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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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MAUNA KEA ANAINA HOU; CLARENCE KUKAUAKAHI CHING; FLORES-CASE
'OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN
ENVIRONMENTAL ALLIANCE, a domestic non-profit corporation,
Appellants-Appellants,

vs.

BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I;
DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I;
SUZANNE CASE, in her official capacity as Chair of the Board
of Land and Natural Resources and Director of the Department of
Land and Natural Resources; and UNIVERSITY OF HAWAI'I AT HILO,
Appellees-Appellees.

SCAP-14-0000873

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CAAP-14-0000873; CIV. NO. 13-1-0349)

DECEMBER 2, 2015

CONCURRING OPINION BY POLLACK, J.,
IN WHICH WILSON, J., JOINS,
AND IN WHICH MCKENNA, J., JOINS AS TO PART IV

Rising to a majestic 13,796 feet above sea level,
Mauna Kea, the highest mountain peak in the Hawaiian Islands, is

of profound importance in Hawaiian culture. The summit region is sacred to Native Hawaiians, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit area.

Mauna Kea is also one of the world's foremost locations for astronomical observation and research. The Board of Land and Natural Resources (Board) issued the University of Hawai'i at Hilo (UH) a permit to construct a 180-foot high astronomical observatory within a conservation district on Mauna Kea over the objections of Native Hawaiians and others, who sought a contested case hearing to fully assess the effects of the project prior to making a decision of whether to issue the permit. Instead, the Board approved the permit but included a condition that, if a contested case proceeding was initiated, then construction could not commence until the Board conducted such a hearing.

The Board's procedure of holding a contested case hearing after the permit has already been issued does not comply with our case law, see Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res., 131 Hawai'i 193, 205-06, 317 P.3d 27, 39-40 (2013) (concluding that a contested case hearing was required "prior to decision making on UH's application"), nor with Hawai'i Revised Statutes (HRS) § 91-1 (2012) (defining "contested case" to mean "a proceeding in which legal rights, duties, or privileges of

specific parties are required by law to be determined after an opportunity for agency hearing"), nor with due process under the Hawai'i Constitution (lack of meaningful opportunity to be heard compromised appearance of justice). I therefore concur in the majority's result. However, I write separately because this court's precedents have established that, in addition to these grounds, other provisions and guarantees of the Hawai'i Constitution forge the right to a contested case hearing and establish procedures essential to safeguard the rights protected by the constitution in cases such as this one.

I. Traditional Hawaiian Rights Under Article XII, Section 7

Our proud legal tradition in this State of protecting Native Hawaiian rights is not of recent vintage, for even as far back as the days of the Hawaiian Kingdom, protections have been in place to ensure the continued exercise of traditional Hawaiian rights amidst the pressures exerted by countervailing interests of a changing society. See Pub. Access Shoreline Haw. v. Haw. Cty. Planning Comm'n (PASH), 79 Hawai'i 425, 437 n.21, 903 P.2d 1246, 1258 n.21 (1995) (discussing laws dating back to the era of the Hawaiian Kingdom with provisions that ensured protection of Native Hawaiian customs and traditions).

In 1978, protection of traditional and customary Hawaiian rights was preserved within the Hawai'i Constitution.

Article XII, Section 7 embodies the resolute promise by the State to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a^[1] tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right . . . to regulate such rights." Haw. Const. art. XII, § 7; see In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications ('Īao), 128 Hawai'i 228, 247, 287 P.3d 129, 148 (2012). So robust is this promise that even though Article XII, Section 7 carves out for the State the power to regulate the exercise of customary and traditional Hawaiian rights, this court underscored that "the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." PASH, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43.

The meaning of Article XII, Section 7 was first examined by this court in Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982). In that case, the plaintiff sought "to exercise traditional Hawaiian gathering rights" on undeveloped lands within an ahupua'a on the island of Moloka'i. Id. at 3,

¹ An ahupua'a refers to a division of land that generally runs from the sea to the mountains. Palama v. Sheehan, 50 Haw. 298, 300, 440 P.2d 95, 97 (1968).

656 P.2d at 747. The plaintiff "assert[ed] that it ha[d] long been the practice of him and his family to travel the lands of the [d]efendants in order to gather indigenous agricultural products for use in accordance with traditional Hawaiian practices." Id. at 3-4, 656 P.2d at 747. Chief Justice Richardson, writing for the court, stated that "any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail," for the exercise of these traditional rights are protected pursuant to the express terms of the Hawai'i Constitution. Id. at 4, 656 P.2d at 748. The Kalipi court held that "lawful occupants of an ahupua'a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather those items enumerated in the statute."² Id. at 7-8, 656 P.2d at 749.

Ten years later, this court extended Kalipi's holding in Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992). There, the plaintiff maintained that its "native Hawaiian members were entitled under Article XII, § 7 to enter Wao Kele 'O Puna and the Puna Forest Reserve to exercise traditional and

² For purposes of uniformity, Hawaiian words in quoted passages that do not include the 'okina or kahakō, e.g., "ahupuaa" instead of "ahupua'a," have been modified, without showing the modification in brackets.

customary rights" since they were tenants who resided in the ahupua'a abutting Wao Kele 'O Puna. Id. at 616, 837 P.2d at 1269. This court disavowed any notion that traditional Hawaiian gathering rights may only be exercised within an ahupua'a and by the lawful occupants of the ahupua'a. Id. at 620-21, 837 P.2d at 1272. The Paty court reasoned that traditional Native Hawaiian gathering rights are not grounded only in land ownership but also in the practiced customs of Native Hawaiians. Id. And if those practiced customs indicate that traditional gathering was conducted in an area outside of, but abutting, an ahupua'a, then undeveloped portions of that area may be accessed by individuals of native Hawaiian descent for traditional gathering purposes. Id.

In PASH, this court interpreted Kalipi's discussion of customary rights derived from the Hawaiian usage exception in HRS § 1-1 (2009)³ and affirmed that "the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7." 79 Hawai'i at 442, 903 P.2d at 1263. Further,

³ HRS § 1-1, in relevant part, provides as follows:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage

(Emphases added).

the court declared that the regulatory power reserved for the State in Article XII, Section 7 does not equate to the authority to extinguish traditional and customary Hawaiian rights because they have become "inconsistent with generally understood elements of the western doctrine of 'property.'" Id.

Article XII, Section 7 was pronounced by this court in Ka Pa'akai O Ka'Aina v. Land Use Commission, 94 Hawai'i 31, 7 P.3d 1068 (2000), as placing "an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights." Id. at 45, 7 P.3d at 1082 (emphasis added). At the core of this affirmative duty, as explained by the Ka Pa'akai court, is the responsibility of the State and its constituent agencies to act only after "independently considering the effect of their actions on Hawaiian traditions and practices." Id. at 46, 7 P.3d at 1083.

