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The Indigenous Peoples' Journal of Law, Culture & Resistance

Title

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Permalink

<https://escholarship.org/uc/item/6qx331sp>

Journal

The Indigenous Peoples' Journal of Law, Culture & Resistance, 10(1)

ISSN

2575-4270

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Publication Date

2026-10-30

DOI

None/uclalaw_ipjlcrr.70047

Peer reviewed

MAUNA KEA TELESCOPE AND THE FAUX EXPANSION OF THE PUBLIC TRUST DOCTRINE

Dennis W. Jung

In re Contested Case Hearing Re Conservation Dist. United States Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, a case decided in 2018 by the Hawai‘i Supreme Court, found lands set aside in public trust for “native Hawaiians and the general public” to be lands set aside in trust for the people. Indigenous lands were taken from native Hawaiians, again, but this time, arguably, with judicial protection grounded in interpreted language of the Hawai‘i Constitution.

Native Hawaiian cultural practitioners (“the plaintiffs”)¹ challenged a proposal by the University of Hawai‘i to offer an international consortium of

¹ Native Hawaiian cultural practitioners opposed the development of a large telescope near the summit of Mauna Kea. The case for Native Hawaiians is summarized by the Court, as follows:

Some Native Hawaiians, including some of the appellants, consider Mauna Kea, which rises to an elevation of 13,796 feet above sea level, to be an ancestor, a living family member and progenitor of Hawaiians, born of *Wākea* (Sky Father) and *Papa* (Earth Mother). They consider the Mauna Kea summit area, also known as *Kūkahau‘ula* (cluster of *pu‘u* or cinder cones), to be a *wahi pana* (storied place) and *wao akua* (the place where gods reside), the realm of ancestral *akua* (gods, goddesses, deities) believed to take earthly form as the *pu‘u*, the waters of Lake Waiau, and other significant landscape features. The summit of Mauna Kea is thought to touch the sky in a unique and important way, as a *piko* (navel) by which connections to the ancestors are made known to them, or as the *piko ho‘okahi* (the single navel), which ensures spiritual and genealogical connections, and the rights to the regenerative powers of all that is Hawai‘i. The large number of shrines on Mauna Kea indicate that there was a pattern of pilgrimage, “a walk upward and backward in time to cosmological origins,” to worship the snow goddess *Poli‘ahu* and other *akua* such as *Kūkahau*, *Līlīnoe*, and *Waiau*. As discussed later, various Native Hawaiian traditional and customary practices are derived from these beliefs, which have also led to related contemporary cultural practices. Before Western contact, the summit area was considered *kapu* (taboo) to all but the highest chiefs and priests, and unavailable to the general public. Archaeological research also indicates that from as early as 1100 A.D., and continuing through the 1700s up until the time of Western contact, Native Hawaiians mined extremely high quality, dense, blue-black basalt in a 4,800 acre adze quarry on the southern slopes of Mauna Kea concentrated between 11,500 and 12,400 square feet above sea level to produce tools to cut trees, shape canoes, and carve other smaller items.

In re Contested Case Hearing Re Conservation Dist. U.S. Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Rsr. (Matter of Conservation Dist. Use Application HA-3568), 431 P.3d 752, 758–59 (Haw. 2018).

scientists the opportunity to build a thirty-meter telescope on five acres of land near the summit of Mauna Kea, on the island of Hawai‘i.² The action specifically being challenged was the issuance of a Conservation District Use Permit. A hearing was held and the hearing officer who recommended that a permit should be granted to allow the international consortium to build a thirty-meter telescope on Mauna Kea.³ The State of Hawai‘i’s Board of Land and Natural Resources (“BLNR”) reviewed the recommendations of the hearing officer and rendered final approval for the granting of the permit. The plaintiffs appealed the BLNR administrative decision to the Hawai‘i Supreme Court (“Court”). On appeal, the Court affirmed the BLNR decision to permit a thirty-meter telescope to be built near the summit of Mauna Kea, pursuant to “Article XI, Section 1 of the Hawai‘i Constitution and public trust principles.”⁴ A published decision was handed down by the Court, *In re Contested Case Hearing Re*

² The international consortium of scientists believed that the telescope would be an appropriate land use, that measures could be taken to reduce the telescope’s impact, and that Mauna Kea would be honored through advancement of scientific knowledge. In 1968, the University of Hawai‘i acquired a general lease for a science reserve, including a 525-acre astronomy precinct, on Mauna Kea above the 12,000-foot elevation. Over the years observatories have been built at Mauna Kea. In 2003, Caltech and the University of California formed TMT Corporation, for the purpose of building a thirty-meter telescope (“TMT”). Mauna Kea was selected as its site. In 2014, TMT was transferred to a nonprofit organization comprised of the Regents of the University of California, Caltech, the National Institutes of Natural Science of Japan, the National Astronomical Observatories of the Chinese Academy of Sciences, the Department of Science and Technology of India, and the national Research Council of Canada. *Id.* at 759–60.

