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The National Park Service and Hawaii's Public Trust Doctrine

Commission on Water Resource Management
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Introduction

- NPS Management Policies
- State Constitution
- State Caselaw
- State Statutes
- State Water Plan
- CWRM Regulations & Other Materials



NPS Management Policies

- Requires that the protection of water resources be obtained in accordance with legal authorities
- Requires that NPS work with state water administrators to protect waters resources in parks



Hawai`i Constitution

Public Trust Doctrine

Precautionary Principle

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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.

Article 11, Section 1

The Hawai'i Supreme Court declared that this section made the public trust doctrine a fundamental element of constitutional law in Hawai'i.

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The State has an obligation to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people.

Article 11, Section 7

The Hawai'i Supreme Court declared that this constitutional provision created a duty for the State to protect public trust purposes.

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The goal of the Public Trust Doctrine is to protect public trust purposes. So, what are public trust purposes?

- Domestic water use of the general public, particularly drinking water
- The exercise of Native Hawaiian and traditional and customary rights including appurtenant rights
- Reservations of water for Hawaiian Home Land allotments
- Maintenance of waters in their natural state



Scope of the State Water Resources Trust

Both the Hawai`i Supreme Court and the Commission on Water Resource Management have declared that the Public Trust Doctrine applies with equal force to groundwater as it does to surface water.



Hawai`i Constitution

Public Trust Doctrine

Precautionary Principle



The Precautionary Principle: A Duty under the Public Trust Doctrine

The Public Trust Doctrine is a preventative doctrine, not a remedial one, as the Hawai`i Supreme Court recognized when it found that the precautionary principle was an inherent attribute of the Public Trust Doctrine.

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In endorsing the precautionary principle, the Hawai`i Supreme Court rejected the requirement of scientific certainty before acting to protect public trust purposes, noting that to do so will often allow for only reactive, not preventive regulation.

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Where scientific evidence is preliminary and not yet conclusive regarding the management of freshwater resources which are part of the public trust, it is prudent to adopt ‘precautionary principles’ in protecting the resource.

Commission on Water Resource Management, 1997



Water Resources Protection Plan (2008)

There is a duty to take anticipatory action to prevent harm to public resource.

“Precautionary actions” may include anticipatory and preventative actions and actions that increase the resilience, health, and the integrity of the whole system.



“Margins of Safety”

The Hawai`i Supreme Court has suggested the need for “margins of safety” to protect public trust purposes.

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In 2006, the Chairman of the Commission embraced this suggestion when he urged his fellow Commission members to “adopt the suggestion of the *Waiāhole* I Court to provide for “margins of safety” under our public trust duties and the precautionary principle.”

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Question - How can
“margins of safety
be established for
public trust
resources at Kaloko-
Honokōhau National
Historical Park?





State Water Code

How are Public Trust Resources
Protected Outside of Water
Management Areas?

For Surface Water

Stream Diversion Works Permit by §174C &
§13-168

- quantity and quality of stream water and ecology must not be adversely affected

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For Groundwater

- No protection for public trust resources outside of water management areas
- Definition of “sustainable yield” does not provide for the protection of public trust resources
- Issuance of well construction and pump installation permits does not involve an analysis of effects on all of the public trust uses of water

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PUBLIC TRUST RESOURCES IN PARKS OUTSIDE WATER MANAGEMENT AREAS

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PROTECTED



NOT PROTECTED



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When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area

§174C-41 of the State Water Code



Conclusions

Hawai`i state law provides a sufficient legal basis to protect the public trust resources of Kaloko-Honokōhau National Historical Park.

Protection for those public trust resources dependent on groundwater can be obtained only through the designation of a Water Management Area.