The court also held that meaningful protection of Native Hawaiian rights pursuant to Article XII, Section 7 means that they must be enforceable through "an analytical framework [that] endeavor[s] to accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other." Id. The analytical framework crafted by the court required the State and its agencies "at a minimum" to make particularized findings and conclusions regarding the identity and scope of "'valued

cultural, historical, or natural resources' in the petition area," including

- (1) . . . the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (2) the extent to which those resources--including traditional and customary native Hawaiian rights--will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084 (format altered).

Because the Land Use Commission in Ka Pa'akai did not render sufficient findings and conclusions addressing these essential considerations before reclassifying land in a conservation district to an urban district, this court was not able to determine whether the agency "discharged its duty to protect customary and traditional practices of native Hawaiians to the extent feasible." Id. at 48, 7 P.3d at 1085. Thus, we concluded that the Land Use Commission "failed to satisfy its . . . constitutional obligations." Id. at 52, 7 P.3d at 1089.

The Ka Pa'akai framework was later applied in the context of an agency's amendment of an interim instream flow standards (IIFS) for certain streams on the island of Maui. 'Īao, 128 Hawai'i at 247-48, 287 P.3d at 148-49. This court in 'Īao determined that the agency failed to comply with the framework because, although the agency recognized that the amendment would limit "the native Hawaiian practices of kalo

cultivation and gathering," it did not make "findings or conclusions articulating the effect of the amended IIFS on the native Hawaiian practices" and the feasibility of protecting those practices. Id. at 248-49, 287 P.3d at 149-50.

Thus, this court's evolving jurisprudence concerning Native Hawaiian traditional and customary rights has conceived of a system in which the State and its agencies bear an affirmative constitutional obligation to engage in a meaningful and heightened inquiry into the interrelationship between the area involved, the Native Hawaiian practices exercised in that area, the effect of a proposed action on those practices, and feasible measures that can be implemented to safeguard the vitality of those practices. See id. at 247-48, 287 P.3d at 148-49; Ka Pa'akai, 94 Hawai'i at 47, 7 P.3d at 1084. When an individual of Native Hawaiian descent asserts that a traditionally exercised cultural, religious, or gathering practice in an undeveloped or not fully developed area would be curtailed by the proposed project, the State or the applicable agency is "obligated to address" this adverse impact in its findings and conclusions pursuant to the Ka Pa'akai framework. Ka Pa'akai, 94 Hawai'i at 46, 50, 7 P.3d at 1083, 1087.

Consequently, if customary and traditional Native Hawaiian practices are to be meaningfully safeguarded, "findings on the extent of their exercise, their impairment, and the

feasibility of their protection" are paramount. Ka Pa'akai, 94 Hawai'i at 50, 7 P.3d at 1087. To effectively render such findings, it is imperative for the agency to receive evidence and then make "[a] determination . . . supported by the evidence in the record." In re Haw. Elec. Light Co., 60 Haw. 625, 642, 594 P.2d 612, 623 (1979) (findings of basic facts "are required to be supported by the evidence in the record"); Finding of Fact, Black's Law Dictionary (10th ed. 2014). Thus, the agency must act as a factfinder--to evaluate the evidence presented by the parties--in order to determine whether the exercise of Native Hawaiian rights will be limited to some extent. To fulfill this duty and to permit such findings to be made, the agency is obligated to conduct a contested case hearing before the legal rights of the parties are decided.⁴

In this case, several individuals testified during the public hearings about the sanctity of Mauna Kea to Native

⁴ See Kilakila 'O Haleakalā, 131 Hawai'i at 209, 317 P.3d at 43 (Acoba, J., concurring) (reasoning that the appellants' assertion--that their traditional and customary practices would be adversely affected by the agency's action--triggered their right to a contested case hearing); 'Īao, 128 Hawai'i at 271, 271 P.3d at 172 (Acoba, J., concurring) ("[W]here native Hawaiian Petitioners claim that their native Hawaiian rights are adversely affected by the [Land Use Commission's] decision . . . they may sue to enforce their rights under Article XII, Section 7 of the Hawai'i Constitution."); Kaleikini v. Thielen, 124 Hawai'i 1, 31, 237 P.3d 1067, 1097 (2010) (Acoba, J., concurring) ("[N]ative Hawaiians . . . have equal rights to a contested case hearing where these [traditional and customary] practices are adversely affected.").

Hawaiian culture.⁵ Prior to the vote granting the permit, the Administrator of the Office of Conservation and Coastal Lands provided the Board with a background relating to UH's application for the permit. His comments also informed the Board of the project's potential for significant impacts on the exercise of Hawaiian cultural practices:

Number one we acknowledge and discussed the importance of the ancient and contemporary cultural values and resources at Mauna Kea. . . .

[W]e acknowledge concerns remain regarding the project['s] impact on the spiritual nature of Mauna Kea and on the cultural beliefs and practices of many--that is clear. Interpretation of the spiritual impact is based upon individual perception. For some no mitigation is possible and any development on the mountain would be sacrilegious. . . .

At the end of the day what it comes down to is these values were identified--the worshipping, the placement of piko, the gathering of water, gathering of stones and burials were all identified. The [e]ffects of the project on these things were considered. What flowed from that is the third part of the Ka Pa'akai analysis which is how do we mitigate the effect of the project on these values

(Emphasis added). Thus, the Board was informed of multiple traditional Hawaiian cultural practices exercised in the project area and was aware of the project's potential adverse impact on

⁵ An example of the concerns raised can be found in a letter, which was submitted to the Board during the course of the public hearings, from petitioner Mauna Kea Anaina Hou, The Royal Order of Kamehameha, Sierra Club, and petitioner Clarence Kukauakahi Ching. The letter emphasized that "Mauna Kea is considered the Temple of the Supreme Being[,] the home of Na Akua (the Divine Deities, Na 'Aumakua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and Wakea (sky Father)." Additionally, the letter stated that "[t]he ceremonies and practices on Mauna Kea are practiced nowhere else[] and formed the basis of the navigational knowledge that allowed Hawaiians to navigate over ten million square miles of the Pacific."

the "spiritual nature of Mauna Kea" and the "cultural beliefs and practices of many."

Nonetheless, despite numerous requests for a contested case hearing, the Board proceeded to summarily approve the permit in contravention of its obligation to determine the extent of the impairment of Native Hawaiian cultural practices that would be caused by the proposed action and the feasibility of protecting such practices. The Board's action was in clear derogation of its "affirmative duty" to fully and carefully assess evidence presented in a hearing, which is critical to making essential findings and conclusions pursuant to the Ka Pa'akai framework. "The promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection." Ka Pa'akai, 94 Hawai'i at 50, 7 P.3d at 1087. Thus, the Board was required to conduct a heightened inquiry evaluating the requisite factors in a contested case hearing before reaching a determination on the permit application. Such a hearing would have enabled the Board to make the findings and conclusions that are essential to the Board's determination of whether or not to grant the permit. Because such a heightened inquiry was not conducted, the Board had no basis for its decision, and "as a matter of law," the Board "failed to satisfy its . . . constitutional obligations"

under Article XII, Section 7 of the Hawai'i Constitution. Id. at 52, 7 P.3d at 1089.