³ A Conservation District Use Application (“CDUA”) for TMT was submitted on September 2, 2010. A permit was granted on April 12, 2013, but a court order approving the permit application was vacated by the Hawai‘i Supreme Court, and the matter was set for a contested hearing before a hearing officer. On September 27, 2017, the BLNR approved the permit in a 271-page Findings of Fact, Conclusions of Law and Decision and Order. *Id.* at 759–60.

⁴ Native Hawaiians opposed the granting of this permit on spiritual and cultural grounds. On appeal, the Court considered, in pertinent part, the following points of error alleged on appeal: 1) Whether the BLNR fulfilled its duties under Article XII, Section 7 of the Hawai‘i Constitution, and *Ka Pa‘akai o Ka ‘Aina v. Land Use Commission*; 2) Whether the BLNR erred in concluding that the Hawai‘i Constitution does not protect contemporary native Hawaiian cultural practices; 3) Whether the TMT Project violates religious exercise rights of Native Hawaiians protected by federal statutes; 4) Whether the Hearing Officer should have allowed briefing and a hearing on a motion to disqualify [the University of Hawai‘i at Hilo] as applicant based on its alleged hostility toward traditional Hawaiian faith; 5) Whether the Hearing Officer should have allowed briefing and a hearing on a motion to dismiss based on violation of the desecration statute of the Hawai‘i Penal Code; 6) Whether the Hearing Officer should have excluded challenges to the legal status of the State of Hawai‘i and its ownership of Mauna Kea as well as the existence of the Kingdom of Hawai‘i; 7) Whether the TMT Project violates Article XI, Section 1 of the Hawai‘i Constitution and public trust principles; 8) What the nature of the proceeding was below, and whether there is an appropriate record on appeal; 9) Whether the Hearing Officer improperly failed to provide reasoned explanations for her orders; 10) Whether the Hearing Officer improperly failed to provide required rulings and explanations for thousands for proposed findings of fact; and 11) Whether the entire proceeding was not legitimate. *Id.* at 759–62; *see also* HAW. CONST. art. XII, § 7; *id.* art. XI, § 1.

*Conservation Dist. United States Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve.*⁵

DISCUSSION

The Court's decision focused on the language of Article XI, Section 1 of the Hawai'i Constitution ("Article XI, Section 1"), which reads:

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.

In the majority opinion, the Court reasoned that the Constitution places all public lands into the public trust. Specifically, the Court stated:

The plain language of Article XI, Section 1 provides that all public natural resources, including land, are held in trust by the State for the benefit of the people. **We 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.** The plain language of Article XI, Section 1 further requires a balancing between the requirements of conservation and protection of public natural resources, on the one hand, and the development and utilization of these resources on the other in a manner consistent with their conservation. We have also stated that the balancing must be "consistent with ... conservation [of these resources] and in furtherance of the self-sufficiency of the State." We have also stated Article XI, Section 1, requires the state both to "protect" natural resources and to promote their "use and development," consistent with the conservation of the natural resources. We have also indicated that any balancing between public and private purposes must begin with a presumption in favor of public use, access and enjoyment..⁶

Justice Pollack concurred with the majority, in the following:

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." However, Hawaii's public lands have long been regarded as subject to the doctrine incorporated by article XI,

⁵ *Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d at 759–62. A review of this decision has been published. See William N.K. Crowell, *Chipping Away at the Public Trust Doctrine: Mauna Kea and the Degradation Principle*, 21 ASIAN PACIFIC L. & POL'Y J. 1 (2019).

⁶ *Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d at 773–74 (emphasis added) (footnote omitted) (citation omitted). Compare *id.*; with *State by Kobayashi v. Zimring*, 566 P.2d 725, 731 (1977) (finding that only land that has not been awarded or granted belong in the public domain).

section 1, having been held in trust for the people's benefit since the times of the Hawaiian Kingdom.

In 1840, King Kamehameha III promulgated the first constitution to bind Hawai'i. 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.

