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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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IN THE MATTER OF CONTESTED CASE HEARING RE
CONSERVATION DISTRICT USE APPLICATION (CDUA) HA-3568
FOR THE THIRTY METER TELESCOPE AT THE MAUNA KEA SCIENCE
RESERVE, KA'OHE MAUKA, HĀMĀKUA, HAWAI'I, TMK (3)404015:009

SCOT-17-0000777, SCOT-17-0000811, & SCOT-17-0000812

APPEAL FROM THE BOARD OF LAND AND NATURAL RESOURCES
(BLNR-CC-16-002 (Agency Appeal))

NOVEMBER 30, 2018

AMENDED OPINION CONCURRING IN PART AND CONCURRING IN THE
JUDGMENT BY POLLACK, J., IN WHICH WILSON, J., JOINS AS TO PARTS
I-III

Article XI, section 1 of the Hawai'i Constitution declares, "All public natural resources are held in trust by the State for the benefit of the people." This provision places an affirmative obligation on the State to "conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources" for "the benefit of present and future generations." Our constitution also specifies that development or utilization of these natural

resources must be "in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."

In the first opinion by this court in this case, the majority declined to address the application of the public trust doctrine embodied in article XI, section 1 to the potential construction and operation of the Thirty Meter Telescope ("TMT" or "TMT project") on conservation land located on the summit of Mauna Kea, one of the most sacred areas in the state to Native Hawaiians. See generally Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (Mauna Kea I), 136 Hawai'i 376, 363 P.3d 224 (2015). Today, the court only partially rectifies this omission.

Although the majority acknowledges the applicability of the public trust doctrine to conservation land, it does not fully apply its principles. In only partially adopting our precedents that set out public trust principles applicable to state water resources, the majority effectively determines that the natural resources the constitution entrusts to the State for the benefit of the people are governed by different measures of protection. Majority at 47 n.24. But neither the text nor the history of article XI, section 1 provides for differing levels of protection for individual natural resources, such as water as compared to land, and this court should not establish artificial distinctions without a compelling basis for doing so. Indeed,

the fundamental importance of land to Hawai'i and its people is manifest in King Kamehameha III's enduring statement, which was included in our constitution as the official State motto at the same time that article XI, section 1 was adopted: "Ua mau ke ea o ka aina i ka pono," translated by statute to mean, "The life of the land is perpetuated in righteousness." Haw. Const. art. XV, § 5; Hawaii Revised Statutes (HRS) § 5-9 (2009).

It is fundamental that the land held in trust under article XI, section 1 should receive the full protections it is rightfully afforded under our constitution. An essential step in securing these protections is establishing a clear framework for agencies and courts to employ in future cases when applying public trust principles to state conservation land. In the absence of such guidance, courts and agencies will be forced to develop their own ad hoc methods of applying public trust principles to the various natural resources implicated by their decisions, which will result in incorrect interpretations and unequal treatment of protected resources.

Further, a clear alternative to this unstructured approach exists in this court's precedents. Our caselaw setting forth public trust principles governing water resources provides a uniform standard that may easily be applied to other natural resources with only minor alterations. By identifying a general framework for evaluating the impact of State actions, we ensure

that all of the public natural resources entrusted to the State for the benefit of the people are afforded the same degree of protection as the text and history of article XI, section 1 attest that the drafters intended. I therefore write separately.

I. Public Lands Have Long Been Regarded as a Public Natural Resource Held in Trust by the State for the Benefit of the People.

The majority states today that "[w]e therefore now hold that conservation district lands owned by the State, such as the lands in the summit area of Mauna Kea, are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1." Majority at 46 (footnote omitted). However, Hawaii's public lands have long been regarded as subject to the doctrine incorporated by article XI, section 1, having been held in trust for the people's benefit since the times of the Hawaiian Kingdom. See 136 Hawai'i at 403-07, 363 P.3d at 251-55 (Pollack, J., concurring).

In 1840, King Kamehameha III promulgated the first constitution to bind Hawai'i. Id. at 403, 363 P.3d at 251 (citing Fundamental Law of Hawaii 3 (Lorrin A. Thurston ed., 1904)). The document stated the following:

KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I, was the head, and had the management of the landed property.

State by Kobayashi v. Zimring, 58 Haw. 106, 111, 566 P.2d 725, 729 (1977) (quoting Fundamental Law of Hawaii 3) (emphases added). Thus, “[i]t was long ago acknowledged that the people of Hawaii are the original owners of all Hawaiian land,” with the king holding it as a trustee and managing it for their benefit. Id. (emphasis added).

Responding to pressure from foreign settlers who sought fee title to land, Kamehameha III instituted a reformation of the traditional system of land tenure during the 1840s. Id. After the Great Māhele,¹ the public domain, which had previously been “all-inclusive,” was diminished by the withdrawal of the Crown Lands and lands successfully claimed by the chiefs, konohiki,² and tenants. Id. at 113, 566 P.2d at 730-31. But title to all land that was not specifically removed from the public domain has always remained in the people of Hawai‘i, “subject to the stewardship of the government for the benefit of the people.” Mauna Kea I, 136 Hawai‘i at 404, 363 P.3d at 252 (Pollack, J., concurring) (citing Zimring, 58 Haw. at 114, 566 P.2d at 731).