II. The Public Trust Doctrine Under Article XI, Section 1

A.

The public trust doctrine is an ancient principle recognizing that certain resources bestowed by nature are so inviolable that their benefits should accrue to the collective, rather than only to certain members of society. See Martin v. Waddell's Lessee, 41 U.S. 367, 414 (1842) (opining that navigable waters and lands under them are not susceptible to private ownership); J. Inst. 2.1.1 (under Roman law, "the following things are by natural law common all--the air, running water, the sea, and consequently the sea-shore"); 2 H. Bracton, De Legibus et Consuetudinibus Angliae 40 (S. Thorne transl. 1968) (thirteenth-century English common law stated that "[a]ll rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public"). The values vindicated by this doctrine are so universal in their application that, in this jurisdiction, its roots can be traced to the time of the Hawaiian Kingdom, when it was reaffirmed that it was not the King--the sovereign--but "the people of Hawai'i [who] are the

original owners of all Hawaiian land." State v. Zimring, 58 Haw. 106, 111, 566 P.2d 725, 729 (1977).

The Constitution of 1840, the first one to bind Hawai'i, expressly provided that "all the land from one end of the Islands to the other" belonged to Kamehameha I, "though it was not his own private property[, for i]t belonged to the chiefs and the people in common, of whom Kamehameha I, was the head." Fundamental Law of Hawaii 3 (Lorrin A. Thurston ed., 1904). Hence, lands held in the public domain--those that the populace owned at large--constituted all lands in Hawai'i, and the King "owned" them only for the purpose of benefiting everyone within his Kingdom. This arrangement was changed after the Great Māhele, "a process with multiple divisions or allocations of land," Native Hawaiian Law: A Treatise 13 (Melody Kapilialoha MacKenzie et al. eds., 2015), which ushered in an era where private ownership of Hawaiian lands was allowed. See Zimring, 58 Haw. at 112-13, 566 P.2d at 730-31 (discussing how the King signed instruments transferring ownership of royal lands to the Hawaiian government, the chiefs and konohiki,⁶ and the people at large, while retaining for himself and his heirs some designated lands).

⁶ "Konohiki in ancient Hawai'i were agents of the King or chiefs." Zimring, 58 Haw. at 112 n.4, 566 P.2d at 730 n.4.

After the effectuation of the Great Māhele, all lands that were not claimed for private ownership remained in the public domain, subject to the stewardship of the government for the benefit of the people. See id. at 114, 566 P.2d at 731 (“[L]and in its original state is public land and if not awarded or granted, such land remains in the public domain.”).

Following the overthrow of the monarchy, the Crown Lands were also added to the public domain. Id. at 113, 566 P.2d at 731.

The nature of the public trust in the modern era was expounded upon by this court in Zimring. In that case, lava flows from the 1955 Puna volcanic eruption on the island of Hawai‘i resulted in the addition of “approximately 7.9 acres of new land” to the shoreline. Id. at 107, 566 P.2d at 727. These lava extensions were adjacent to private land owned by the defendants. Id. at 107, 566 P.2d at 727-28. The defendants entered the lava extensions and made improvements upon them, at which point the State demanded that they vacate the lava extensions and cease and desist from engaging in any other activities thereon. Id. at 108, 566 P.2d at 728. Thereafter, the State sued the defendants and their predecessors-in-interest to quiet title, and the case was later appealed. Id. at 108-10, 566 P.2d at 728-29.

Chief Justice Richardson concluded for the court that the people of Hawai‘i are the beneficial owners of public lands.

Id. at 125, 566 P.2d at 737. This fundamental principle was acknowledged in the Admission Act, which "provided that the public lands conveyed to the State upon admission 'shall be held by said State as a public trust for the support of public schools and other public institutions, for the betterment of the conditions of native Hawaiians . . . , for making of public improvements, and for the provisions of lands for public use.'"

Id. (quoting Admission Act, Pub. L. No. 86-3, 73 Stat. 5 (1959)). The Zimring court held that "the equitable ownership of the [lava extensions] and other public land in Hawai'i has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in public trust since that time." Id. (emphases added). The court was clear, however, that the trusteeship that the State assumed was coupled with the associated obligation "to protect and maintain the trust property and regulate its use."

Id. at 121, 566 P.2d at 735.

Shortly after Zimring, the concept of public trust was reaffirmed by the framers of the 1978 Constitution:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

Haw. Const. art. XI, § 1 (emphases added).

This court has never precisely demarcated the dimensions of the public trust doctrine as incorporated in Article XI, Section 1. Nonetheless, through case-by-case adjudication, this court has carefully applied the fundamental principles inherent in the concept of public trust and, in the process, has addressed attendant duties that the State and its agencies must discharge in instances where it applies.

In the context of water resources, this court in In re Water Use Permit Applications (Waiāhole I), 94 Hawai'i 97, 9 P.3d 409 (2000), determined that "[t]he plain reading of" Article XI, Section 1 "manifests the framers' intent to incorporate the notion of the public trust into our constitution." Id. at 131, 9 P.3d at 443. Hence, we held "that article XI, section 1 . . . adopt[s] the public trust doctrine as a fundamental principle of constitutional law in Hawai'i." Id. at 132, 9 P.3d at 444. Defining the substance of the public trust, the court stated that it "is a dual concept of sovereign right and responsibility." Id. at 135, 9 P.3d at 447. As a logical extension of this duality, the court concluded, based on the express language of Article XI, Section 1, that the public trust represents the twin "mandate of 1) protection and 2) maximum reasonable and beneficial use." Id. at 139, 9 P.3d at 451.

Applied to water resources, the court found that "the [S]tate has both the authority and duty to preserve the rights of present and future generations in the waters of the [S]tate." Id. at 141, 9 P.3d at 453. This means that the State and its agencies may not grant or assert "vested rights to use water to the detriment of public trust purposes." Id. Therefore, in planning and allocating various water resources, the State "bears an 'affirmative duty to take the public trust into account.'" Id. (quoting Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 728 (Cal. 1983)).

Waiāhole I was an explicit acknowledgement by this court that the public trust doctrine, as incorporated into the Hawai'i Constitution, necessitates "a balancing process" between the constitutional requirements of protection and conservation of public trust resources, on the one hand, and the development and utilization of those resources, on the other. Id. at 142, 9 P.3d at 454. This balancing process, however, exists in a framework demanding that "any balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment." Id. The burden of showing that the requisite balance has been properly evaluated "in light of the purposes protected by the trust" rests on "those seeking or approving such uses." Id.

