate Committee on Water, Land and Hawaiian Affairs. Senator Hanabusa is a graduate of the University of Hawai'i (B.A., M.A., Sociology) and William S. Richardson School of Law (J.D.).

CHARLENE HOE is the Director, Office of Strategic Planning at Kamehameha Schools. She has been an active leader in windward O'ahu, Waiāhole, and the Hawaiian community for more than twenty-five years. She was a member of the Water and Natural Resources Committee of the 1978 Hawai'i Constitutional Convention that wrote the water amendment to the Hawai'i State Constitution.

TIMOTHY E. JOHNS is the Chief Operating Officer of the Damon Estate. He previously served as Chairperson, Hawai'i Board of Land and Natural

Resources and Hawai'i Commission on Water Resources Management. He has also been counsel to the Nature Conservancy and to AMFAC. He is a graduate of University of California (B.A.) and the University of Southern California Law School (J.D.).

COLIN KIPPEN is the Deputy Administrator for the Office of Hawaiian Affairs ("OHA") and manages OHA's Hawaiian Rights Division. Before returning to Hawai'i several years ago, he was a trial lawyer and a policy analyst in Seattle, and later a trial and appellate judge for Indian tribes in the Pacific Northwest. He graduated from the University of Hawai'i (B.A.) and the University of Iowa (M.S., Planning; and J.D.).

KENNETH R. KUPCHAK is a partner at Damon Key Leong Kupchak & Hastert where he concentrates on commercial and construction litigation. He represented community groups to place Kawainui Marsh (windward O'ahu) in the State Conservation District and in the 1980s litigated on behalf of the Volcano Community Association in the geothermal litigation on the Island of Hawai'i. He is a graduate of Cornell (B.A.), Pennsylvania State University (M.S., Meteorology), and Cornell Law School (J.D.).

KEM LOWRY is the Chairperson, Department of Urban and Regional Studies, University of Hawai'i, a long time mediator, and on the editorial board of the Ocean and Coastal Zone Management Journal. He has written extensively on planning and land management issues. Dr. Lowry graduated from Washburn (B.A., Honors) and the University of Hawai'i (Ph.D., Political Science).

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<sup>70</sup> 65 Haw. 641, 658 P.2d 287 (1982).

#### IV. SUMMARY OF THE PUBLIC TRUST DOCTRINE DISCUSSION IN THE WAIĀHOLE WATER CASE

In the landmark August 2000 *Waiāhole* water case, the Hawai'i Supreme Court expressly relied on a modernized version of the public trust doctrine as its guiding star for interpreting Hawai'i's unique and complex water law.<sup>71</sup> By providing an overarching legal framework that requires protection of natural instream flows before diversionary offstream uses of water are fully considered,<sup>72</sup> the public trust doctrine now provides state courts and agencies a powerful paradigm for reviewing future water rights use conflicts across the State.

In remanding the *Waiāhole* case back to the State Commission on Water Resource Management ("Commission"), the Hawai'i Supreme Court directed the Commission to re-evaluate its voluminous<sup>73</sup> 1997 decision<sup>74</sup> by explicitly viewing the water reallocation issues through the lens of a proactive trustee charged with "considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process," instead of "relegat[ing] itself to the role of a mere umpire passively calling balls and strikes for adversaries appearing before it."<sup>75</sup>

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<sup>71</sup> Although the philosophical cornerstone of the *Waiāhole* decision, the public trust doctrine issues were only one set of a large number of issues addressed by the court. For a discussion of the important procedural and statutory issues in the case, see, e.g., *Waiāhole*, 94 Hawai'i at 144-73, 9 P.3d at 456-85 (discussing State Water Code interpretation issues, such as instream flow standards). While important, however, these issues are beyond the scope of this Foreword.

<sup>72</sup> *Waiāhole*, 94 Hawai'i at 142, 9 P.3d at 454 (stating that the water resources trust in Hawai'i "demand[s] that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment"). The Hawai'i Supreme Court expressly rejected the argument of one private landowner, Kamehameha Schools/Bishop Estate, that the Commission's denial of its request for 4.2 mgd of water for a proposed urban housing development was an unconstitutional "taking" of its property without just compensation in violation of the United States and Hawai'i constitutions. *Id.* at 180, 9 P.3d at 492. The court found the taking argument both premature, *id.*, and fundamentally flawed because "the right to absolute ownership of water exclusive of the public trust never accompanied the 'bundle of rights' conferred in the Mahele." *Id.* at 182, 9 P.3d at 494; see also *id.* at 181, 9 P.3d at 493 (citing Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990)).