¹ “The Māhele (meaning ‘division’ or ‘share’) . . . was a process with multiple divisions or allocations of land” that laid the foundations for the private ownership of real property within the Kingdom of Hawai‘i. Native Hawaiian Law: A Treatise 13 (Melody Kapilialoha MacKenzie et al. eds., 2015).

² “Konohiki in ancient Hawaii were agents of the King or chiefs.” Zimring, 58 Haw. at 112 n.4, 566 P.2d at 730 n.4.

In 1977, this court specifically addressed the implications of this history in State by Kobayashi v. Zimring, in which it considered whether the private owner of what was once ocean-side property on the island of Hawai'i also held title to approximately eight acres of adjoining land that was created when lava from the 1955 Puna eruption overflowed and extended the shoreline. 58 Haw. at 107-09, 566 P.2d at 727-29. Writing for the court, Chief Justice Richardson stated that "the origin and development of the private title in Hawaii makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or granted, such land remains in the public domain." Id. at 114, 566 P.2d at 731. This history, he wrote, coupled with "equity and sound public policy[,] demand[ed] that such land inure to the benefit of all the people of Hawaii, in whose behalf the government acts as trustee." Id. at 121, 566 P.2d at 735.

Chief Justice Richardson then dispelled all doubt that he was referring to the common law public trust doctrine, stating:

[W]e hold that lava extensions vest when created in the people of Hawaii, held in public trust by the government for the benefit, use and enjoyment of all the people.

Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use.

Id. (footnote omitted) (emphasis added). In a footnote, he cited Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892), as

providing guidance regarding the public trust principles to which he referred--the same seminal case this court has frequently cited and extensively discussed in interpreting the State's article XI, section 1 public trust obligations regarding the use of water. Zimring, 58 Haw. at 121 n.18, 566 P.2d at 735 n.18; see, e.g., In re 'Āao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawai'i 228, 277, 287 P.3d 129, 178 (2012); Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 221, 140 P.3d 985, 1001 (2006); In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 429, 83 P.3d 664, 692 (2004); In re Water Use Permit Applications (Waiāhole I), 94 Hawai'i 97, 127, 9 P.3d 409, 439 (2000).

Indeed, the delegates to the 1978 Hawai'i Constitutional Convention adopted article XI, section 1 only a year after Zimring was decided. A review of the convention records indicates that the delegates were well aware of contemporary decisions by this court regarding the public trust doctrine when they drafted the provision. Although Zimring was not mentioned by name, the delegates several times mentioned McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973), a very similar case decided a few years earlier in which this court also discussed the Great Māhele before holding that the ownership of the state's waters

continued to be held in public trust for the benefit of the people. See 2 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 862, 865, 867, 877, 878 (1980). The delegates then adopted language that expressly set forth the State's obligation to "conserve and protect . . . all natural resources, including land," reaffirming that "[a]ll public natural resources are held in trust by the State for the benefit of the people." Id. at 426 (emphases added) (setting forth the text of Haw. Const. art. XI, § 1); see also State ex rel. Bronster v. Yoshina, 84 Hawai'i 179, 186, 932 P.2d 316, 323 (1997) ("The general rule is that, if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written." (alteration in original) (quoting Blair v. Cayetano, 73 Haw. 536, 543, 836 P.2d 1066, 1070 (1992))).

On this historical record, the only logical conclusion is that the framers intended article XI, section 1 to incorporate as a constitutional principle Zimring's holding that land in the public domain is "held in public trust by the government for the benefit, use and enjoyment of all the people." 58 Haw. at 121, 566 P.2d at 735; cf. Gardens at W. Maui Vacation Club v. County of Maui, 90 Hawai'i 334, 341, 978 P.2d 772, 779 (1999) (stating that "[t]he participants of the

1978 constitutional convention . . . are presumed to have been aware" of then-recent changes in the law).

Thus, the principle that public land is a public natural resource within the meaning of article XI, section 1 has long been established under our law.³ As such, it enjoys a stature equal to that afforded to public water resources under the provision, and the same principles should generally apply to our interpretation of agencies' constitutional public trust obligations with regard to the two resources.

II. The Existing Public Trust Framework May Be Applied to Public Lands.

This court has thus far declined to demarcate the outer limits of the public trust doctrine as incorporated by

³ The Mission Statement of the Department of Land and Natural Resources--which is presumably intended to guide the agency in its management of coastal lands, forest preserves, state parks, wildlife sanctuaries, and other public lands over which it has jurisdiction--makes express mention of the Department's public trust responsibilities:

Enhance, protect, conserve and manage Hawaii's unique and limited natural, cultural and historic resources held in public trust for current and future generations of the people of Hawaii nei, and its visitors, in partnership with others from the public and private sectors.

Hawai'i Department of Land and Natural Resources, <https://dlnr.hawaii.gov/> (last visited October 29, 2018) (emphasis added). This mission statement and my general discussion of public lands in Hawai'i notwithstanding, I agree with the majority that, for the purposes of this appeal, it is only necessary for us to determine how public trust principles apply to state conservation lands that have been so classified by the Hawai'i Land Use Commission pursuant to HRS § 205-2 and Act 234, section 2, of the 1957 Session Laws of Hawaii. Majority at 46 n.23. The issue of whether the doctrine applies to other types of public land is not before us, nor is the question of what limitations the doctrine may place on the reclassification of conservation land by the Land Use Commission.

article XI, section 1, instead applying the fundamental principles inherent in the concept of a public trust through case-by-case adjudication. Mauna Kea I, 136 Hawai'i at 404-05, 363 P.3d at 252-53 (Pollack, J., concurring). We have also recognized a series of attendant duties that the State and its agencies must discharge when a contemplated action may impact a public natural resource. Id.