Thus, "[i]t was long ago acknowledged that the people of Hawai'i are the original owners of all Hawaiian land," with the king holding it as a trustee and managing it for their benefit.

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. After the Great Māhele, 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, and tenants. 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."

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. Writing for the court, Chief Justice Richardson stated that "the origin and development of the private title in Hawai'i 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." 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."

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.

In a footnote, Chief Justice Richardson cited [*Illinois Central R.R. v. Illinois*] 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.

Indeed, the delegates to the 1978 Hawai‘i Constitutional Convention adopted article XI, section 1 only a year after *Zimring* was decided. Although *Zimring* was not mentioned by name, the delegates several times mentioned *McBryde Sugar Co., Ltd. v. Robinson*, a very similar case decided a few years earlier in which this court also discussed the Great Mahele before holding that the ownership of the state’s waters continued to be held in public trust for the benefit of the people. The delegates then adopted language that expressly set forth the State’s obligation to “conserve and protect... all natural resources, including land,” reaffirming that “all public natural resources are held in trust by the State for the benefit of the people.”

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.”

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. 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. 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.⁷

With this holding, the Court uprooted a general understanding of Article XI, Section 1 of the Hawai‘i Constitution and the public trust doctrine, as it pertained to water and other natural resources.⁸ The Court’s reasoning would be less susceptible to challenge if it was able to show support for its reading of “natural resources” to include “land,” from three sources. The first would be from directly within the Hawai‘i Constitution. Secondly, the Court could try to show that interpretation was the intention of the people adopting it. And,

⁷ *Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d at 783–86 (Pollack, J., concurring) (emphasis added) (footnote omitted) (citation omitted) (citing *Zimring*, 566 P.2d at 731). *Zimring* explained how land in its original state, not awarded or granted, remained in the public domain, and that history demands that such land inure to the benefit of all the people of Hawaii in whose behalf the government acts as trustee. *Zimring*, 566 P.2d at 738–39

⁸ See Kent D. Morihara, *Hawai‘i’s Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177 (1997); Denise E. Antolini, *Water Rights and Responsibilities in the Twenty-First Century: A Forward to the Proceedings of the 2001 Symposium on Managing Hawaii’s Public Trust Doctrine*, 24 U. HAW. L. REV. 1 (2001); *Proceedings of the 2001 Symposium on Managing Hawaii’s Public Trust Doctrine*, 24 U. HAW. L. REV. 21 (2001); Keala C. Ede, *He Kanawai Pono no ka Wai (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in In Re Water Use Permit Applications*, 29 ECOLOGY L.Q. 283 (2002); see also *Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d at 774–75, n.24 (McKenna, C.J., majority opinion) (“with respect to the Article XI, Section 1 public trust as to conservation lands, we do not wholesale adopt our precedent setting out public trust principles as applied to the state water resources trust”).

lastly, the third source of support for the Court's interpretation could be insights derived from orthodox methods of constitutional interpretation.⁹ Even beyond these sources of support, the Court must also be able to show continuity between its reading of "natural resources," and other provisions within the Hawai'i Constitution.¹⁰ With so much that could have been said, the Court offered up a holding that is not much more than the conclusion that land is a "natural resource." The Court must know that this holding is problematic.¹¹

The problem of conflation is not lost to the Court. In Footnote 24 to the Court's decision, we find the Court juggling the problem of persistent issues:

We note that **Appellants only assert a violation of public trust principles** under Article XI, Section 1, and although Appellees raise arguments based on permissible uses of ceded lands pursuant to Section 5(f) of the Admission Act of 1959, Appellants have not alleged a violation of the ceded lands trust. Section 5(f) ceded lands trust purposes are "[1] the support of the public schools and [2] other public educational institutions, [3] the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [4] the development of farm and home ownership on as widespread a basis as possible for the making of public improvement, and [5] the provision of lands for public use."

Ceded lands are also subject to Article XII, Section 4 of the Hawai'i Constitution, which provides that "[t]he lands granted to the State of Hawai'i by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native

⁹ The fundamental principle in construing a constitution provision is to give effect to the intention of the framers and the people adopting it. *Huihui v. Shimoda*, 531, 644 P.2d 968, 971 (Haw. 1982) (citing *State v. Miyasaki*, 614 P.2d 915, 922 (Haw. 1980) (quoting *HGEA v. County of Maui*, 576 P.2d 1029, 1039 (Haw. 1978)); *accord Kaheawa Wind Power, LLC v. County of Maui*, 456 P.3d 149, 160–61 (Haw. 2020); *Nelson v. Hawaiian Homes Comm'n*, 277 P.3 279 (Haw. 2012); *Blair v. Harris*, 45 P.3d 798 (Haw. 2002); *Pray v. Jud. Selection Comm'n of Haw.*, 861 P.2d 723 (Haw. 1993); *Bd. of Educ. v. Waihee*, 768 P.2d 1279 (Haw. 1989); *Cobb v. State of Hawai'i*, 722 P.2d 1032 (Haw. 1986); *Hayes v. Gill*, 473 P.2d 872 (Haw. 1970).