Because of the constitutional stature of the State's duties under the public trust doctrine, the Waiāhole I court described the following standard by which the State's actions concerning public trust resources are reviewed on appeal:

"The duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager." Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.

Id. at 143, 9 P.3d at 455 (emphases added) (citation omitted) (quoting Ariz. Ctr. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 168-69 (Ariz. Ct. App. 1991)).

The compelling duty of the State is "to consider the cumulative impact of existing and proposed diversions on trust purposes[,] to implement reasonable measures to mitigate this impact, including the use of alternative sources," and to plan and make decisions "from a global, long-term perspective." Id. Distilled to its essence, "the [S]tate may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." Id.

This court, in In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 83 P.3d 664 (2004), held that the State has a

continuing trust obligation to "ensure the continued availability and existence of its water resources for present and future generations." Id. at 431, 83 P.3d at 694 (quoting Waiāhole I, 94 Hawai'i at 139, 9 P.3d at 451). That case involved, inter alia, whether a State agency's grant of a water use permit was proper in light of another State agency's water reservation. Id. The court determined that the agency's failure "to render the requisite [findings of fact] and [conclusions of law] with respect to whether [the permit applicant] had satisfied its burden as mandated by the [State Water] Code" was tantamount to a violation of the agency's "public trust duty to protect" the reservation of water rights at issue. Id. at 432, 83 P.3d at 695.

The Wai'ola O Moloka'i court also interlinked two constitutionally based legal principles: the public trust doctrine and the right to exercise Native Hawaiian customs and traditions. According to the court, the applicant was required to prove that "the proposed water use would not abridge or deny traditional and customary native Hawaiian rights."⁷ Id. at 442, 83 P.3d at 705. Because the agency excluded evidence as to the

⁷ The Waiāhole I court also, consistent with Hawaii's legal history, prior precedent, and the constitutional mandate, "continue[d] to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose." Waiāhole I, 94 Hawai'i at 137, 9 P.3d at 449 (citations omitted).

adverse effect of the proposed water use on the traditional and customary Native Hawaiian gathering rights, the court held that the agency failed to "effectively balanc[e] [the] proposed private commercial use of water against an enumerated public trust purpose, namely the protection of native Hawaiians' traditional and customary gathering rights, as mandated by article XII, section 7 of the Hawai'i Constitution."⁸ Id. at 443, 83 P.3d at 706 (emphasis added).

In Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 140 P.3d 985 (2006), this court again expounded upon the duties inherent in the public trust doctrine. There, we held that the duties under the public trust doctrine bind not only the State and its agencies but also the several counties of this State. See id. at 224, 140 P.3d at 1004. Pursuant to the agency's duty as a public trustee, and as "guardian of the water quality in this [S]tate," the agency "must not relegate itself to the role of a 'mere umpire' . . . but instead must take the initiative in considering, protecting, and advancing public rights in the

⁸ The court clarified, in In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 174 P.3d 320 (2007), that in cases where Native Hawaiian rights figure in an agency's public trust balancing, the burden is not on parties of Native Hawaiian ancestry to prove that the proposed use would harm traditional and customary Native Hawaiian rights; rather, the permit applicants and the agency are the parties obligated to justify the proposed use and the approval thereof in light of the trust purpose of protecting Native Hawaiian rights. Id. at 507-09, 174 P.3d at 346-48.

resource at every stage of the planning and decision-making process." Id. at 231, 140 P.3d at 1011 (alteration in original) (quoting Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 456).⁹

In In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications ('Īao), 128 Hawai'i 228, 287 P.3d 129 (2012), this court found that, in instances where an agency lacks data or information to discharge its duties pursuant to the public trust doctrine, the agency "must 'take the initiative' to obtain the information it needs. Where the [agency]'s decisionmaking does not display 'a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state,' the decision cannot stand." Id. at 262, 287 P.3d at 163 (quoting Wai'ola O Moloka'i, 103 Hawai'i at 422, 83 P.3d at 685).

Recently, this court reiterated the independent nature of the duties pursuant to the public trust doctrine in Kauai Springs, Inc. v. Planning Commission of Kaua'i, 133 Hawai'i 141, 324 P.3d 951 (2014). In that case, we observed that, "[a]s the

⁹ The duty of the agency does not cease after it has engaged in the required balancing of competing interests in the course of evaluating whether a water use permit should issue and in determining whether a prescribed measure under the permit complies with the law; rather, the agency has a continuing duty, even after the issuance of the permit, to "ensure that the prescribed measures [under the permit] are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources." 1250 Oceanside Partners, 111 Hawai'i at 231, 140 P.3d at 1011.

public trust arises out of a constitutional mandate, the duty and authority of the [S]tate and its subdivisions to weigh competing public and private uses on a case-by-case basis is independent of statutory duties and authorities created by the legislature." Id. at 172, 324 P.3d at 982.

B.

The public trust doctrine under the Hawai'i Constitution, and the principles that it embodies, applies to the conservation land--the summit of Mauna Kea--involved in this case. This conclusion is supported by the plain language of Article XI, Section 1, the historical context under which this provision was ratified, and this court's precedents.¹⁰

Construction of constitutional provisions is largely guided by the same principles that courts use in interpreting statutes. Because of the exalted position that constitutional provisions occupy in the constellation of laws that operate in our State, "we have long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to

¹⁰ It is noted that the Board acknowledged the applicability of the public trust doctrine in this case: "In assessing the Project and determining whether the criteria of [the Department of Land and Natural Resources rules] have been satisfied, the State must protect the public trust and the customary and traditional rights and practices of native Hawaiians." (Emphasis added).

that intent." Hanabusa v. Lingle, 105 Hawai'i 28, 31, 93 P.3d 670, 673 (2004) (emphasis added) (quoting Blair v. Harris, 98 Hawai'i 176, 178-79, 45 P.3d 798, 800-01 (2002)). Divining intent, however, always starts with the words of the constitutional provision, and it is an elementary precept that "if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written." Id. (quoting Blair, 98 Hawai'i at 179, 45 P.3d at 801). It is also a settled canon that "the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them." Id. at 31-32, 93 P.3d at 673-74 (quoting Blair, 98 Hawai'i at 179, 45 P.3d at 801). Given that our constitutional provisions exist under one instrument, construction of one provision must be in harmony "with other provisions of the instrument." Id. at 32, 93 P.3d at 674 (quoting Blair, 98 Hawai'i at 179, 45 P.3d at 801). Finally, the circumstances under which the provision was adopted and the "history which preceded it" inform judicial construction of the Hawai'i Constitution. Id. (quoting Blair, 98 Hawai'i at 179, 45 P.3d at 801).