Our evolving caselaw applying constitutional public trust principles to water usage was collected and summarized by this court in Kauai Springs, Inc. v. Planning Comm'n of County of Kaua'i, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014). "To assist agencies in the application of the public trust doctrine," we distilled from our precedents a framework of inter-related principles applicable to agencies and applicants in discharging their respective obligations under the provision.⁴ Id. at 174-75, 324 P.3d at 984-85. The framework initially sets forth general principles relating to the agency's affirmative

⁴ In meeting these obligations, "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." Mauna Kea I, 136 Hawai'i at 414, 363 P.3d at 262 (Pollack, J., concurring, in which McKenna and Wilson, JJ., joined). Rather, agencies must conduct themselves "in a manner that fulfills the State's affirmative constitutional obligations." Id. The Kauai Springs framework is not mandatory, however, and it does not "preclude[] other analytical approaches that are consistent with the public trust doctrine." Kauai Springs, 133 Hawai'i at 174 n.25, 324 P.3d at 984 n.25.

duty to fulfill its constitutional trust obligations. See Mauna Kea I, 136 Hawai'i at 414, 363 P.3d at 262 (Pollack, J., concurring, in which McKenna and Wilson, JJ., joined). Next, the framework provides the agency with evidentiary guides to assist it in addressing these obligations. Lastly, the framework informs the applicant as to what must be shown in order to obtain a permit. All of these principles may be applied to state conservation land with relatively little alteration.⁵

The first principle, originally derived from Robinson v. Ariyoshi, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982), sets forth a basic tenet of the public trust doctrine: agencies have the "duty and authority" to maintain the integrity of Hawaii's public natural resources for future generations⁶ and to ensure that they are put to "reasonable and beneficial" use. Kauai Springs, 133 Hawai'i at 174, 324 P.3d at 984. With respect to conservation land, that duty is to ensure that a contemplated use of conservation land will not result in long-term damage to

⁵ Indeed, the Board of Land and Natural Resources in its decision to grant the permit, and the majority today, apply some of these principles to their consideration of the public trust in this case. They do so however, without stating whether or explaining how these considerations fit within a larger legal framework that can be employed in future cases.

⁶ In the context of water resources, we have stated that maintaining the integrity of the resource means ensuring the contemplated use of some water does not compromise the purity and flow of the water that remains, thus preserving Hawaii's many water sources for future generations. Kauai Springs, 133 Hawai'i at 174, 324 P.3d at 984.

the land where the project is to occur or compromise the public's continued use of other natural resources.

Additionally, agencies must verify that the use of the land will further a public purpose and that the project is not unreasonable considering possible alternate uses of the conservation land.

In making this determination, the Kauai Springs framework calls upon the agency to consider the proposed use of conservation land in relation to the public trust purposes that this court has identified. 133 Hawai'i at 174, 324 P.3d at 984. The public trust purposes for water resources were developed over time through case-by-case adjudication. An analogous trust purpose for conservation land exists for each.

The first trust purpose, the maintenance of waters in their natural state, is easily adapted: the maintenance of conservation land in its natural state. The second--the protection of domestic water use--is likewise applicable. The analogous trust purpose for conservation land requires the State to consider the protection of the common uses to which the general public puts conservation land, including access, outdoor recreation, and enjoyment. See Waiāhole I, 94 Hawai'i at 137, 9 P.3d at 449.

The third and fourth trust purposes for water resources also have direct analogues when applied to state conservation land. The protection of water in the exercise of Native Hawaiian and traditional and customary rights clearly coincides with the protection of conservation land in the exercise of traditional and customary rights. And consideration of the reservations of water enumerated by the State Water Code would similarly coincide with consideration of the various dedications and regulations of land set forth in federal, state, and local law.

The next set of principles set forth in Kauai Springs provide evidentiary guidance to the agency in fulfilling its public trust obligations, which may also be directly applied to conservation lands with little need for modification. As with water, any consideration of a proposed use of conservation land should include a presumption in favor of public use, access, enjoyment, and resource protection. See Kauai Springs, 133 Hawai'i at 174, 324 P.3d at 984. Proposed uses for conservation land should be evaluated on a case-by-case basis,⁷ and proposals

⁷ At this stage, the Kauai Springs framework calls for recognition that public trust prohibits the grant of vested rights in water resources that are incompatible with public trust purposes. 133 Hawai'i at 174, 324 P.3d at 984; see also Waiāhole I, 94 Hawai'i at 137, 9 P.3d at 449 (citing Robinson, 65 Haw. at 677, 658 P.2d at 312). As the Board of Land and Natural Resources determined and the majority correctly states, the "TMT Project does not involve the irrevocable transfer of public land to a private party."

(continued . . .)

for private or commercial uses should be assessed with a high level of scrutiny. Id.