¹⁰ *Id.*; *Hanabusa v. Lingle*, 93 P.3d 670, 673–74 (Haw. 2014) (holding a constitutional provision must be construed in connection with other provisions of Hawai'i Constitution). Article XI, Section 1 and Article XII, Section 4 are complementary amendments that were adopted together dealing with both land and natural resources.

¹¹ Land acquired from recently flowing lava is distinguished from land that is not recently created. *Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d at 784 (Pollack, J., concurring) (citing Chief Justice Richardson in *Zimring*, 566 P.2d at 725, 731)). *Zimring* refused claim of adjoining landowner that land created by flowing lava belonged to him because land in its original state is public land; if not awarded or granted, such land remains in the public domain. *Id.* (citing *Zimring*, 566 P.2d at 731). It necessarily follows from *Zimring* that lands "awarded or granted" may not be "land in its original state" or "public lands," because lands that have been "awarded or granted," such as "ceded lands," may be constrained through the law of title, such that "ceded lands" may not be a public natural resource within the meaning of Article XI, Section 1, even though public natural resources are well established under our law. *Zimring*, 566 P.2d at 731.

Hawaiians and the general public.” Article XVI, Section 7 in turn provides that “[a]ny trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.”¹²

The Court’s decision is vexing.¹³ The Court rejects the plaintiff’s claims based on Article XII, Section 4 of the Hawai‘i Constitution (“Article XII, Section 4”) because of their failure to argue a “violation of ceded lands trust,” or to assert a violation of Article XII, Section 4.¹⁴ But, the procedural rule is well-established—¹⁵ Points of error must be set forth in separately numbered paragraphs.¹⁶ When the point of error involves a finding or conclusion of the court or agency, either quotation of finding or conclusion urged as error or ref-

¹² *Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d at 774–75 n.24 (McKenna, C.J., majority opinion) (emphasis added) (citation omitted).

¹³ Justice Pollack’s concurring opinion maps out a history of crown lands being held in trust for the benefit of the people since the time of the Hawaiian kingdom. Even if Justice Pollack’s study of Hawaiian history is correct, Justice Pollack maps out a history of the royal protection of crown lands for the benefit of native Hawaiians, who were loyal subjects of the crown, living in an era before the wrongful overthrow of the Kingdom of Hawai‘i. This is not a history of the protection of crown lands held for the benefit of modern citizens of the United States of America who reside in the State of Hawai‘i, in the United States of America, who flourish on land which was wrongfully taken from the people of the Kingdom of Hawai‘i. This distinction is forged into Article XII, Section 4 of the Hawai‘i Constitution through Section 5 of the Admissions Act.

¹⁴ HAW. CONST. art. XII, § 4. Article XI, Section 1, without Article XII, Section 4, creates and advances an unbalanced legal doctrine that blurs a meaningful distinction between public land, as a “natural resource,” and public land, like Mauna Kea, which are entrusted to the State of Hawaii as public trustee subject to binding constraints of the Admissions Act.

¹⁵ *Id.*

¹⁶ See Rule 28(4) of the Hawai‘i Rules of Appellate Procedure, which states in pertinent part:

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following: (A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected; (B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial; (C) when the point involves a finding or conclusion of the court or agency, either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusions; (D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

HAW. R. APP. P. 28(4). This rule requires Appellants to concisely state erroneous findings of fact or conclusions of law about which Appellants complain.

erence to appended findings and conclusions shall also be included.¹⁷ The Court does not explain Appellants' failure from within the language of the Hawai'i Constitution.¹⁸ The Court's refusal to clarify is noteworthy because Appellants arguably preserved "ceded land trust" as a point of error for appeal.¹⁹