<sup>73</sup> The Hawai'i Supreme Court called the *Waiāhole* contested case a proceeding of "unprecedented size, duration, and complexity." *Waiāhole*, 94 Hawai'i at 110, 9 P.3d at 422.

<sup>74</sup> Findings of Fact, Conclusions of Law, and Decision and Order, *In re Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing*, Case No. CCH-OA95-1, Commission on Water Resource Management, State of Hawai'i (Dec. 24, 1997) [hereinafter "Water Commission Final Order"] (on file with author).

<sup>75</sup> *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455 (quotations omitted).

The underlying water dispute arose over the appropriate allocation of approximately twenty-seven million gallons per day (“mgd”) since the 1920s by the Waiāhole Ditch system of high elevation dike water, which fed several windward O‘ahu streams.<sup>76</sup> In the early 1990s, O‘ahu’s sugar industry went out of business, creating a rare opportunity to consider the reallocation of longstanding offstream diversions and the restoration of natural flows to long-diverted streams.

The twenty-five-mile-long Waiāhole tunnel and ditch system diverted fresh surface water and dike-impounded ground water from the natural reservoirs in the windward volcanic Ko‘olau mountain range to irrigate sugar plantation lands in the more arid leeward plain of central O‘ahu.<sup>77</sup> The ditch system diversions diminished the natural stream flow in several windward streams, including Waiāhole, Waianu, Waikāne, and Kahana “affecting the natural environment and human communities dependent on them.”<sup>78</sup>

Two years before sugar operations ceased in 1995, the private owner of the ditch system, Waiāhole Irrigation Company,<sup>79</sup> filed a combined water use permit application seeking to protect its distribution of water to existing users of the system.<sup>80</sup> State agencies, and private and community organizations, subsequently filed to reserve water.<sup>81</sup> Four windward community groups, later joined by the Office of Hawaiian Affairs, then filed petitions to increase the interim instream flow standards for the windward streams affected by the ditch.<sup>82</sup>

In 1994, after windward parties complained about water being wasted by Waiāhole Irrigation Company, the parties reached an interim mediated agreement, which resulted in a historic partial restoration of flows to Waiāhole Stream.<sup>83</sup> The Commission then ordered a combined hearing on all the

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<sup>76</sup> *Id.* at 111, 9 P.3d at 423.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Since the Commission’s decision, the State of Hawai‘i purchased the ditch system for \$9.7 million and placed it in the hands of the State Agribusiness Development Corporation. State of Hawai‘i, Office of the Governor News Release, State Purchase of Waiāhole Water System Moves Forward (June 15, 1998), <http://gov.state.hi.us/News/98-101.html>.

<sup>80</sup> *Waiāhole*, 94 Hawai‘i at 111, 9 P.3d at 423. The water use permit application was required because the Commission had designated the five aquifer systems of Windward O‘ahu as “ground water management areas” in 1992, as a result of a petition by several windward community organizations, requiring all users to apply for water use permits within one year of designation. *Id.*

<sup>81</sup> *Id.* at 112, 9 P.3d at 424.

<sup>82</sup> *Id.*

<sup>83</sup> The parties reached a mediated agreement to release “surplus” water back into the windward streams after the Commission received complaints that the Waiāhole Irrigation Company was discharging unused ditch water into Central O‘ahu gulches. *Id.* The interim restoration, noted the court, “had an immediate apparent positive effect on the stream ecology.” *Id.*

petitions, admitting a total of twenty-five parties to the contested case hearing, the longest and most complex administrative proceeding of its kind in the State's history.<sup>84</sup>

The Commission held extensive hearings on existing diversionary uses, which were allowed to continue pending a decision on the merits of the case. The live testimony phase of the case alone lasted six months. Ultimately, the Commission's 257-page final order required the ditch operator to adjust the hand-turned gates deep inside the volcanic water diversion tunnel so that 6.0 mgd of the water spilled back into Waiāhole and Waianu Streams.<sup>85</sup> The Commission allowed a total of 13.51 mgd (of the total 27.0 mgd available) to continue to flow through the tunnel for leeward offstream uses (12.22 mgd for agricultural uses and 1.29 for "other" uses); it also set aside a 1.58 mgd "agricultural reserve" for future permitting; created a "non-permitted ground water buffer" of 5.39 mgd (initially to be released into the windward streams but to be kept available for offstream uses as a secondary source); set up several technical advisory committees to assist in implementing the final decision; and denied several specific applications for water uses (for example, for a golf course and landscaping for a future residential development).<sup>86</sup>

