

No Ke Ola Pono O Ka Lāhui Hawai`i: The
Protection and Perpetuation of Customary and
Traditional Rights as a Source of Well-Being for
Native Hawaiians

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Traditional Hawaiian Land Tenure

- Maka`aināna permitted to cultivate lands in exchange for services to the ali`i
- Acute awareness of their surroundings and the interrelationships between life cycles of plants and animals
- Sophisticated and highly complex kapu regulating resources



Changes to Traditional Land Tenure System

- Mahele of 1848
 - Conversion to western system of private property rights
 - Doctrine of Adverse Possession
 - Trespass
 - Letters to Minister of the Interior from various Hawaiians (1850-1880).



Cultural “Kīpuka”

- Rural Hawaiian Communities and their customs and traditions survive due to isolation/cost to develop.
- Analogous to kīpuka caused by geographic and geological isolation
- Serve as cultural “kīpuka” to train new practitioners and thus re-propagate areas devoid of Hawaiian practices



Customary and Traditional Practices and the Well-being of Native Hawaiians

- Value:
 - Supplement income for struggling families
 - Establish confidence, pride, self-worth in perpetuating practices of our ancestors
 - Promote healthy living/lifestyles, e.g., using components of a traditional Hawaiian diet consisting of low fat/protein and high carbohydrates using fresh foods



Challenges

- Lack of access to resources
 - Use of threats, intimidation, or erecting physical obstacles to the exercise of customary and traditional rights.
- Attaching conditions to the exercise of such rights
 - Limited amount of parking stalls



Sources of customary and traditional rights

- H.R.S. section 7-1 (“Kuleana Act”)
 - Right to gather firewood, house timber, aho cord, thatch, or ki leaf.
 - Right to access and water (in general terms)
- H.R.S. section 1-1 (“Hawaiian Usage” exception)
 - Codifies the English common law doctrine of custom
 - Includes other practices not specifically enumerated under 7-1
 - Must be in existence as of November 1892
 - Balancing test: look to respective interest and harm of the parties
- Article 12, section 7, Hawai`i State Constitution
 - Doesn’t create new rights, but reaffirms existing rights
 - Raises right to a level of constitutional importance



Judicial Interpretation

- Government officials have an affirmative obligation to protect these rights
- Does not constitute a “taking” of private property
- Is a valid defense to criminal trespass
- Applies not only to persons of Hawaiian ancestry, but to those non-Hawaiian spouses and friends who accompany the practitioner.
- Must be a Native custom/practice
- The exercise must be “reasonable”
- Must take place on “undeveloped” lands



Other issues

- Education of practitioners on the legitimacy of their rights
- Continued protection of the resource sought by practitioners

