The *Ahupua'a* System and Native Gathering Rights

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Aloha kakou. There are three sources for the assertion of native gathering rights under state law. First is Article 12, Section 7, which was passed by the voters here in Hawai'i in 1978 as a result of the Constitutional Convention that was held. Second is HRS Section 7-1, which is the Statute of Ancient Origin passed in 1850 to assist the native tenants who made claims to the *kuleana*, and third is HRS Section 1-1, which is also known as the Hawaiian Usage Exception. The law has been criticized in the past for not keeping up with the pace of protecting traditional and customary rights.

Since 1978, however, there have been three cases. One is Kalipi versus Hawaiian Trust; the case was decided in 1982 by the Hawai'i Supreme Court. The second is Pele Defense Fund versus Paty; the case was decided in 1992. The most recent case is Public Access Shoreline Hawai'i versus Hawai'i County Planning Commission, also known as the PASH case, which was decided in 1995.

These three cases helped to strengthen and protect claims made by native Hawaiian practitioners and also helped to guide judges, attorneys, and members of the community towards resolution of these claims which have been asserted by native practitioners. I'd like to focus today on the PASH case, because I believe it provides some clear guidelines on how to assess these types of cases. We must remember, however, that PASH cannot be looked at as a panacea to native Hawaiian gathering claims. Each claim will depend upon the specific facts of each case.

In PASH, a native Hawaiian member of PASH, Mahealani Pai, sought an administrative hearing before the local county planning commission on the developer Nansay's request for a shoreline management area permit, claiming that Nansay had failed to assess the impacts of the resort on Mahealani Pai's and other members' right to access and gather. The Supreme Court in PASH made two initial observations that are very important. Number one, it said that agencies are bound to the same extent as a court under Article 12, Section 7 to protect those traditional and customary rights, which opens up a whole new door for agencies, both state and county, and imposes upon them the requirement that before it even gets into court, agencies must take action to assess the impact on these rights.

The PASH court noted initially that any claims, that imposing an assessment of these rights, before property is to be developed is a taking, is not justified because these rights have existed since time immemorial; in other words, these rights were here long before anyone else came and therefore, before the Constitution was set up, which imposed the "taking-without-just-compensation" requirement and therefore these are pre-existing rights, so there is nothing to take.

It's also important to remember that in the PASH case it did not say that the PASH members are entitled to the right, but only that they are entitled to go into court or to come before the agency to prove the existence of that right; that's a very important difference, a major difference. And so that case, by the way, was remanded back to the Hawai'i County Planning Commission for a hearing, but Hawai'i County Planning Commission never did hold a hearing because Nansay withdrew its permit. So the issue is still up there, the same as in the Pele Defense Fund Case. The Pele Defense Fund court said that if you can prove that these rights exist, then you'll have a claim, and remanded it down to the trial court. I was co-counsel along with several other attorneys and actually tried that case before Judge Amano in August of 1994, and we're still waiting for a decision. We are still waiting for a determination as to what actually constitutes, and I assume or I imagine that, either way, this case will be going back on appeal before the Supreme Court.

The most commonly asked questions about gathering rights can be answered through PASH. One of the questions is, "What rights are protected?" Well, the language of Article 12, Section 7, is very broad. It says, "All rights customarily and traditionally exercised for subsistence, cultural and religious purposes." That's a very wide area, and the Supreme Court says that these rights are entitled to protection. One of the sub-questions within that is, "Can commercial use be considered a subsistence or cultural purpose?" The question hasn't

been answered. Who is protected under the Article 12, Section 7 rights? Under the language of Article 12, Section 7, it says "persons of Hawaiian ancestry"; however, the issue arose in the Pele Defense Fund Case, "What about non-Hawaiian spouses?" Or in-laws who accompany Hawaiian practitioners? You have a family and they want to accompany or they have learned through other Hawaiians how to fish, how to gather; are they entitled to these rights? The PASH decision specifically leaves that open, says that we are not deciding that, because that's not before us. That's an issue that again will be decided at a later date, and of course it was raised in our Pele Defense Fund Trial. So, hopefully, the judge will decide that issue as well.

How do you prove the existance of these rights? Well, the PASH court simply says that they must be continuous, they must be certain, and they had a couple of other requirements in there which were similar to the law based on custom. They also say that it must be from "time immemorial," which is standard language to proving the existence of a custom. However, the court said that the phrase "time immemorial" must mean at least since 1892, which was the date that the Section 1-1 was passed. So, at least with regard to proving the existence of custom here in Hawai'i, you have to show that the custom or activity was in existence prior to 1892. This raises another issue in proving the existence of custom: do you have to show that your father, grandfather, and great grandfather specifically gathered or specifically conducted an activity on that specific site, or do you simply have to show that it was an activity that was performed by Hawaiians prior to 1892? There's a big difference in terms of the burden of proof, and that's another issue that has not been decided yet.

Well, you say, this language of Article 12, Section 7 is so broad and it looks like the Supreme Court's decision is going to open the floodgates to all native Hawaiian practitioners, are there any limitations on the exercise of these rights? Yes, there are several. One is that the exercise of these rights must be reasonable. Now, whether reasonable to the practitioner, reasonable to the landowner, or reasonable to the judge, the court did not say. But, again that's going to be a factual inquiry which is going to depend on the facts of the case.

Also, the court said that the activity must be traditional. What is a traditional activity? Certainly, I think, we can all agree that fishing or gathering *'ōpae* are considered traditional activities, but what about pig hunting? Traditionally, Hawaiians never did hunt pig. They were always domesticated, and it was only later that it evolved into an activity that is now very popular. Is that considered a traditional activity? The PASH court did not address that.

The third limitation imposed by PASH and also by Kalipi and the Pele Defense Fund case is that the land must not be developed. Once it's developed, the exercise of those rights ends. Now, what is "developed"? The PASH court again did not say we are not going to go into the different stages or gradations of what constitutes developed property. It's simply to say that once it becomes developed, gathering rights end. So again on the spectrum of what could be developed, certainly a subdivision in Manoa would be a developed property, but what about an abandoned geothermal well site which was initially cleared but has now been abandoned and now a native forest is starting to retake the site?

The fourth condition is that the landowner must show that there is actual harm as a result of this activity. Again, what constitutes "actual harm"? Is it actual, in-fact injury to your business interests, or is it a simple assertion that well, we don't want you to come on the property just for safety and liabilty concerns, without showing more. That hasn't been answered. Once an owner can show that there has been some actual harm, the court says that there must be a balancing of the interests of the native Hawaiian or the practitioner versus the landowner, and a balancing of those interests will then result in work towards resolving those claims.

Finally, the limitation on the exercise of gathering rights is that the rights are subject to regulation by the state. Now, there are no administrative rules or laws that specifically regulate the gathering activities of native Hawaiians, and I sure wish there were, because they'd give a lot of guidance to attorneys and even native Hawaiians in this area. There has been asserted by at least one landowner in recent proceedings, the Al'i' Perogative, that it's a claim implicit in the reservation of rights in favor of the tenant is the ability of the *konohiki* or the landlord to regulate those rights. Not enough research, I believe, has been done in this area, at least for me anyway, to understand this Ali'i Perogative, but there have been claims made on that.

Finally, the last two questions are, first, Can we live with these rights? And my answer is a resounding "Yes!" The second is, Where do we go from here? And I say we go forward, that's the only way we can go.