Appellants challenged the TMT Project as a violation of "public trust" principles.²⁰ They also challenged BLNR's reliance upon Article XI, Section 1 of the Hawai'i Constitution ("Article XI, Section 1").²¹ The Court affirmed the decision of BLNR, establishing Article XI, Section 1 as the controlling principle and including discussion of "ceded lands."²² Appellants pointed out that reliance upon Article XI, Section 1 was not correct. The Court does not provide reasoning for their objection of this argument which raises the question, what did the appellants do wrong in complaining about Article XI, Section 1 and BLNR's violation of public trust principles? Footnote 24 does not explain why Article XII, Section 4 should not control, and especially not when Article XII, Section 4 necessarily conflicts with Article XI, Section 1.²³ This conflict remains embedded within the Court's decision regardless of whether Appellants cite to Article XII, Section 4, or not, because Article XI, Section 1 competes with Article XII, Section 4. The Court must have known that Indigenous belief in the sacredness of Mauna Kea was not going to go away just because Appellants failed to fully articulated the points of error on appeal to the Court's satisfaction

¹⁷ *Id.*

¹⁸ *See Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d at 774–75 n.24. Appellant's objection about a "violation of public trust principles" triggered an objection based upon Article XII, Section 4 of the Hawai'i Constitution, even if "Article XII, Section 4" was not actually written, because, within pertinent articles of the Hawai'i Constitution, only Article XII, Section 4 contains the language "public trust," such that a "public trust" objection, in Appellant's complaint about the State of Hawaii's "violation of public trust principles" incorporates Article XII, Section 4 by reference, as if the same were more fully stated therein. Appellant's objection about a "violation of" Article XII, Section 4's "public trust principles" speaks to a legitimate point of error, notwithstanding Footnote 24. *Id.*

¹⁹ *See id.* Appellants' complaint over the State of Hawaii's reliance on Article XI, Section 1, and Appellant's objection to the State of Hawaii's failure to apply Article XII, Section 4 are complementary points of error, which together explain the error in the State of Hawaii's decision which the Court affirmed on appeal. *Id.*

²⁰ *Id.* at 761.

²¹ *Id.* at 774–75..

²² *Id.* at 774–75 n.24. Footnote 24 comments about "ceded lands" and the "public trust" created by Article XII, Section 4, are impertinent because "ceded land" or "ceded lands trust," are non-textual, giving no meaning or reference to either Article XI, Section 1 or Article XII, Section 4. *Compare id.*; with Haw. CONST. art. XI, § 1; and *id.* art. XII, § 4. However, Footnote 24 foreshadows the resilience of Appellant's points of error, as Justice Pollack juxtaposes "ceded lands" with lands newly created by lava. *See State by Kobayashi v. Zimring*, 566 P.2d 725, 731 (1977)

²³ The Court's ability to explain Appellants' arguments are convincing evidence of compliance with Rule 28(4) of the Hawai'i Rules of Appellate Procedure. *See Hous. Fin. & Dev. Corp. v. Ferguson*, 977 P.2d 1107, 1111–12 (Haw. 1999); *Bettencourt v. Bettencourt*, 909 P.2d 553, 556 (Haw. 1995) (applying judicial policy to afford litigants the opportunity to have their cases heard on the merits).

Principles of constitutional interpretation are well established.²⁴ In fact, in a previous opinion, the Hawai‘i Supreme Court wrote:

Because constitutions derive their power and authority from the people who draft and adopt them, 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 that intent. This intent is to be found in the instrument itself.

[T]he 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. In this regard, the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.

Moreover, a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.²⁵

The Court offered little beyond the assertion of plain language within the Hawai‘i Constitution.²⁶ Further, Justice Pollack’s concurring opinion does not help because he draws upon the history and common law of the Kingdom of Hawaii, in addition to other facts and circumstances which should arguably play no role in the constitutional interpretation of provisions ratified by the 1978 Hawai‘i Constitutional Convention. Rather, the intent of the delegates to the 1978 Hawai‘i Constitutional Convention is plainly controlling on their amendments to the Hawai‘i Constitution and should remain unaffected by arcane historical references. In addition, clear and unambiguous provisions must be construed as they are written, and lastly, and other adopted and ratified articles by the Convention delegates may conflict with the establishment of land as a “natural resource” pursuant to Article XI, Section 1.²⁷ Justice Pollack’s concurring opinion falters when it admits that BLNR’s conclusions are not wholly consistent with the law. This concession weakens the entire holding because Justice Pollack’s departure from the majority’s opinion (“Mauna Kea”) are matters of substance, and not mere *obiter dicta*.²⁸ Mauna Kea neither refutes nor rebuts these aspects of Justice Pollack’s concurring opinion.

²⁴ Kaheawa Wind Power, LLC v. County of Maui, 456 P.3d 149, 160–61 (Haw. 2020).

