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Traditions That Appertain: Clarifying the Differences Between Appurtenant and T & C Water Rights in Hawai'i

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I. Introduction

The government of Hawai'i, starting with the kingdom, has historically failed to adequately acknowledge native rights in the allocation of both land and water resources. In 1845, the King of Hawai'i established a system to transfer Hawaiian lands into private ownership,[1] which unjustly resulted in only 28,600 out of over 4 million acres, or 0.8 percent, of the Kingdom's lands being granted to native Hawaiian tenants.[2] Those individuals who did receive land grants also received water rights that came attached to the land. The Supreme Court of the Kingdom of Hawai'i named these "appurtenant rights." For those native people who did not receive land grants, the Hawaiian legislature attempted to create an equitable solution by statute, creating water rights based on native Hawaiian descendancy and continuous use. These rights became known as Traditional & Customary (T & C) rights.

As a result of the unjust origins of those two types of rights, there is tension between the native and non-native communities in Hawai'i concerning the allocation of appurtenant and T & C water rights. However, much of this contention is based on the legal community's misunderstanding of differences in the basis, scope, and institutional application of these rights. This paper attempts to clarify these

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1. NATIVE HAWAIIAN RIGHTS HANDBOOK 151 (*Melody Kapilialoha Mackenzie ed.*, *Native Hawaiian Legal Corp. & Office of Hawaiian Affairs*) (1991).

2. U.S. DEPT. OF THE INTERIOR & DEPT. OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY–REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 24 (2000), *at http://permanent.access.gpo.gov/websites/doigov/www.doi.gov/nativehawaiians/pdf/1023fin.pdf* (*on file with author*).

misunderstandings in order to eliminate costs to the state of unnecessary court challenges; correct the unjust misappropriation of rights to native Hawaiians during the land transfer process; and ensure that all Hawaiian citizens receive appropriate water allocations.

Appurtenant water rights attach not to individuals, but to parcels of real property granted during the land transfer process established by the King of Hawai'i in 1845. Landowners acquired these rights when the King originally transferred the land to private individuals from his ownership. The Supreme Court of Hawai'i has defined appurtenant water rights as "rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land."[3] A claimant for these rights must show that the original fee simple owner of a particular parcel of land used water on the land for any purpose. Appurtenant water rights, therefore, do not depend upon an individual ancestor and are available to both native and non-native Hawaiian landowners, provided they show that water was used by the original fee simple owner of the land.

In contrast to appurtenant rights, T & C water rights in Hawai'i apply to individuals descended from native Hawaiians who occupied the islands before western contact in 1778.[4] The T & C water rights are rights to water established by continuous native Hawaiian usage. Federal law and the State of Hawai'i both define "Native Hawaiian" as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778."[5] As a result, T & C rights apply to individuals who can show that they descend from the people who inhabited the Islands before 1778, provided they can also show continuous use beginning prior to November 25, 1892.[6]

Some Hawaiian courts and legal scholars have recently argued to revise the interpretation of the distinctions between appurtenant and T & C rights in an attempt to redefine property-based appurtenant water rights as

3. *Reppun v. Board of Water Supply*, 656 P.2d 57, 71 (Haw. 1982).

4. HAW. CONST. art. XII § 7 ("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.").

5. *See* HI HHCA § 201 (The federal Hawaiian Homes Commission Act of 1921 defines "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."); HAW. REV. STAT. § 10-2 (1979) (state statute creating the Office of Hawaiian Affairs and using the same definition for "Native Hawaiian" as the HHCA).

6. *See Pub. Access Shoreline Hawaii by Rothstein v. Hawaii Cnty. Planning Comm'n by Fujimoto*, 903 P.2d 1268 (Haw. 1995) (hereinafter referred to as PASH).

personal T & C rights obtained through custom.[7] There are several reasons for wanting to redefine appurtenant water rights as T & C. First, a land-based interpretation could potentially prevent native Hawaiians who do not own property from receiving land-based appurtenant water rights, which would lead to a more inequitable distribution of this resource. Second, by treating appurtenant rights as T & C, they would become available only to native Hawaiians rather than any owner of a dominant estate, which directly benefits native Hawaiians. Clarifying the differences between the common law and statutory bases of appurtenant and T & C rights, however, uncovers flaws in the arguments advanced. Instead of conflating appurtenant and T & C rights, native Hawaiian legal practitioners should embrace the differences and attempt to work within the frameworks that the courts have established to assert these rights individually.