Ten parties appealed to the Hawai'i Supreme Court,<sup>87</sup> generating a host of procedural and substantive issues on appeal that took the court almost three years to resolve.<sup>88</sup> In August 2000, the court issued a 102-page majority decision written by Justice Paula Nakayama.<sup>89</sup> Justice Mario Ramil authored the lone dissent.<sup>90</sup>

The focal point of the Hawai'i Supreme Court's extensive review of the Commission's order was the public trust doctrine.<sup>91</sup> Tracing Hawai'i's adoption of the doctrine to the 1899 *King v. O'ahu Railway & Land Co.* case,<sup>92</sup> through subsequent decisions<sup>93</sup> including Hawai'i's landmark water

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<sup>84</sup> *Id.* at 113, 9 P.3d at 425.

<sup>85</sup> *Waiāhole*, 94 Hawai'i at 116-17, 9 P.3d at 428-29.

<sup>86</sup> *Id.* at 117-18, 9 P.3d at 429-30.

<sup>87</sup> Under the Hawai'i State Water Code, contested case hearings are appealed directly to the Hawai'i Supreme Court. HAW. REV. STAT. § 174C-60 (1997).

<sup>88</sup> The Commission issued its decision on December 24, 1997; the Hawai'i Supreme Court issued its decision on August 22, 2000, denying reconsideration on September 17, 2000.

<sup>89</sup> *Waiāhole*, 94 Hawai'i at 110-90, 9 P.3d at 422-502.

<sup>90</sup> *Id.* at 190-98, 9 P.3d at 502-10.

<sup>91</sup> *Id.* at 127-44, 9 P.3d at 439-56.

<sup>92</sup> 11 Haw. 717 (1899).

<sup>93</sup> Post-*King* cases that confirmed Hawai'i's "embrace of the public trust doctrine," *Waiāhole*, 94 Hawai'i at 128, 9 P.3d at 440, included *County of Hawai'i v. Sotomura*, 55 Haw. 176, 183-84, 517 P.2d 57, 63 (1973), *cert. denied*, 419 U.S. 872 (1974); *In re Sanborn*, 57 Haw. 585, 593-94, 562 P.2d 771, 776 (1977); and *State v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977).



rights case in the early 1970s, *McBryde Sugar Co. v. Robinson*,<sup>94</sup> the Hawai‘i Supreme Court emphasized the ancient and historical reservation of the public’s right to water resources in Hawai‘i.<sup>95</sup> In *Robinson v. Ariyoshi*,<sup>96</sup> the court expressly recognized that “a public trust was imposed upon all waters of the kingdom,”<sup>97</sup> encompassing both the right and duty “to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.”<sup>98</sup> Citing Professor Sax’s seminal 1970 article on the public trust doctrine,<sup>99</sup> the *Robinson* court held that the State’s obligation to enforce the water trust “necessarily limited the creation of certain private interests in waters.”<sup>100</sup>

The Hawai‘i Supreme Court noted that the 1978 Constitutional Convention added several water rights provisions to the Hawai‘i Constitution emphasizing the public trust over natural resources. Article XI, Section 1 requires the State to “conserve and protect” Hawai‘i’s “natural beauty and all natural resources, including . . . water,” and states that “[a]ll public natural resources are held in trust by the State for the benefit of the people.”<sup>101</sup> Article XI, Section 7 further provides that the State “has an obligation to protect, control, and regulate the use of Hawai‘i’s water resources for the benefit of its people”<sup>102</sup> and required the Legislature to create a water resources agency. Eleven years later, the Legislature enacted the State Water Code,<sup>103</sup> which “engrafted the [public trust] doctrine wholesale”<sup>104</sup> and created the Water Commission.

The court then addressed the scope and substance of the “State Water Resources Trust.”<sup>105</sup> The court clarified that “all water resources without

<sup>94</sup> 54 Haw. 174, 504 P.2d 1330, *aff’d on reh’g*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed and cert. denied*, 417 U.S. 962 (1974).

<sup>95</sup> *Waiāhole*, 94 Hawai‘i at 129, 9 P.3d at 441.

<sup>96</sup> 65 Haw. 641, 658 P.2d 287 (1982).

<sup>97</sup> *Waiāhole*, 94 Hawai‘i at 129, 9 P.3d at 441 (quoting *Robinson*, 65 Haw. at 674, 658 P.2d at 310) (emphasis added by *Waiāhole* court).

<sup>98</sup> *Id.* (quoting *Robinson*, 65 Haw. at 674, 658 P.2d at 310) (emphasis added by *Waiāhole* court).