Lastly, the Kauai Springs framework specifies what applicants for a proposed use of public natural resources need to show to gain approval. Under the framework, an applicant is required to demonstrate the need for a conservation district use permit, the propriety of using conservation land to fill that need, and a lack of a practicable alternative location suitable for the project. See id. at 174, 324 P.3d at 984. And, if there is a reasonable allegation of harm to public trust purposes, the framework requires that the applicant demonstrate that reasonable mitigation measures will be implemented to alleviate the cumulative impact on trust purposes of both existing and proposed uses. Id. at 175, 324 P.3d at 985. Applying this requirement to conservation land, an applicant must demonstrate that there will be reasonable efforts undertaken to mitigate the negative impact on the public trust purposes discussed above from both the proposed undertaking and other existing projects that make use of conservation land.

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Majority at 48. Therefore, for purposes of this appeal, it is not necessary for us to decide what restrictions article XI, section 1 places on the State's transfer of public lands. But see Zimring, 58 Haw. at 121, 566 P.2d. at 735 ("Sale of the property would be permissible only where the sale promotes a valid public purpose").

In sum, our precedents governing the constitutional public trust obligations of agencies and applicants may readily be adapted to conservation land, and the history and text of article XI, section 1 indicate that they should be so applied. The TMT project should therefore be considered in light of our existing public trust framework rather than ascribing differing types of constitutional protections depending on the particular public natural resource at issue.

III. The Approaches Taken by the Hearing Examiner and the Board, are Inconsistent with the Law, and the Majority Offers Little Guidance to Correct These Missteps.

The great need for guidance regarding the application of public trust principles to state conservation land is amply demonstrated by the manner in which the hearing examiner and the Board of Land and Natural Resources ("BLNR" or "the Board") addressed the doctrine in this case. In the proposed conclusions of law, for instance, the hearing examiner stated that "the scope of the public trust doctrine has traditionally been limited to water resources, and the reliable, credible and substantial evidence establishes that the TMT Project will not restrict or otherwise impair any water resources." Based on this proposition, the hearing examiner concluded that "the public trust doctrine does not apply to consideration of the TMT Project." But this conclusion is refuted by Zimring, in which this court expressly applied "public trust principles" to public

land. See 58 Haw. at 121 & n.18, 566 at 735 & n.18 (citing Illinois Central R.R., 146 U.S. at 387). Further, the proposed conclusion is contrary to the plain language of article XI, section 1, which specifically defines natural resources to "include[] land" before stating, "All public natural resources are held in trust by the State for the benefit of the people." (Emphasis added.)

It is thus unsurprising that BLNR rejected this proposed conclusion, instead stating that article XI, section 1 "expressly includes all natural resources" and "[u]nquestionably . . . imposes mandatory duties on the BLNR to act as a trustee in dealing with" the conservation lands at issue "and the other publicly-owned natural resources on them."

In addressing its constitutional public trust obligations, however, the Board made a number of conclusions that are not wholly consistent with established law. For instance, the Board relied upon Section 5(f) of the Admission Act of 1959 and article X, section 5 of the Hawai'i Constitution to conclude that "[t]he purposes of the TMT Project are valid public trust uses." BLNR appears to conflate the purposes of the ceded land trust that article XII, section 4 created from the land granted to this state in the Admission Act of 1959, the University trust created by article X, section 5, and the public natural resource trust created by article XI, section 1. To be

sure, the three constitutional trusts share similarities, including that the public is a beneficiary of each. And in some instances, the trusts may share assets in common, as in the present case when the conservation land at issue is both ceded land and a public natural resource. But each of the three trusts is distinct, with its own historical origin and unique trust purposes.⁸ Accordingly, when a contemplated action may affect property in which multiple trusts hold common title, the State is obligated to consider the impact of its actions on the separate purposes of each trust that is implicated.

Additionally, BLNR suggested that its article XI, section 1 public trust obligations may be coextensive with the eight criteria it is required to fulfill under Hawaii Administrative Rules (HAR) § 13-5-30(c). The Board stated that "[t]he criteria set out in HAR § 13-5-30(c) expressly promote these public trust objectives;" a "thorough and diligent assessment of those criteria necessarily addresses the concerns that doctrine protects since the criteria set out in HAR § 13-5-30(c) embody and implement the public trust doctrine;" and "the

⁸ See 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 668-69 (1980) (discussing the motivation for the adoption of the ceded land trust); 1 Proceedings of the Constitutional Convention of Hawaii of 1950, at 317 (1960) (adopting University trust wording to ensure that university property is held and administered "in a manner consistent with its responsibility as a public institution").

conclusion that those criteria are satisfied . . . is a compelling indication that the public trust obligations of both [the University of Hawai'i at] Hilo and the BLNR are satisfied as well."

This court has indicated that an agency's public trust obligations may overlap with the agency's statutory duties, and it would follow that they may similarly overlap with duties imposed by an administrative rule. See Waiāhole I, 94 Hawai'i at 146, 9 P.3d at 458. And several of the HAR § 13-5-30(c) criteria indeed parallel public trust obligations discussed above. For example, HAR § 13-5-30(c)(1) mandates that a project be consistent with the purpose of the conservation district, which is defined by statute as "to conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare." HRS § 183C-1 (2011). HAR § 13-5-30(c)(4) also requires a determination that "[t]he proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region." Together, these inquiries are consistent with an agency's public trust duty to maintain the integrity of Hawaii's public natural resources for

future generations and to ensure that they are put to beneficial use.