²⁵ *Hanabusa v. Lingle*, 93 P.3d 670 (Haw. 2004) (citing *Blair v. Harris*, 45 P.3d 798, 800–01 (2000)).

²⁶ The Court should have explained why Mauna Kea belongs in the Article XI, Section 1 trust for the people, and not the Article XII, Section 4 public trust for native Hawaiians and the general public, from study into the intent of the people who drafted the articles and the people who adopted them.

²⁷ 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 that intent. *Hanabusa*, 93 P.3d at 670 (citing *Blair*, 45 P.3d at 800–01). Constitutional provisions must be construed in connection with other provisions of Hawai‘i Constitution, and in the light of the circumstances under which it was adopted, and the history which preceded it. *Id.*

²⁸ Justice Pollack uses Zimring to explain historically a creation of conservation land under Article XI, Section 1, which finds the Court engaged in a process of groping through the law

The 1978 Hawai‘i Constitutional Convention adopted and ratified Article XII, Section 4 of the Hawai‘i Constitution, which reads:

The lands granted to the State of Hawai‘i by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as “available lands” by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a **public trust for native Hawaiians** and the general public.²⁹

Section 5(b) of the Admission Act certainly renders the lands near the summit of Mauna Kea to be land transferred to the State of Hawaii, pursuant to Section 5 of the Admissions Act.³⁰ The import of Section 5 of the Admissions Act, and the issue of “ceded lands” are well understood, even by the Court, in the contentious history between native Hawaiians and those who favored the then foreign involvement of the United States.³¹

The 1978 Hawai‘i Constitutional Convention created Article XII, Section 7 of the Hawai‘i Constitution, which reads:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978].³²

of title, in a special case where land newly created by lava flow must be a “public natural resource,” as well as land that cannot run afoul of Article XII, Section 4, or Section 5 of the Admissions Act, because land newly created by lava flow is probably not land that could have been previously “awarded or granted.”

²⁹ HAW. CONST. art. XII, § 4 (emphasis added).

³⁰ See JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? (2008) (noting “ceded lands” are lands conveyed in public trust to the State of Hawai‘i at the time of statehood).

³¹ Justice Pollack writes:

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 Admissions 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 in 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. 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.

Matter of Conservation Dist. Use Application HA-3568, 431 P.3d 752 788 (Haw. 2018) (Pollack, J., dissenting) (emphasis added). Justice Pollack conceded to Mauna Kea being “ceded land,” in the context of seeing Mauna Kea as both conservation land and a public natural resource. Compare *id.* at 784; with *State by Kobayashi v. Zimring*, 566 P.2d 725, 731 (1977).

³² HAW. CONST. art. XII, § 7.

The 1978 Hawai‘i Constitutional Convention also promulgated Article XVI, Section 7 of the Hawai‘i Constitution, which reads:

Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.³³

The purpose of noting these sections is to highlight that Article XI, Section 1 of the Hawai‘i Constitution was not created in isolation. The delegates to the 1978 Hawai‘i Constitutional Convention carefully crafted a unified legal framework, to address both land and natural resources, and redundantly drilled down the matter of lands held in public trust for the benefit of native Hawaiians. The deafening silence of the Court as to the meaning and obligation of all four of these interlocking constitutional provisions respecting public land and public trust obligations of trustee State of Hawai‘i to native Hawaiians is maddening.

Article XI, Section 1 of the Hawai‘i Constitution speaks to a public trust for the benefit of the people. Article XII, Section 4 of the Hawai‘i Constitution addresses land being held by the State in public trust for the benefit of native Hawaiians and the general public. Therefore, even if there might be one public trust doctrine, there are two public trusts. In the aftermath of the Court’s holding, one could say that Article XII, Section 4’s public trust for native Hawaiians and the general public was swallowed by the State of Hawai‘i’s trust for the people. Specifically, the Court’s decision can be read to suggest that Indigenous lands held in public trust for native Hawaiians and the general public are no more.

Native Hawaiian cultural practitioners complained about the legal status of the State of Hawai‘i and the nature of its ownership of Mauna Kea as well as the existence of the Kingdom of Hawai‘i. They complained about Article XI, Section 1. They complained that the TMT project violated public trust principles. They complained about whether there was an appropriate record on appeal. Arguably, the sheer depth and breadth of complaints raised by the Indigenous practitioners were sufficiently weighty as to make it almost incumbent upon the Court to dress down the Indigenous practitioners over the issue whether Mauna Kea belonged to a public trust for Native Hawaiians, pursuant to Article XII, Section 4 of the Hawai‘i Constitution, even if the Indigenous practitioners referred to “lands in public trust,” instead of “ceded lands.”³⁴ The Court cannot say that it did not understand. The Court must have understood. The Court should have responded to the Indigenous practitioners

³³ *Id.* art. XVI, § 7.