<sup>99</sup> Sax, *supra* note 14.

<sup>100</sup> *Waiāhole*, 94 Hawai‘i at 129, 9 P.3d at 441 (quoting *Robinson*, 65 Haw. at 674 n.31, 658 P.2d at 310 n.31) (citing Professor Sax).

<sup>101</sup> *Id.* at 130, 9 P.3d at 442 (citing HAW. CONST. art. XI, §1).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (citing HAW. REV. STAT. Chapter 174C).

<sup>104</sup> *Id.* The court rejected the arguments of several parties that the State Water Code had abolished or subsumed the common law public trust doctrine, which was an “inherent attribute of sovereign authority that the government ‘ought not, and ergo, . . . cannot surrender,’” *id.* at 131, 9 P.3d at 443 (quoting *McBryde*, 54 Haw. at 186, 504 P.2d at 1388), and which had been enshrined in Hawai‘i’s Constitution as a “fundamental principle of constitutional law.” *Id.* at 131-32, 9 P.3d at 443-44.

<sup>105</sup> *Id.* at 133-43, 9 P.3d at 445-55.

distinction or exception” were included in the trust.<sup>106</sup> The court rejected the “surface-ground dichotomy” as an “artificial distinction neither recognized by the ancient system nor borne out in the present practical realities of this state.”<sup>107</sup> Citing the California Supreme Court’s broad interpretation of the public trust doctrine in the *Mono Lake* case<sup>108</sup> with approval,<sup>109</sup> the Hawai‘i Supreme Court noted that it “ha[d] likewise acknowledged resource protection, with its numerous derivative public uses, benefits, and values, as an underlying purpose of the reserved water resources trust.”<sup>110</sup> The Hawai‘i Supreme Court expressly rejected the argument that maintaining waters in their natural state constituted “waste.”<sup>111</sup> The court also specifically recognized domestic water use (for example, drinking water) as “among the highest uses of water resources,”<sup>112</sup> reaffirmed “the exercise of Native Hawaiian traditional and customary rights as a public trust purpose,”<sup>113</sup> and rejected the argument that private economic development was a protected trust purpose.<sup>114</sup>

The powers and duties of the State under the trust embodied the “dual mandate of 1) protection and 2) maximum reasonable and beneficial use.”<sup>115</sup> The Hawai‘i Supreme Court clarified that the meaning of the latter mandate “is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes ‘use.’”<sup>116</sup> Accordingly, the State not only could, but must, “revisit prior diversions and allocations”<sup>117</sup> as part of its trust responsibilities. Yet, the court acknowledged that “reason and necessity dictate that the public trust may have to accommodate offstream diversions

<sup>106</sup> *Id.* at 133, 9 P.3d at 445 (noting the Constitutional Convention’s understanding of “water resources” as including “ground water, surface water, and all other water”).

<sup>107</sup> *Id.* at 135, 9 P.3d 447.

<sup>108</sup> *Mono Lake*, 658 P.2d 709, 728 (Cal. 1983). For the Hawai‘i Supreme Court’s extensive discussion of *Mono Lake*, see *Waiāhole*, 94 Hawai‘i at 140-41, 9 P.3d at 452-53 (concluding that the distinctions between *Mono Lake* and *Waiāhole* suggest that an even broader interpretation of the trust is warranted under Hawai‘i’s riparian water rights system and constitutional provisions).

<sup>109</sup> *Waiāhole*, 94 Hawai‘i at 136, 9 P.3d at 448.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 136-37, 9 P.3d at 448-49.

<sup>112</sup> *Id.* at 137, 9 P.3d at 449.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 138, 9 P.3d at 450 (“while the state water resources trust acknowledges that private use for ‘economic development’ may produce important public benefits and that such benefits must figure into any balancing of competing interests in water, it stops short of embracing private commercial use as a protected ‘trust purpose.’”).

<sup>115</sup> *Id.* at 139, 9 P.3d at 451.

<sup>116</sup> *Id.* at 140, 9 P.3d at 452.