The article XI, section 1 public trust doctrine, however, imposes additional obligations that are unaddressed by the HAR § 13-5-30(c) criteria. The regulation does not require that the agency determine that the proposed use is reasonable by specifically considering it in relation to other possible uses, including the enumerated trust purposes that have been developed through this court's case law. It also does not afford a presumption in favor of public use, access, enjoyment, and resource protection, nor does it require that the agency subject proposed private or commercial uses to a higher level of scrutiny.

Lastly, the rule does not speak to the obligations that article XI, section 1 imposes on the applicant for the proposed use of natural resources, including demonstrating an actual need for the resource, a lack of alternative means of meeting that need, and the undertaking of reasonable mitigation measures if the proposed use will cause harm to public trust purposes. Thus, although some congruence exists, BLNR's and the University of Hawai'i at Hilo's public trust obligations are distinct from their obligations under HAR § 13-5-30(c). See Kauai Springs, 133 Hawai'i at 172, 324 P.3d at 982 ("As the

public trust arises out of a constitutional mandate, the duty and authority of the state 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.”).

The majority’s approach does little to correct these misapprehensions. To be sure, the majority cites an array of findings that are relevant to our determination of whether the Board fulfilled its public trust duties under article XI, section 1. Majority at 45-50. It notes, for instance, that BLNR found that the TMT Project will not cause a substantial adverse impact to geological sites and that the site will be decommissioned and restored upon the end of the lease or the project’s anticipated 50-year useful life. Majority at 48. And the majority points out that the Board required that the closed access road on Pu’u Poli’ahu be renaturalized and that five existing telescopes be decommissioned in conjunction with the construction of the TMT. Majority at 48-49.

The majority, however, does not provide significant guidance regarding how these findings should be evaluated or applied under our precedents, stating only in very general terms that they fulfil the requirement of conservation and resource protection. And, because the majority does not establish a framework or set forth specific requirements, the basis for its

determination that BLNR fulfilled its article XI, section 1 public trust obligations remains unclear.

Further, the majority misapprehends portions of the article XI, section 1 public trust doctrine that it does apply. In addressing the presumption in favor of public use, access, enjoyment, and resource protection, the majority cites the various grants, scholarships, and career training the operators of the TMT will offer the community if the project is allowed to proceed, as well as the sublease rent that will be paid to the University of Hawai'i. Majority at 49-50. The majority appears to conclude that these factors make the TMT project a public use that falls within the presumption. But this approach threatens to render the presumption meaningless. Although donations or payments to the State and community that are unrelated to the actual use of a resource may be somewhat relevant to whether the proposed use of the conservation land is being put to a reasonable and beneficial use, they have no bearing on whether the proposed use is itself "public" within the meaning of the presumption. Were this not the case, virtually any use of a natural resource could be converted to a public use falling within the presumption simply by coupling it with sufficient auxiliary payments to the State or community. Rather, our precedents make clear that the presumption in favor of public use refers to actual use of the land by the public. Zimring, 58

Haw. at 121, 566 P.2d at 735 ("Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation."); Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454 (same).

In all, the majority's analysis does not provide a workable approach for courts and agencies tasked with applying the public trust doctrine, particularly in light of the majority's decision not to define which aspects of the doctrine it would apply to conservation lands. I therefore evaluate the Board's decision under our established public trust framework to provide guidance in future cases.

IV. BLNR and the Permit Applicant Largely Fulfilled Their Obligations Under Our Existing Public Trust Framework.

Although it misconstrued its duties under article XI, section 1, the findings and conclusions that BLNR made regarding the public trust and other matters are sufficient to evaluate whether the Board satisfied the obligations outlined in the Kauai Springs framework.⁹ BLNR's factual findings on these

⁹ Under the adapted framework, an agency's obligations when evaluating a proposed use of conservation land may be summarized as follows:

- a. The agency's duty and authority is to maintain conservation land for future generations and to assure that the land is put to reasonable and beneficial use.
- b. The agency must determine whether the proposed use is consistent with the public trust purposes:

(continued . . .)

issues appear to be supported by substantial evidence and are thus not clearly erroneous, and an appellate court is therefore obliged to accept them. See Leslie v. Bd. of Appeals of Cty. of Hawai'i, 109 Hawai'i 384, 391, 126 P.3d 1071, 1078 (2006).

As discussed, an agency's foremost duties under the public trust doctrine are 1) to maintain the integrity of public natural resources for future generations and 2) to assure the resources at issue are put to reasonable and beneficial use as compared to other possible ways in which they could be utilized. Kauai Springs, 133 Hawai'i at 174, 324 P.3d at 984. I thus first examine whether BLNR ensured that the TMT project would not cause long-term damage to Hawaii's public natural resources. The Board made a range of detailed findings and conclusions relevant to this inquiry.

(. . . continued)

- i. the maintenance of conservation land in its natural state;
- ii. the protection of the common uses to which the general public puts conservation land, including access, outdoor recreation, and enjoyment;
- iii. the protection of conservation land in the exercise of Native Hawaiian and traditional and customary rights; and
- iv. the consideration of conservation land dedications and regulations enumerated by federal, state, and local law.