Article XI, Section 1 provides that "the State and its political subdivisions shall conserve and protect . . . all natural resources, including land." Further, "[a]ll public

natural resources are held in trust by the State for the benefit of the people." Haw. Const. art. XI, § 1. Thus, it was the express intent of the legislature that the protections afforded by the public trust doctrine extend to one of our most precious natural resources--land. A conclusion that would exclude public lands from the scope of the public trust doctrine would be contrary to the express statements that all public natural resources are held in trust and natural resources include land. Such a result is to be avoided because, as is true in construing statutes, all words of a constitutional provision must be given effect, and "no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Blair, 98 Hawai'i at 179, 45 P.3d at 801 (quoting Keliipuleole v. Wilson, 85 Hawai'i 217, 221, 941 P.2d 300, 304 (1997)).

This plain language interpretation is amply supported by the history and development of the public trust doctrine in this State. As discussed, lands in the public domain have always been held, from the time of the Hawaiian Kingdom to the post-statehood era, by the sovereign for the benefit of the people of Hawai'i at large, and this arrangement has always required the sovereign, as a public trustee, to protect and maintain those lands. Concluding that the framers of the 1978

Constitution intended to exclude public lands from the protections of the public trust is not reconcilable with the deep roots of the public trust doctrine in this State, the fact that the doctrine has been repeatedly reaffirmed throughout the State's history, and this court's unwavering adherence to the values that the doctrine encompasses. Such a conclusion would overlook "the circumstances under which [Article XI, Section 1] was adopted and the history which preceded it." Hanabusa, 105 Hawai'i at 32, 93 P.3d at 674 (quoting Blair, 98 Hawai'i at 179, 45 P.3d at 801). Indeed, if the public trust doctrine were not intended by the framers of the 1978 Constitution to cover lands in the public domain, they could have disavowed such a view by excluding any references to "land" from the express language of Article XI, Section 1. The framers did not do so but, instead, affirmatively included land as a specific example of public "natural resources" covered by the public trust doctrine.

Finally, this court's precedents support the interpretation that the public trust doctrine under Article XI, Section 1 applies to lands in the public domain. As discussed, this court held in Zimring that all lands in the public domain are within the public trust, which means that the sovereign is obligated to protect and maintain them and to regulate their use. Zimring, 58 Haw. at 121, 566 P.2d at 735 (concluding that the State held lava extensions in public trust for the benefit

of the populace). Additionally, in Morimoto v. Board of Land and Natural Resources, 107 Hawai'i 296, 113 P.3d 172 (2005), this court implicitly concluded that the public trust doctrine under Article XI, Section 1 applies to conservation district lands. At issue in that case was the propriety of an agency's decision to approve a permit to upgrade a road on the island of Hawai'i that traverses acres of conservation district lands. Id. at 297-98, 113 P.3d at 173-74. The circuit court concluded, inter alia, that the Board's decision "d[id] not violate Article [XI], Section 1 of the Hawai'i Constitutional Public Trust Doctrine." Id. at 301, 113 P.3d at 177. In addressing the appellants' contention that the agency was required to "affirmatively protect public resources, including natural resources," pursuant to the public trust doctrine, we reviewed the arguments of the appellants in support of this contention and concluded that the arguments were similar to those challenging the agency's alleged failure to follow its own administrative rules--arguments that the court had already considered and rejected; thus, we determined that the circuit court did not err in concluding that there was no public trust violation on the agency's part. Id. Importantly, the court did not conclude that the public trust doctrine was not applicable to land.

Accordingly, based on the plain language of Article XI, Section 1, the application of principles guiding the

interpretation of constitutional provisions, the special history of the public trust doctrine in this State, and this court's precedents implicating the public trust doctrine in land cases, the summit area of Mauna Kea, as state conservation land, is within the public trust and entitled to the protections that the public trust doctrine provides.

C.

The Board's error in this case lies in approving the permit before making specific findings and conclusions on whether the proposed use satisfies all requisites of the public trust doctrine. See Wai'ola O Moloka'i, 103 Hawai'i at 432, 83 P.3d at 695. By doing so, the agency decided the merits of UH's application without discharging its affirmative duty of "considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process." 1250 Oceanside Partners, 111 Hawai'i at 231, 140 P.3d at 1011 (quoting Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 456). That is, the Board issued the permit without "'tak[ing] the initiative' to obtain the information it needs" in order to reach a well-considered decision. Īao, 128 Hawai'i at 262, 287 P.3d at 163. Relatedly, the Board failed to place on UH the constitutional burden of "justify[ing] the proposed . . . use in light of the trust purposes." Kauai Springs, Inc., 133 Hawai'i at 173, 324 P.3d at 984.

Accordingly, the Board "compromise[d] public rights in the resource" without adhering to a decision-making process consistent with "a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our [S]tate." Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 455 (emphasis added). Further, the Board's error was not cured merely by conducting a contested case hearing, through which findings and conclusions concerning the public trust doctrine were made, after the permit had already issued. Under the facts of this case, such a procedure--which may be viewed, rightly or wrongly, as an attempt to legitimize a foregone conclusion--cannot be considered permissible pursuant to the State's public trust duties when decision-making concerning public-trust resources is involved. Id.; cf. Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res., 131 Hawai'i 193, 214, 317 P.2d 27, 48 (2013) (Acoba, J., concurring) (reasoning that "[a]ny post hoc rationale by the agency to justify its earlier decision will not constitute a determination of [the permit applicant's] legal rights or privileges" since those rights had already been decided pursuant to the agency's grant of the permit).

Hence, the Board violated Article XI, Section 1 of the Hawai'i Constitution as a matter of law by deciding the merits of UH's application before conducting a contested case hearing in

which the public trust doctrine, and the obligations it imposes on the State, could have been duly considered. See Wai'ola O Moloka'i, 103 Hawai'i at 432, 83 P.3d at 695 (holding that the agency failed to discharge its public trust obligations by granting water use permits without rendering findings of facts and conclusions of law regarding the applicant's burden under the public-trust balancing framework); Waiāhole I, 94 Hawai'i at 158, 9 P.3d at 470.