Clarifying the differences between appurtenant and T & C water rights directly affects how the State of Hawai'i Commission on Water Resource Management (CWRM) regulates water allocation. In fulfilling its regulatory duties, CWRM must take both of these rights into account when issuing water permits[8] and determining instream flow standards.[9] The State Water Code (code) mandates states that CWRM "shall determine appurtenant water rights."[10] Additionally, Hawai'i established T & C rights to ensure that the chiefs and westerners would not deny native Hawaiian tenants their customary use of the land.[11] Contrary to those duties, without accurately understanding the elements of each of these rights, CWRM could unintentionally deny rights holders the water they deserve by incorrectly determining appurtenant rights or failing to ensure that native Hawaiians continue their lawful customary rights.

Determining a right as appurtenant or T & C also establishes its priority within the water allocation system. Under the water code, CWRM

7. *See In re Iao Ground Water Management Area High-Level Source Water Use Permit Applications*, 287 P.3d 129, 171 (Acoba, J., concurring) (Haw. 2012) (hereinafter referred to as *Na Wai Eha*).

8. HAW. REV. STAT. § 174C-101(d) (1987) ("The appurtenant rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.").

9. *Na Wai Eha*, 287 P.3d at 189 (vacating and remanding a decision by CWRM setting Interim Instream Flow Standards because the commission did not adequately take into account appurtenant or T & C rights).

10. HAW. REV. STAT. § 174C-5(15) (1987).

11. Jocelyn B. Garovoy, "*Ua Koe Kuleana O Na Kanaka*" (*Reserving the Rights of Native Tenants*): *Integrating Kuleana Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523, 525-534 (2005).

has authority to grant permits for appurtenant rights.[12] These water use permits for appurtenant rights remain subject to other sections of the water code.[13] In contrast, the water code does not impose any permit obligations for T & C rights. As a result, clarifying the differences between appurtenant and T & C rights allows for a clearer understanding of scope and any restrictions attached.

Some confusion surrounds the delineation of appurtenant water rights and T & C rights. Courts do not clearly identify the differences between these rights,[14] making it difficult for CWRM to sufficiently take them into account when making water allocation decisions. In addition, CWRM sometimes misunderstands the differences between T & C and appurtenant water rights when interpreting the water code.[15] For example, in a 2012 challenge to CWRM's determination of interim instream flow standards for two streams on northeast Maui, the Hawai'i Supreme Court adopted CWRM's conclusions of law determining that T & C rights include appurtenant rights "when practiced for subsistence, cultural, and religious purposes."[16] As its reasoning, the court stated that the conclusions of law "[are], in large part, a quotation from [the water code]."[17] That particular code section, however, states, "traditional and customary rights shall include . . . cultivation or propagation of taro . . ."[18] Both CWRM and the court failed to acknowledge that the current cultivation or propagation of taro does not establish an appurtenant water right, because type of use is not considered when establishing such rights. Appurtenant rights holders simply have to show the existence of any use at the time of the property's original conversion into fee simple land.[19] Misinterpretations such as this lead to inaccurate decisions by the courts and CWRM. In fact, the Hawai'i Supreme Court has vacated and remanded every decision brought before it by CWRM, in many cases as a result of misinterpretations of law regarding

12. HAW. REV. STAT. § 174C-63 (1987) ("A permit for water use based on an existing appurtenant right shall be issued upon application.").

13. *Id.* ("Such permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62.").

14. *See Na Wai Eha*, 287 P.3d at 171 (Acoba, J., concurring) (citing HAW. REV. STAT. § 174C-101(c)) (failing to clearly identify the major differences between appurtenant and T & C rights).

15. *See Id.* at 146 (citing CWRM's conclusions of law that state, "[i]n addition to appurtenant rights when practiced for subsistence, cultural and religious purposes, traditional and customary rights include . . .").

16. *Id.*

17. *Id.*

18. HAW. REV. STAT. § 174C-101(c) (1987).

19. *Reppun*, 656 P.2d at 71.

appurtenant or T & C rights.[20] If CWRM had a better understanding of the differences between appurtenant water rights and T & C water rights, this would likely result in fewer illegal decisions by the agency.

The purpose of this paper is to clarify the differences between appurtenant water rights and T & C water rights. An understanding of these variations in basis, scope, and institutional application will allow CWRM to protect the valid water rights of native Hawaiians and private property owners. This paper posits that, upon analysis of historical background and relevant case law, appurtenant rights remain common law land-based rights, while T & C rights are personal to native Hawaiians and based on showing that water has been used on the land continuously since November 25, 1892. Lack of clarity over the differences could result in CWRM potentially granting rights to individuals who might not have valid claims. By understanding the characteristics of each system of rights, CWRM can clarify the allocation of water in a more coherent manner and ensure that the appropriate parties receive the rights to which they are legally entitled.