The Board considered the impact of the TMT project on water drainage, surrounding bodies of water, and Mauna Kea's underlying groundwater. It made additional specific findings regarding the impact of the project on the flora, fauna, and other biological resources located at and near the project site, including by considering the effect of the project on various habitats and the possibility of the introduction of invasive species. The Board also examined the project's effect on geologic sites in and around the project area. And the Board made detailed findings regarding the plan to decommission and restore the project site upon the completion of the TMT project.

Based on these findings, BLNR concluded that the TMT Project would not cause significant damage to the public natural resources on or surrounding the project site. It further concluded that the management plan "appropriately addresses" the eventual decommissioning and restoration of the site to its original, natural state. Considered together, these findings and conclusions indicate the Board properly discharged its duty to ensure the TMT Project does not permanently damage or compromise Hawaii's public natural resources so as to deprive future generations of their beneficial use.

The Kauai Springs framework next calls upon an agency to consider whether the proposed use of the conservation land is beneficial and reasonable in relation to other possible uses.

See 133 Hawai'i at 174, 324 P.3d at 984. The Board specifically found that "[t]he TMT Project will make optimum use of the natural resources" of the Mauna Kea summit, indicating that the TMT Project would result in greater public benefit than other possible uses of the conservation land and related public natural resources. The Board stated that these benefits would accrue at very little harm to the public. "Implemented in accordance with its plans," BLNR found, "the TMT Project will not consume significant natural resources; will not pollute; will not harm species of concern, or the environment generally; will not prevent contemporary, customary, historical and traditional cultural practices; will not impede recreational uses; and will not threaten the public health, safety, or welfare."

Under the framework, the agency must duly evaluate the impact of the proposal on the enumerated trust purposes this court has identified. Kauai Springs, 133 Hawai'i at 174, 324 P.3d at 984. As discussed, in the context of conservation lands, these purposes include the maintenance of conservation lands in their natural state, protection of recreational usage by the public, protection of conservation lands in the exercise of Native Hawaiian traditional and customary rights, and the preservation of various land dedications and compliance with

regulations in state and local law. Each of these trust purposes was properly considered by the Board in its decision and order.

When considering whether the TMT project was consistent with the public trust purpose of maintaining the conservation land in its natural state, the Board acknowledged that the TMT's Final Environmental Impact Statement indicated that the project would have an incremental negative effect on the site and surrounding environment. As a condition of its approval, however, BLNR required that the closed access road on Pu'u Poli'ahu and the batch plant staging area be fully and partially renaturalized, respectively, that three existing telescopes be permanently decommissioned as soon as reasonably possible, and that at least two additional facilities be permanently decommissioned by December 31, 2033. The Board found that, "[w]hen taken in conjunction with its proposed mitigation^[10] and applicable management and decommissioning plans, the overall effect of the TMT Project will be either

¹⁰ BLNR cited a number of proposed practices as "mitigation measures" that lessened the impact of the TMT project, including the site selection and physical design of the observatory and the implementation of various cultural and natural resources training programs for site personnel. However, as discussed infra, these factors simply lessened the impact of the project and did nothing to offset that impact by improving existing conditions. They were thus not truly mitigation measures for purposes of the constitutional public trust analysis.

neutral or provide for lesser overall impacts than current existing uses in the Astronomy precinct." The Board thus effectively concluded that the TMT project was not inconsistent with the trust purpose of maintaining conservation lands in their natural state because, when considered as a whole-- including the required decommissioning and renaturalization--the project would cause no greater divergence from the natural state of the land in the astronomy precinct than currently existed and would perhaps bring the land closer to its natural state than under present conditions.

BLNR also considered the effect of the TMT project on the public trust purpose of public access, enjoyment, and recreation. The Board found that, as a whole, the TMT project will neither "impede recreational uses" of Mauna Kea nor have an adverse impact on "recreational sites." Among related considerations, BLNR considered changes to the ambient noise level that the project might cause and concluded that the project would not "contribute to a noticeable increase in noise levels" at "noise-sensitive" recreational sites. The Board also examined the project's effect on visual and aesthetic resources, ultimately finding that it would not significantly impact any scenic vista or view plane identified in the Hawai'i County General Plan or the South Kohala Development Plan. The Board acknowledged, however, that "[t]here will be a temporary impact

to recreational visitors who expect to traverse near the construction site during construction.”

BLNR also made extensive findings regarding the effects of the TMT project on the public trust purpose of protecting Native Hawaiian traditional and cultural practices before ultimately finding that no traditional or cultural practices would be impeded by the project. See Majority at 34-37. And the Board found that, if constructed in accordance with all “relevant plans, sub-plans, and permit conditions,” the TMT project will comply with all applicable laws, including local, state, and federal land dedications and regulations. Accordingly, BLNR properly evaluated the impact of the TMT project on each of the enumerated public trust purposes as required by article XI, section 1 under the Kauai Springs framework.

Next, the framework sets forth evidentiary principles to guide the agency’s determinations.¹¹ It requires that

¹¹ Under the framework, the agency is provided with these evidentiary guides for assessing its public trust obligations:

- a. The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection.
- b. The agency should evaluate each proposal for use on a case-by-case basis.
- c. If the requested use is private or commercial, the agency should apply a high level of scrutiny.