III. Due Process Under Article I, Section 5

The notion that an individual must be accorded sufficient procedural safeguards before being deprived of a "property" interest is a cornerstone of Hawai'i law. In Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 522 P.2d 1255 (1974), this court explained that a claim of due process requires a two-step inquiry: "(1) is the particular interest which the claimant seeks to protect by a hearing 'property' within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is 'property,' what specific procedures are required to protect it." Id. at 495, 522 P.2d at 1266. In that case, the issue was "whether the plaintiffs' interest[s] in continuing to receive the benefit of low cost housing and hence in not paying assertedly erroneous rent increases [are] substantial enough to require agency hearings prior to the

imposition of the increases." Id. at 495, 522 P.2d at 1267 (emphasis added). The court answered in the affirmative, reasoning that the plaintiffs' interests in the statutory benefit of low-cost housing were so substantial that they constituted "'property interest[s]' for due process purposes." Id. at 496, 522 P.2d at 1267. In this light, the court held that (1) the plaintiffs were entitled to a hearing before the state agency could impose rent increases upon them, (2) the agency "must follow the adjudicatory procedures of the [Hawai'i Administrative Procedure Act (HAPA)] prior to increasing rents because of any plaintiff's alleged overincome status," and (3) "[a]ny administrative burden [that following HAPA may] impose on the [agency] is more than offset by the substantial safeguards [it] afford[s] to low-income tenants against erroneous rent increases which may undermine those tenants' very ability to survive." Id. at 497-98, 522 P.2d at 1267-68.

With the ratification of Article I, Section 5 of the Hawai'i Constitution in 1978, due process principles were reaffirmed by the people of this State. As is relevant here, that provision declares that "[n]o person shall be deprived of life, liberty or property without due process of law." Haw. Const. art. I, § 5 (emphasis added). This court later elaborated upon what constitutes a property interest in Sandy Beach Defense Fund v. City Council of Honolulu, 70 Haw. 361,

377, 773 P.2d 250, 260-61 (1989). In that case, the appellants challenged the issuance of a Special Management Area use permit without the agency first conducting a contested case hearing, reasoning that the procedure was violative of constitutional due process. Id. at 361, 773 P.2d at 253. This court explained that a due process claim must be grounded in a property interest. Id. at 377, 773 P.2d at 260-61. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. at 377, 773 P.2d at 260 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

The Sandy Beach court explained that "[t]he basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Id. (emphasis added) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976); and N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-06 (1975)). The court adopted the Mathews v. Eldridge framework in determining the precise procedures required to comply with constitutional due process. Id. According to the court, several factors must figure in the balancing process: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such

interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." Id. (citing Mathews, 424 U.S. at 335; and Silver v. Castle Mem'l Hosp., 53 Haw. 475, 484, 497 P.2d 564, 571 (1972)).

In Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 881 P.2d 1210 (1994), this court reaffirmed the principle that "[c]onstitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." Id. at 68, 881 P.2d at 1214. That case involved an appeal from a State agency's grant of an applicant's permits to construct geothermal and developmental wells and a power plant. Id. at 66, 881 P.2d at 1212. This court found two instances in which a property interest is considered sufficiently substantial so as to trigger due process protections: (1) where an agency denies an applicant's proposed property use and (2) "where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." Id. at 68, 881 P.2d at 1214 (second emphasis added). The first avenue was not applicable because the agency

approved the applicant's proposed property use. See id. The second alternative, on the other hand, applied because both of its requirements were satisfied. See id. First, certain appellants averred or testified that they were owners of property adjacent to the area where the applicant engaged in construction activities pursuant to the permit issued by the agency and that they had been detrimentally affected by those activities. Id. at 70 & n.14, 881 P.2d at 1216 & n.14. Second, those appellants followed the procedures imposed by the agency in requesting contested case hearings, including those governing the submission of applications for contested cases pursuant to the rules of the agency. See id. at 69, 881 P.2d at 1215.

Recently, in In re 'Īao Ground Water Management Area High-Level Source Water Use Permit Applications ('Īao), 128 Hawai'i 228, 287 P.3d 129 (2012), this court considered whether the exercise of traditional and customary Native Hawaiian practices is a property interest deserving of due process protections. Id. at 241, 287 P.3d at 142. This court focused its analysis on the second alternative under Puna Geothermal, which would trigger due process protections because the agency was considering the issuance of a permit that could adversely affect constitutionally protected rights of other interested parties. Id. at 240, 287 P.3d at 141. Relying on Aguiar, the court emphasized "that 'a benefit which one is entitled to

receive by statute constitutes a constitutionally-protected property interest.'" Id. at 241, 287 P.3d at 142 (emphasis added) (quoting Aguiar, 55 Haw. at 496, 522 P.2d at 1267). Proceeding from this premise, this court found that the exercise of traditional and customary Native Hawaiian rights constitutes a property interest because it has "a statutory basis in the water code." Id. at 241-42, 287 P.3d at 142-43 (discussing HRS §§ 174C-101 and 174C-63). Hence, because the water resources implicated in the permit granted by the agency affected the property interest of the appellants in the exercise of Native Hawaiian traditional and customary practices, the court found that pursuant to constitutional due process, the agency was required to conduct a hearing. Id. at 244, 287 P.3d at 145.

In this case, under Puna Geothermal, the first avenue that triggers due process protections--an agency's denial of an applicant's proposed use--is inapposite because the Board actually approved UH's proposed use, and the Board's decision did not directly adjudicate any property interest of the appellants. Cf. Aguiar, 55 Haw. at 496, 522 P.2d at 1267 (deciding whether one is entitled to the property interest of low-rent public housing). Instead, just like 'Īao, this case falls under the second Puna Geothermal alternative for finding a property interest inasmuch as the Board's issuance to UH of a permit would affect the appellants' exercise of Native Hawaiian

customs and traditions. See 'Īao, 128 Hawai'i at 240, 287 P.3d at 141. The only difference between 'Īao and this case is the venue in which Native Hawaiian customs and traditions are being exercised. Thus, just as the exercise of traditional and customary Native Hawaiian rights was found in 'Īao to be a property interest when performed in water resources, the question in this case is whether the exercise of these customs and traditions should receive the same treatment when performed on conservation land. See id. at 241, 287 P.3d at 142. Because the exercise of Native Hawaiian customs and traditions on conservation land has a statutory source and because the appellants in this case adhered to the administrative rules for a contested case hearing imposed by the Board, the requirements of Puna Geothermal were satisfied.

The statutory source of the appellants' entitlement to exercise Native Hawaiian rights is the "Hawaiian usage exception to the adoption of the English common law" under HRS § 1-1,¹¹ which was intended "to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law." Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 10, 656 P.2d 745, 750-51 (1982).

¹¹ See supra note 3.

In Kalipi, this court concluded that the Hawaiian usage exception is "a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others." Id. at 12, 656 P.2d at 751-52. Inasmuch as the exercise of Native Hawaiian customs and traditions on the summit of Mauna Kea is statutorily supported by HRS § 1-1, it is a property interest protected by constitutional due process. See 'Īao, 128 Hawai'i at 241-42, 287 P.3d at 142-43.

The appellants in this case also adhered to the Board's administrative rules with respect to requesting a contested case hearing. In relevant part, Hawai'i Administrative Rules (HAR) § 13-1-28 (2009) provides, "When required by law, the board shall hold a contested case hearing upon its own motion or on a written petition of any government agency or any interested person." Additionally, the Board's rules provide as follows with respect to the initiation of a contested case hearing:

(a) On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral

or written request or submitting a written petition or both may be waived.