Part I of this paper introduces the historical and legal context needed in order to accurately define both appurtenant water rights and T & C water rights. This section includes a brief history of the land division initiated by King Kamehameha III in 1845, a process otherwise known as "The Great Mahele."[21] Part II explains the differences between appurtenant and T & C water rights, including their separate bases, scope, and institutional applications within the state water management system. Part III introduces current arguments considered by courts and legal scholars regarding the nature of both rights, and proposes alternative arguments that rights holders could assert in the future to establish appurtenant and T & C water rights. Ultimately, appurtenant rights have their origins in common law, based on land ownership, while T & C rights were created by the legislature as personal rights established through statute and the state constitution. As a result of these different origins, each type of right requires a showing of different factors to establish its existence, with T & C rights arguably receiving a higher priority within the state water allocation framework. This paper concludes that clarifying the differences between appurtenant water rights and T & C water rights will give CWRM the information necessary to sufficiently protect the existing and future water rights of native Hawaiians, as well as private property owners.

20. *Na Wai Eha*, 287 P.3d 129; *In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000) (hereinafter referred to as *Waiahole* I); *See generally* PASH, 903 P.2d 1246.

21. Not intended to be an exhaustive history.

II. Historical and Legal Context

In order to adequately understand and clearly delineate the differences between appurtenant and T & C rights, a familiarity with the evolution of land and natural resources rights in Hawai'i is necessary. The Hawai'i Supreme Court has described the current legal system in the state as one that conforms both to traditional rights and the modern system of land tenure.[22] Therefore, an analysis of the origins and scope of existing rights is incomplete without an understanding of past rights of ancient Hawaiians. Initially, the eight main islands of Hawai'i existed as individual independent chiefdoms.[23] In the beginning of the nineteenth century, King Kamehameha I unified the islands and brought each of them under his control within a single kingdom, with individual chiefs serving below him.[24] Later, in 1845, King Kamehameha III began a process whereby the land tenure system transferred into one of privatized western private property rights.[25] This process became known as "The Great Mahele," and its results help explain the origins of both appurtenant and T & C water rights.

A. Ancient Hawaiian Society and Land Use

The ancient Hawaiian land system was essentially a feudal tenurial system[26] consisting of several independent chiefdoms, with each chief owning all the land and resources within his territory.[27] Each individual chiefdom maintained its own laws, but any chieftain who could raise an army could impose his new laws upon all conquered peoples.[28] The victorious party then "[cut] up the land," with the leader taking his portion first, and then dividing the rest among members of his army.[29] Tenants who lived on these lands before the conquest typically remained, so only the overlord changed. All parties owed allegiance to him, which imposed a duty

22. *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 748 (Haw. 1982).

23. JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848, 5 (U. Haw. 1958).

24. *Id.* at 6.

25. *In re Kamehameha IV Estate*, 2 Haw. 715, 718-19 (1864).

26. VAN DYKE, CHANG, AIPA, HIGHAM, MARSDEN, SUR, TAGAMORI & YUKIMOTO, *Water Rights in Hawaii, in* LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141, 146 (1977).

27. CHINEN, *supra* note 23, at 5.

28. *Id.*; Marshall Sahlins and Dorothy Barrere, *William Richards on Hawaiian Culture and Political Conditions of the Islands in* 1841, 7 HAW. J. OF HIS. 18, 21-22 (1973).

29. *Id.* at 22.

to pay taxes, serve in the military, and perform daily labor at the chieftain's pleasure.[30]

During the feudal tenure period, water had a spiritual aspect, and its distribution was based on mutual benefit that required chieftains to ensure access to water in exchange for a portion of agricultural products from tenants.[31] Hawai'i's indigenous people regarded fresh water as the physical manifestation of one of the four major deities within their religion.[32] Chieftains conditioned access to this sacred resource based on its productive use by tenants.[33] Tenants had to cultivate the land and contribute to the construction and maintenance of the delivery infrastructure in order to ensure a continued supply, or else they forfeited their right to fresh water.[34] In exchange for a right to continuous water supply, a tenant provided the chieftain with a portion of the goods produced from the soil.[35] Tenants typically maintained possession of only one-third of the products of their labor; the remaining two-thirds went to various chiefs as fealty.[36]

In the early nineteenth century, when King Kamehameha I unified the Hawaiian islands under his control as a single kingdom, he maintained the existing feudal land system.[37] However, the king assumed ownership of the land and granted it to trustees, who possessed it for his benefit.[38] A failure by tenants to fulfill their duties to the king by paying taxes, serving in the military, or providing daily labor could result in forfeiture of the land to the king.[39] Chiefs acted as landlords for the king and were tasked with ensuring that tenants performed their necessary duties.[40] The Hawai'i Constitution of 1840 described the land tenure system as one in which the land and its resources "belonged to the Chiefs and people in common, of whom the King was the head and had the management of landed property."[41] Under this

30. *Id*. at 23.