<sup>117</sup> *Id.* at 141, 9 P.3d at 453.

inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values,”<sup>118</sup> which the Commission must determine on a “case-by-case basis,” rather than using “a categorical imperative” and “formulaic solutions.”<sup>119</sup> Nonetheless, the court affirmed the Commission’s finding that a “higher level of scrutiny” was required for reviewing private commercial uses and that “the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust.”<sup>120</sup>

In his dissent, Justice Ramil agreed that “water is absolutely essential to the continued existence of this island state.”<sup>121</sup> Yet, he vigorously criticized the majority’s reliance on the “nebulous common law public trust doctrine”<sup>122</sup> from “foreign jurisdictions”<sup>123</sup> as an improper basis for trumping and rewriting the State’s Water Code. In his view, the Code mandated strong protection for private economic offstream uses such as commercial agriculture.<sup>124</sup> Justice Ramil argued that “the Code trumps common law, not the other way around.”<sup>125</sup> He concluded that, although he agreed with the majority that the Commission should establish more definitive instream flow standards, he feared that, in the interim, “offstream uses, which, in substantial part, drive the economy and promote the self-sufficiency of the State, may run dry.”<sup>126</sup>

In light of Justice Ramil’s dire warning, it was not surprising that the Commission’s deliberations<sup>127</sup> and the court’s decision generated a strong

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 142, 9 P.3d at 454.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 195, 9 P.3d at 507.

<sup>122</sup> *Id.* at 190, 9 P.3d at 502.

<sup>123</sup> *Id.* at 191, 9 P.3d at 503.

<sup>124</sup> *Id.* at 190-91, 194-95, 9 P.3d at 502-03, 506-07.

<sup>125</sup> *Id.* at 196, 9 P.3d at 508. In a lengthy footnote, Justice Nakayama directly addressed the arguments raised by Justice Ramil’s dissent. *Id.* at 190, 9 P.3d at 502 n.108. She characterized the dissent’s view of the public trust doctrine as “revolutionary,” without precedent, “astonishing,” encouraging a “free-for-all” in water disputes, and using “straw man” arguments. *Id.* In a pointed parting shot, Justice Nakayama suggested that those “concerned about the proper functioning of our democratic system and the continued vitality of our island environment and community . . . can ill-afford to continue down this garden path [of disregarding public rights in water] this late in the day.” *Id.*

<sup>126</sup> *Id.* at 198, 9 P.3d at 510.

<sup>127</sup> See, e.g., Patricia Tummons, ed., *The Great Waiāhole Water Wars*, 7 ENV’T HAW. 1, 1 (Sept. 1996) (discussing, in a series of articles, the Commission’s then on-going contested case hearing, noting that “[t]he stakes are as great as the leeward parties are powerful and the windward parties are persistent. The courts should start clearing their calendars now.”); Patricia Tummons, ed., *Parting the Waters: The Waiāhole Dispute*, 7 ENV’T HAW. 1, 1 (Aug. 1996) (noting the *Waiāhole* dispute “entered its fourth year” and that the Commission members have “heard hundreds of hours of testimony, have read tens of thousands of pages of briefs, reports, and argument, and now appear poised to enter into the last stages of the *Waiāhole* contested case”).

public reaction.<sup>128</sup> The front page of the August 23, 2000 issue of the *Honolulu Advertiser* proclaimed a “[w]indward victory.” The lead story immediately focused on the Hawai‘i Supreme Court’s “reaffirm[ation of] the state’s commitment to the public trust doctrine, ‘to protect, control, and regulate the use of Hawai‘i’s water resources for the benefit of its people.’”<sup>129</sup>

This Foreword and the Symposium proceedings suggest that these issues will continue to be of vital importance in Hawai‘i, not just to the core of attorneys, landowners, and activists who closely follow water rights issues, but to all citizens who enjoy Hawai‘i’s environmental, cultural, and economic benefits. We hope this dialogue on implementing the public trust doctrine can enhance Hawaii’s ability to rise to the challenge of balancing water rights and responsibilities in the new century.

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<sup>128</sup> Even during the Commission’s deliberations, the proceeding was controversial. As the Hawai‘i Supreme Court noted, “[w]hile the Commission was considering its final decision, the state governor and attorney general publicly criticized the proposed decision as inadequately providing for leeward interests. At about the same time, the deputy attorney general representing the Commission was summarily dismissed.” *Waiāhole*, 94 Hawai‘i at 113, 9 P.3d at 425. Although the court rejected the windward parties’ claims that these actions amounted to a denial of due process, *id.* at 123-27, 9 P.3d at 435-39, the court expressed “serious misgivings” regarding the “eleventh hour” timing of these actions prior to the Commission’s final decision and concluded “it is safe to say that the conduct of the public officials in this case did nothing to improve public confidence in government and the administration of justice in this state.” *Id.* at 127, 9 P.3d at 439.

<sup>129</sup> Robbie Dingeman, *Waiāhole Water Allocation Rejected: Ruling Called Windward Victory*, HONOLULU ADVERTISER, Aug. 23, 2000, at A1.