(continued . . .)

agencies evaluate projects on a case-by-case basis, applying a presumption in favor of public use and subjecting proposed private and commercial uses to a high degree of scrutiny. BLNR examined the corporate entities associated with the TMT, noting that the consortium of education and research institutions that would construct and manage the project was a non-profit venture formed to advance human knowledge. The results of the research done by the project would be shared with the public, the Board found, potentially making great contributions to humankind's understanding of the universe. Based on these findings, BLNR concluded that the TMT Project was a public or quasi-public use of conservation land that was not subject to heightened scrutiny. The Board further effectively determined that, based on the circumstances of this particular case, the presumption in favor of actual public use of the land was rebutted. In light of the project's unique potential to advance human knowledge and understanding of the universe, the true mitigation measures that would be undertaken to offset the harm from the project to public trust purposes, and the project's concrete commitment to

(. . . continued)

d. The agency should evaluate the proposed use under a "reasonable and beneficial use" standard, which requires examination of the proposed use in relation to other public and private uses.

the eventual restoration of the conservation land affected by the construction and operation of the TMT, the Board did not err in its determination.

Accordingly, when considered together, there is a sufficient basis in the Board's findings and conclusions to confirm that the agency met each of its Kauai Springs public trust obligations. The Kauai Springs framework also sets forth criteria that applicants must meet to gain approval of a proposed use of public natural resources.¹² 133 Hawai'i at 174-75, 324 P.3d at 984-85. Under the framework, applicants must demonstrate an actual need for the resource, a lack of alternative means of meeting that need, and the undertaking of reasonable mitigation measures if the proposed use will cause harm to the public trust purposes this court has identified.

Id.

¹² As discussed above, under the adapted framework, applicants have the burden to justify the proposed use of conservation lands in light of the trust purposes, which may be summarized as follows:

- a. Permit applicants must demonstrate their actual needs and the propriety of using state conservation lands to satisfy those needs.
- b. The applicant must demonstrate the absence of a practicable alternative location for the proposed project.
- c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must implement reasonable measures to mitigate such cumulative impact from existing and proposed projects using conservation land.

BLNR made detailed findings regarding the process by which the summit of Mauna Kea was selected as the location for the TMT project. The decision was the result of an extensive worldwide study to evaluate potential locations. The study concluded that a unique combination of environmental factors made the Mauna Kea summit the best location for the project, including its altitude, location at a favorable latitude, atmospheric clarity and stability, general lack of cloud cover, low humidity, low mean temperature and temperature variability, and distance from light pollution. The Board also made findings regarding the advantages of locating the TMT near related scientific facilities, which would allow the projects to work in conjunction for mutual benefit. Additionally, the Board found that locating the TMT in Hawai'i will allow the United States to remain at the forefront of astronomy research--a goal that may be unrealized if the TMT were built outside the country.

In short, the University of Hawai'i at Hilo (UH) offered substantial evidence demonstrating its need for the unique natural resources at the summit of Mauna Kea and that alternative locations would be substantially less suited to meeting that need. It therefore satisfied the first two criteria for approval under article XI, section 1 as interpreted in the Kauai Springs framework.

BLNR determined, however, that there will be at least some harm to the public trust purposes this court has identified when it acknowledged that, considered alone, the TMT would have an "incremental" negative effect on natural resources at the project site and a temporary impact to recreational visitors who expect to traverse near the construction site during construction. UH was therefore required to demonstrate that reasonable mitigation measures would be undertaken to reduce the cumulative harm of TMT and other existing projects making use of conservation land on the public trust purposes. Kauai Springs, 133 Hawai'i at 175, 324 P.3d at 985.

BLNR found that UH demonstrated an extensive number of mitigation measures associated with the project, including locating the project below the summit ridge, making various adjustments to how the access way and observatory will be built, installing a zero-discharge wastewater system, implementing special training and a mandatory ride-sharing program for TMT employees, and a host of other efforts intended to minimize the impact of the TMT project. But this misconstrues the mitigation analysis. By their nature these efforts cannot mitigate the impact of the TMT project because they are part of the TMT project and merely reduce its impact without counterbalancing

the deleterious effects.¹³ This is to say that alterations in how the TMT project will be carried out are included in evaluating the project's effect. If the impact of the project on public trust purposes remains negative after accounting for these modifications, then applicants are additionally required to demonstrate that mitigations measures will be undertaken to offset this effect. Cf. Morimoto v. Bd. of Land & Nat. Res., 107 Hawai'i 296, 299, 113 P.3d 172, 175 (2005) (citing a plan to acquire and manage "approximately 10,000 acres for Palila habitat restoration and an attempt to reintroduce the Palila to areas within their historic range where they had not resided" as a mitigation measure "to offset damage to Palila critical habitat and minimize effects on the species" from a proposed project).