³⁴ See VAN DYKE, *supra* note 30; James S. Burns, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries*, 38 U. HAW. L. REV. 213 (2105); Jonathan K. K. Osorio & Kamanamaikalani Beamer, *Sullyng the Scholar’s Craft: An Essay and Criticism of Judge James S. Burns’ Crown Lands Trust Article*, 39 U. HAW. L. REV. 469 (2017); Melody Kapiliaoha MacKenzie & D. Kapua’ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai‘i’s Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481 (2017). The issues raised by the Mauna Kea telescope do not exist in isolation.

on the issue of Indigenous lands. The Court's holding does not do that and so these questions persist.

Mauna Kea is not a natural resource, which includes land, in public trust for the benefit of "the people," because the Hawai'i Constitution does not make it so. Mauna Kea belongs in public trust for Native Hawaiians and the general public.³⁵ Further, nothing should turn on what the Indigenous practitioners did or did not do. Rather, the real issues are to be found in the record on appeal and the real question is whether the record on appeal provides actual support for the holding of the Court, all of this against the backdrop of the Court's curious refusal to deal with Article XII, Section 4.

The Indigenous practitioners asked whether the permitted telescope project violates public trust principles. The issues of land ownership, and subsistence, cultural, and religious rights of native Hawaiians, and the existence of a public trust for native Hawaiians, were clearly before the Court, in appellate review conducted *de novo*. Must the Indigenous practitioners lose, because they did not specifically use the Court's language, of "ceded lands," "ceded lands trust," or object to BLNR's lack of reference to "Article XII, Section 4," as mandatory elements of a points of error?³⁶

Under Hawai'i Revised Statutes Section 91-14(g), the Court, in review of BLNR's findings of fact and conclusions of law, need not affirm BLNR's factual findings, legal conclusions, decisions, or orders.³⁷ If BLNR failed to

³⁵ This proposition stems from readings of Article XII, Section of the Hawai'i Constitution and Section 5 of the Admission Act. *Compare* HAW. CONST. art. XII, § 4; *with* Hawaii State Admissions Act, Pub. L. No. 86-3, § 5, 73 Stat.4, 5-6 (1959).

³⁶ Does the Court want to suggest that merits of a serious issue can be ignored by word choice? Does the Court want to leave an impression that you either win or lose a case on appeal, depending upon a prowess to guess what words lie in the mind of the Court, such that you win if you write into your argument the words, "ceded lands trust," but you lose if you assert a violation of "public trust" principles?

³⁷ Section 5 of the Admission Act reads:

Section 5. (a) Except as provided in subsection (c) of this section, the State of Hawai'i and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawai'i and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Any lands and other properties that, on the date Hawai'i's admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawai'i shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

(d) Any public lands or other public property that is conveyed to the State of Ha-

properly consider the matter of title or ownership of lands held in “public trust for native Hawaiians and the general public,” pursuant to Article XII, Section 4 of the Hawai‘i Constitution, the Court should have remanded this case to BLNR with instructions for further proceedings. Nothing required the Court to

wai‘i by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawai‘i or any department thereof may, at any time during the five years following the admission of Hawai‘i into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States. [Am July 12, 1960, Pub L 86-624, 74 Stat 422].

(e) Within five years from the date Hawai‘i is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawai‘i by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(g) As used in this Act, the term “lands and other properties” includes public lands and other public property, and the term “public lands and other public property” means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawai‘i under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

(h) All laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawai‘i or its political subdivisions pursuant to subsection (a), (b), or (e) of this section or reserving the right to alter, amend, or repeal laws relating thereto shall cease to be effective upon the admission of the State of Hawai‘i into the Union.

(i) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) and the Outer Continental Shelf Lands Act of 1953 (Public Law 212, Eighty-third Congress, first session, 67 Stat. 462) shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing States thereunder.

Hawaii State Admissions Act, § 5 (emphasis added). *See also Hawai‘i’s Ceded Lands*, 3 U. HAW. L. REV. 101 (1981).

sidestep a potentially incomplete record to craft a wide sweeping conclusion of law pursuant to Article XI, Section 1.