HAR § 13-1-29 (2009) (emphases added).

During the February 25, 2011 public hearing for the permit, the appellants made oral requests for a contested case hearing. At the conclusion of that public hearing, the Board decided to hold a contested case hearing that would involve parties who made either an oral or written request followed by the submission of a petition and the payment of a filing fee within the timeframe provided by the Board's administrative rules. The appellants thereafter filed their respective written petitions within the ten-day period following the close of the February 25, 2011 public hearing. Thus, the appellants "followed the agency's rules governing participation in contested cases." Puna Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214; see HAR § 13-1-29; Īao, 128 Hawai'i at 234-35, 287 P.3d at 135-36 (stating that several attendees at a public hearing requested a contested case hearing and filed written petitions to that effect); see also Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res., 131 Hawai'i 193, 211, 317 P.3d 27, 45 (2013) (Acoba, J., concurring) (discussing how the appellant in that case satisfied the same administrative rules involved in this case by making an oral request for a contested case hearing before the close of a public hearing followed by the submission of a

written petition within the ten-day period imposed by the rules).

In view of the fact that the appellants' exercise of Native Hawaiian traditional and customary practices on the summit of Mauna Kea is a property interest under the constitutional due process framework, and because that property interest could be adversely affected by UH's proposed action, the appellants were entitled to a contested case hearing prior to being deprived of their property interest. Cf. Aguiar, 55 Haw. at 495-96, 522 P.2d at 1267 (holding that the plaintiffs' interest in low-cost housing was a property interest "substantial enough to require agency hearings prior to the imposition of [rent] increases" (emphasis added)).

The same conclusion is reached under the Mathews three-factor balancing test, as adopted by this court in Sandy Beach. The interest involved, which is the first Mathews factor, Sandy Beach, 70 Haw. at 378, 773 P.2d at 261, is the property interest of the appellants of Native Hawaiian ancestry to practice Native Hawaiian customs and traditions on the summit area of Mauna Kea. The risk of erroneous deprivation of this property interest by virtue of the procedures followed by the Board--the second factor, id.--was high because the merits of UH's application were summarily decided without a process ensuring the proper presentation of evidence and a thoughtful

deliberation. The procedure that the Board used simply failed to assess the appellants' property interest in light of countervailing considerations relevant to the permitting process. Additionally, the fact that the Board's administrative rules do not appear to provide a procedural vehicle for the Board to reverse its grant of a permit, if it were later found that the permit was improperly granted, elevated the risk of erroneous deprivation.

Also to be considered under the second factor is the probable value of additional or alternative procedures. Id. An alternative procedure that was available to the Board was to conduct a contested case hearing prior to granting the permit to UH. This procedure would have allowed the Board to receive evidence, including testimony adduced by the parties, weigh the probative value of such evidence, consider arguments, engage in thorough deliberation, and thereafter make thoughtful findings of fact and conclusions of law based on the evidence. The "probable value" of this alternative procedure is considerable, especially under the facts of this case, where the property interest at stake is as profound as the exercise of Native Hawaiian customs and traditions. That is, as compared to the procedure that the Board actually followed, this alternative

procedure substantially lessens the risk of erroneous deprivation.¹²

Finally, the burden that the alternative procedure places on the Board--the final Mathews factor, id.--is minimal, especially in view of the fact that the property interest implicated in this case has constitutional underpinnings. See Haw. Const. art. XII, § 7.¹³ It also cannot be reasonably argued that it would have been burdensome for the Board to hold a contested case hearing before issuing the permit since the Board actually conducted such a hearing after the issuance of the permit. In any event, whatever burden the Board must bear because of a pre-issuance contested case hearing is more than outweighed by the protections such procedure provides to the appellants' constitutionally rooted interest in exercising Native Hawaiian customs and traditions. Cf. Aguiar, 55 Haw. at 498, 522 P.2d at 1268 (burden imposed on the agency by the

¹² Notably, cases have voiced a preference for predeprivation hearings whenever they are feasible regardless of the merits of a postdeprivation remedy. See Zinermon v. Burch, 494 U.S. 113, 132 (1990) ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking."); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978).

¹³ Cf. Aguiar, 55 Haw. at 496, 522 P.2d at 1267 (concluding that a plaintiff is entitled to a predeprivation hearing before being required to pay higher rent for low-cost public housing); Silver, 53 Haw. 475, 486, 497 P.2d 564, 572 (1972) (requiring a predeprivation hearing before deciding whether to renew a medical doctor's privileges in a federally funded private hospital). Both Aguiar and Silver involved property rights not rooted in the Hawai'i Constitution.

procedures that they must follow "is more than offset by the substantial safeguards they afford to low-income tenants against erroneous rent increases which may undermine those tenants' very ability to survive").

Accordingly, the Board should not have granted the permit before holding a contested case hearing because that procedure is inconsistent with the procedural safeguards contemplated by Article I, Section 5 of the Hawai'i Constitution. By deciding UH's application on the merits without the benefit of a contested case hearing, the Board failed to provide the procedural safeguards to which the appellants were constitutionally entitled prior to being deprived of a protected property interest, violating Article I, Section 5 of the Hawai'i Constitution.

IV. Constitutional Responsibilities of an Agency

Although the power of a State agency is delineated by statute, an agency's statutory duties must be performed in a manner that is consistent with the Hawai'i Constitution.¹⁴ Thus, the agency must function in accordance with both its governing

¹⁴ An agency is a creature of the legislature, and the scope of its authority is specifically delineated by statute. See *Marquette Cement Mfg. Co. v. FTC*, 147 F.2d 589, 592-93 (7th Cir. 1945) (emphasizing that "Congress is the creator of all . . . administrative agencies" and that agencies' "jurisdiction and authority . . . is confined solely to that which Congress bestows").

statutes and the Hawai'i Constitution. With respect to the Hawai'i Constitution, an agency's obligation is twofold: the agency must not only avoid infringing upon protected rights to the extent feasible, but it also must execute its statutory duties in a manner that fulfills the State's affirmative constitutional obligations.¹⁵

In other words, the authority and obligations of an agency are necessarily circumscribed and regulated by the Hawai'i Constitution. See Czerkies v. U.S. Dep't of Labor, 73 F.3d 1435, 1441-42 (7th Cir. 1996) (stating that "an administrative agency [may not] claim to receive from Congress by sheer inadvertence a license to ignore the Constitution"); Hennessey v. Indep. Sch. Dist. No. 4, 552 P.2d 1141, 1145 (Okla. 1976) ("All governmental bodies must remain within bounds of the Constitution."); City of Modesto v. Modesto Irrigation Dist., 110 Cal. Rptr. 111, 114 (Cal. Ct. App. 1973) (holding that state agencies "must submit to a constitutional mandate"). Hence, an agency may not fulfill its statutory duties without reference to and application of the rights and values embodied in the constitution.