Despite the Board's misapprehension as to what may constitute an appropriate mitigation action, substantial evidence was introduced that true mitigation measures will be undertaken that are sufficient to offset the harm from the

¹³ Further, it is unclear that some of these actions are not measures that the TMT project would have undertaken in any event. For example, the summit ridge was likely unavailable as a potential location for the 180 foot tall telescope due to height restrictions according to evidence presented at the hearing. In assessing whether applicants have sufficiently demonstrated mitigation measures to offset the negative impact of a proposed project, an agency should not credit the applicant for simply complying with regulations and not causing even greater damage to public trust purposes.

project on public trust purposes. The project will fund the renaturalization of a portion of the Batch Plant Staging Area and the closed access road on Pu'u Poli'ahu, as well as the decommissioning and restoration of five existing observatories. The project will also contribute funds to the maintenance of Mauna Kea. The Board concluded that these measures will mitigate the harm from the TMT Project and other uses of conservation land to the public trust purposes of maintaining conservation land in its natural state, protecting the use of conservation land in the exercise of Native Hawaiian traditional and cultural practices, and providing for public recreational access. Considered together, these measures indicate that UH sufficiently carried its obligation to demonstrate that damage to public trust purposes will be offset by the implementation of reasonable mitigation measures.

V. BLNR's Duty to Prudently Manage Public Natural Resources Requires it to Ensure Funding will be Available to Complete the TMT Project Prior to Commencement of Construction.

I share the majority's concern regarding the adequacy of the applicants' assurances that sufficient funding will be available for decommissioning. Majority at 51 n.29. Further, as the majority aptly notes, we have often stated that the article XI, section 1 public trust "duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager." Majority at 50 n.28 (quoting Waiāhole

I, 94 Hawai'i at 143, 9 P.3d at 455). Courts have long interpreted the duties of a trustee to include a responsibility to manage the assets of a trust with caution and prudence. See Restatement (Third) of Trusts: General Standard of Prudent Investment § 90 (2007). I do not believe simply ensuring the availability of funds for decommissioning and restoration adequately meets this standard because the ultimate state of the conservation land upon completion of the project does not fully reflect the project's public costs.

As the Board found, both the construction and decommissioning of the project will cause some disruption and impairment to the public's use and enjoyment of Mauna Kea, and the project footprint will be unusable for other purposes for the duration of the project. These adverse impacts will potentially be offset by the public benefits of the TMT project if it is completed as planned. But these benefits will not accrue if there is insufficient funding to complete construction and operate the TMT as intended, leaving only the aforementioned negative effects as the result of the endeavor.

Indeed, other state agencies considering potential development have made detailed findings regarding an applicant's finances and ability to complete a proposed project. See, e.g., In re Castle & Cooke Homes Hawai'i, Inc., No. A11-793 at 16 (Haw.

Land Use Comm'n June 21, 2012), http://files.hawaii.gov/luc/canchohonolulu/a11793_dando_06212012.pdf (making findings regarding "petitioner's financial capability to undertake the project" (capitalization omitted)); In re Lanai Resort Partners, No. A89-649 at 9-10 (Haw. Land Use Comm'n Apr. 16, 1991), http://luc.hawaii.gov/wp-content/uploads/2018/03/A89-649_Lanai-Resorts_FOFCOLDO_4-16-1991.pdf (same). And BLNR appears to have in the past acknowledged the importance of such verification when considering the development of Mauna Kea.

Before the Board in this case, a party that was challenging the approval of the conservation district use permit argued that approval would be inconsistent with Section II(C) of the Mauna Kea Plan that the Board formally adopted in 1977. This provision provided that "[n]o application or any proposed facility shall have final approval without the applicant having first filed with the Board, adequate security equal to the amount of the contract to construct the telescope facilities, support facilities and to cover any other direct or indirect costs attributed to the project." In its findings, the Board stated that the 1977 Mauna Kea Plan has "obviously been superseded by the much more detailed and extensive planning efforts" undertaken since its release. However, The Board identified no rule or other document that it had formally adopted that either expressly overrode the 1977 Mauna Kea Plan

or otherwise addressed the funding requirements for projects undertaken on the site.

Ultimately, this issue is not raised on appeal, and thus it is not necessary for this court to determine whether the Board's decision was consistent with its internal rules regarding funding. Nevertheless, I do not believe a prudent trustee of public natural resources would assume the risks associated with the TMT project without assurances beyond vague statements regarding future fundraising of an indeterminate nature to be undertaken at an indefinite time. I would therefore hold that the Board is obligated under article XI, section 1 to utilize Special Condition Forty-Three in its Decision and Order, which permits the Chairperson to prescribe additional conditions on the conservation district use permit, to require the permittee to provide concrete information demonstrating the ability of the responsible parties to acquire the requisite construction and operation funding prior to beginning construction.

VI. Conclusion

As an island state, Hawaii's natural resources are necessarily limited and cannot be replenished from a bordering state or country. Consequently, Hawai'i has historically provided special protections to its public natural resources, entrusting them to the care of the king or government for the

benefit of all its people. It is thus unsurprising that the framers granted these principles the greatest security that may be afforded, incorporating them into the very document that creates the government of this state.

In interpreting these provisions, our cases have provided a level of protection for these public natural resources commensurate with their constitutional stature and historical importance. And while we have often defined these public trust principles in the context of water resources, neither history nor the text of our constitution provide for a hierarchy between water and land. Our public trust precedents should thus be applied equally to conservation land, ensuring that it is preserved to be passed to future generations as it was preserved for us.

/s/ Richard W. Pollack



I join in this opinion as to Parts I-III.

/s/ Michael D. Wilson