The Court cannot outrun the Hawai‘i Constitution. Even if the Court believed that Article XI, Section 1 of the Hawai‘i Constitution placed the Court on the path to a proper decision, the Court faltered as soon as it incorporated “land” into Article XI, Section 1. Article XI, Section 1 concerns “natural resources,” because it says so in plain language, where land can be protected as a “natural resource.”³⁸ Article XII, Section 4 speaks to public land granted to the State of Hawai‘i by the Admissions Act.³⁹ Now that Article XI, Section 1 purports to incorporate land into “natural resources,” pursuant to Article XI, Section 1, one must wonder whether Article XII, Section 4 and the lands held in public trust for native Hawaiians and the general public are meant fade from view to become not much more than a soon to be forgotten artifact in the history of Hawai‘i constitutional law.⁴⁰ While the Court is empowered to interpret the Hawai‘i Constitution, nothing within our legal tradition and the rule of law encourages any judicial body to do what this Court has done.⁴¹

³⁸ The Court’s holding is grounded in a single mention of “land” as a “natural resource” in Article XI, Section 1, sans a constitutional context. The Court’s holding is factually grounded in the premise that Mauna Kea is conservation land owned by the State of Hawaii. Suppose that title to Mauna Kea precludes a factual finding that Mauna Kea is owned by the State of Hawaii. Suppose that Mauna Kea is not conservation land owned by the State of Hawaii, but public land owned by a public trust for the benefit of native Hawaiians and the general public.

³⁹ Hawai‘i Revised Statutes Section 91-14(g) provides:

Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HAW. REV. STAT. § 91-14(g) (2025). If the majority disagreed with Justice Pollack over his conclusion that Mauna Kea was “ceded land,” the Court should have either offer up evidence of Mauna Kea being not “awarded or granted,” or remand this case for further proceedings, to determine whether Mauna Kea is in fact “ceded lands.” Nothing should have compelled the Court to pen a bold decision not well-founded in the law that came before, just because the Court may say in Footnote 24 that the words “ceded lands trust” were not contained in Appellants’ points of error on appeal.

⁴⁰ The Court must explain how the plain language of Article XI, Section 1 applies to land previously “awarded or granted,” or land that is not in its original state, or “ceded land.” The plain language of Article XI, Section 1 offers no guidance as to how Mauna Kea becomes conservation land belonging to the State of Hawaii, and a public natural resource under Article XI, Section 1.

⁴¹ The Court may overrule prior decisions of the Court, and set out in a new direction, but any new direction must be reconcilable within the tapestry of the existing law, including the law of title, the Hawai‘i Constitution, and the Admissions Act.

CONCLUSION

Almost five years has passed since the Court made its decision to expand the scope and reach of Article XI, Section 1 of the Hawai‘i Constitution. Something must be done to support the Indigenous practitioners, to protect the public trust for native Hawaiians and the general public, and to restore clear meaning to Article XI, Section 1, Article XII, Sections 4 and 7, and Article XVI, Section 7 of the Hawai‘i Constitution.⁴² Mauna Kea begs for the correction of judicial errors.⁴³ Until then, we can only pray for justice, and the return of Poli‘ahu.⁴⁴

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March 2, 2021 / December 21, 2023

⁴² Even if the issues decided by Mauna Kea are raised anew, issues of law and questions of fact will persist whether Mauna Kea can be applied as a legal precedent, given the wrinkles of Footnote 24, Justice Pollack’s concurring opinion, and the decision of the Court in *Zimring*.

⁴³ The people need not wait for the Court to act. Article XVI, Section 7 of the Hawai‘i Constitution offers the people an alternative. If the people apply Article XVI, Section 7, they can implore the state legislature to enact remedial measures, to limit lands affected by the Court’s holding to lands not granted to the State of Hawai‘i by Section 5(b) of the Admission and “available lands” by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, or to remove state authority over “ceded lands,” or to require the State of Hawai‘i, as *trustee* of the public trust for Native Hawaiians and the general public, to collect substantial rent revenue and use fees from BLNR and other state agencies who appropriate lands held in public trust for native Hawaiians and the general public, or all of the above.

⁴⁴ *Poli‘ahu* is one of four goddesses of snow. *Poli‘ahu* resides on Mauna Kea. Perhaps with the protection of *Poli‘ahu*, the Court has, to date, taken no further steps to advance Article XI, Section 1 against the fiduciary obligation of the State of Hawaii, in its Article XII, Section 4 capacity as the protector of “ceded lands,” and *trustee* of the public trust for native Hawaiians and the general public.