¹⁵ The Hawai'i Constitution sets out many specific mandates that the State must fulfill. For example, Article XII, Section 7 sets forth the State's obligation to "reaffirm[]" and "protect" certain rights of Native Hawaiians.

As a related matter, an agency is often in the position of deciding issues that affect multiple stakeholders and implicate constitutional rights and duties. See In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications ('Īao), 128 Hawai'i 228, 231, 287 P.3d 129, 132 (2012) (deciding water use applications of several parties with a multitude of interests in several water resources); Ka Pa'akai O Ka'Aina v. Land Use Comm'n, 94 Hawai'i 31, 34, 7 P.3d 1068, 1071 (2000) (reclassification of approximately 1,000 acres of land from a conservation district to an urban district). As a result, an agency is often the primary protector of constitutional rights and perhaps is in the best position to fulfill the State's affirmative constitutional obligations.¹⁶ Cf. Save Ourselves, Inc. v. La. Env'tl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984) (holding that "the rights of the public must receive active and affirmative protection at the hands of the" agency making the decision (emphasis added)).

Consequently, an agency bears a significant responsibility of

¹⁶ This is not to say that an agency, like the Board in this case, must assume this role at all times. Given the various powers that the Board wields and the duties that it must fulfill, the Board's role obviously changes depending on the matter, facts, and circumstances presented to it. Cf. Save Ourselves, Inc. v. La. Env'tl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984) (reasoning that the agency becomes "the representative of the public interest" when acting "as the primary public trustee of natural resources" (emphasis added)). The Board's role as defender and enforcer of constitutional rights is invoked where, as here, an action or decision of the agency implicates certain constitutional rights and values.

assuring that its actions and decisions honor the constitutional rights of those directly affected by its decisions.

In this case, the Board, which heads the Department of Land and Natural Resources, was asked to perform its statutory duty to consider an application for a permit to build on conservation land. See HRS § 183C-6 (2011) ("The department shall regulate land use in the conservation district by the issuance of permits."); HRS § 171-3(a) (Supp. 2008) (stating that the department "shall manage, administer, and exercise control over," inter alia, "public lands, the water resources, ocean waters, navigable streams, coastal areas (excluding commercial harbor areas), and minerals and all other interests therein and exercise such powers of disposition thereof as may be authorized by law"). As recognized by the Administrator of the Office of Conservation and Coastal Lands, the proposed use of the conservation land implicates the constitutional right of individuals of Native Hawaiian descent to exercise traditional and customary Native Hawaiian practices.

Under such facts, the role of an agency is not merely to be a passive actor or a neutral umpire, and its duties are not fulfilled simply by providing a level playing field for the parties. See Save Ourselves, Inc., 452 So. 2d at 1157 ("[T]he commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls

and strikes for adversaries appearing before it.”). Rather, an agency of the State must perform its statutory function in a manner that fulfills the State’s affirmative constitutional obligations. See, e.g., Ka Pa‘akai O Ka‘Aina, 94 Hawai‘i at 45, 7 P.3d at 1082 (placing “an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights”); In re Water Use Permit Applications (Waiāhole I), 94 Hawai‘i 97, 143, 9 P.3d 409, 456 (2000) (describing the state agency’s affirmative duty of “considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process”). In particular, an agency must fashion procedures that are commensurate to the constitutional stature of the rights involved, see, e.g., Waiāhole I, 94 Hawai‘i at 143, 9 P.3d at 455 (decisions involving public rights to a public-trust resource must be “made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state”), and procedures that would provide a framework for the agency to discover the full implications of an action or decision before approving or denying it, see, e.g., Kauai Springs, Inc. v. Planning Comm’n of Kaua‘i, 133 Hawai‘i 141, 174-75, 324 P.3d 951, 984-85 (2014) (crafting an assistive framework that can guide agencies when considering the application of the public trust doctrine to water resources).

In light of the unique position that an agency occupies, the agency may be at the frontline of deciding issues that involve various interests that implicate constitutional rights. Especially in instances where an agency acts or decides matters over which it has exclusive original jurisdiction, that agency is the primary entity that can and, therefore, should consider and honor state constitutional rights in the course of fulfilling its duties. Furthermore, to the extent possible, an agency must execute its statutory duties in a manner that fulfills the State's affirmative obligations under the Hawai'i Constitution. An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision.¹⁷

V. Conclusion

This case illustrates the interweaving nature of the various provisions of our constitution. When rights as integral as the exercise of Native Hawaiian customs and traditions are

¹⁷ The non-delegable nature of an agency's duty to protect and enforce constitutional rights only intensifies the important role that an agency plays. See *Ka Pa'akai O Ka'Aina*, 94 Hawai'i at 51, 7 P.3d at 1088 (holding that "the delegation of the protection and preservation of native Hawaiian practices to [the party petitioning for the reclassification of land] was inappropriate"). In this case, outside of judicial review, no other entity but the Board can preserve constitutional rights involved in the permitting of a proposed use of a conservation land. See HRS § 26-15(a) (Supp. 2005).

implicated by a proposed action, our constitution provides several safeguards that combine to preserve those rights.

In this case, the Board was asked to grant a permit to UH for the construction of an astronomical observatory on the summit of Mauna Kea, an area sacred to Native Hawaiians.¹⁸ Because the project could infringe upon the constitutional right of Native Hawaiians to exercise their customs and traditions, the guarantees of Article XII, Section 7, the public trust obligations of the State under Article XI, Section 7, and the due process protections encompassed by Article I, Section 5 were all triggered to constitutionally safeguard the continued practice of Native Hawaiian customs and traditions.

Under the foregoing constitutional provisions and the precedents of this court, the Board's obligations were to protect Native Hawaiian customs and traditions to the extent feasible, to effectuate the values of the public trust, and to provide a procedure befitting the compelling interests at stake. To perform these obligations, the Board was required to decide UH's application pursuant to a decision-making process that incorporates the rights, values, and duties embodied by the constitutional provisions involved. Instead, the Board failed

¹⁸ It has been noted that "[i]n Hawaiian culture, natural and cultural resources are one and the same." Mauna Kea Science Reserve Master Plan V-1 (2000).

to conduct a contested case hearing before deciding the merits of UH's application and summarily granted the requested permit without duly accounting for the constitutional rights and values implicated. The Board acted in contravention of the protections of Native Hawaiian customs and traditions provided by Article XII, Section 7; Article XI, Section 7; and Article I, Section 5. Accordingly, as a matter of constitutional law, the permit issued by the Board must be invalidated.

/s/ Richard W. Pollack

/s/ Michael D. Wilson



I join in Part IV of this concurring opinion.

/s/ Sabrina S. McKenna