31. CHINEN, *supra* note 23, at 5-7.

32. D. Kapua'ala Sproat, *Wai Through Kanawai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 140 (2011).

33. VAN DYKE et al., *supra* note 26, at 149.

34. *Id*.; Antonio Perry, A *Brief History of Hawaiian Water Rights*, Read at the Annual Dinner of the Hawaiian Bar Association, 6-8 (June 15, 1912).

35. CHINEN, *supra* note 23, at 5.

36. Sahlins et al., *supra* note 28, at 23.

37. CHINEN, *supra* note 23, at 6.

38. *In re Kamehameha*, 2 Haw. at 719.

39. *Id*. at 718.

40. *See Id*. at 718-19.

41. D. Kapua'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law*, 33 U. HAW. L. REV. 537, 537-38 (2011). The

system, tenants constantly faced the possibility of ejection from their land by either the king or the chiefs.[42] Other evidence, however, suggests that ancient Hawai'i law granted absolute and unburdened title to the King, and described him as "Suzerain of the Kingdom."[43] Nevertheless, the totality of the evidence supports the idea that the King owned the land and resources of Hawai'i, which were allocated to the chiefs, landlords, and tenants, based upon a system where each level of the social structure depended on the duties of the others.

B. The Great Mahele

In 1846, due to external and internal pressures, King Kamehameha III began a process for private land distribution that became known as the Great Mahele.[44] By the time Kamehameha III became king in 1825, there was a large foreign population in Hawai'i.[45] Familiar with a western system of property rights, foreign tenants strongly objected to being subject to ejection from their property by the King and chiefs at will.[46] These westerners applied external pressure on Kamehameha III to establish a system of individual privatized property rights in Hawai'i.[47] In addition to this external push for western property rights, the King privately believed that transferring his lands from public to private ownership would help prevent a foreign power from seizing them upon invasion.[48] The chiefs, however, expressed hesitation to "give up their hold [secured by the feudal tenure system] on the common people . . ."[49] Ultimately, because of their belief that the feudal tenure system was not amenable to economic

Hawaiian language version of the constitution, however, did not include the words "in common," Richard A. Greer, *Notes on Early Land Titles and Tenure in Hawaii*, 30 HAW. J. OF HIS. 29, 35 (1996).

42. CHINEN, *supra* note 23, at 7.

43. *In re Kamehameha*, 2 Haw. at 719-20; Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests*, 18 (2d ed. 1984) ("In this country, one who has full ownership of land is said to own it allodially—that is, free of feudal services and incidents."); W.H.H. Kelke, *Feudal Suzerains and Modern Suzerainty*, 12 L. Q. REV. 215, 222 (1896) ("Suzerainty denoted the aggregate of rights which the feudal lord had over his vassal.").

44. CHINEN, *supra* note 23, at 15.

45. *Id*. at 6.

46. *Id*. at 7.

47. LAWERENCE H. MIIKE, WATER AND THE LAW IN HAWAI'I 49 (U. Haw. 2004).

48. *In re Kamehameha*, 2 Haw. at 722.

49. Greer, *supra* note 41, at 40.

expansion of the Kingdom, the King and chiefs agreed to divide up and transfer all the Hawaiian lands into private ownership.[50]

On December 18, 1847, the King's Privy Council established a committee to oversee an initial division of lands between the King and chiefs.[51] A few months later, the King divided his lands up into 1 million acres set aside for himself, his heirs, and assigns ("Crown Lands"), and 2.5 million acres for the government ("Government Lands").[52] In addition, many chiefs also transferred a portion of their lands to the government in exchange for fee simple title in the remainder.[53] This first process of transferring land from sovereign ownership to private ownership among the king and chiefs completed the first phase of the Great Mahele.

In 1850, after the King and chiefs received private ownership in land, the government began a process to provide the same for native tenants. Each initial transfer of the King and chiefs was "subject to the rights of the native tenants."[54] To establish what exactly constituted "the rights of native tenants," the king's council responsible for overseeing the entire land transfer process adopted four resolutions.[55] The resolutions laid out a process for tenants of any transferred lands "who had occupied and improved the land" to receive fee simple ownership of their parcels.[56] The government subsequently codified this process when it enacted the Kuleana Act in 1850 as legislation.[57] Unfortunately for native tenants, however, the procedures established to carry out the Kuleana Act contained a number of flaws, such as inadequate notice to qualified tenants and an inflexible time period in which to file valid claims.[58] These deficiencies of the Kuleana Act, combined with a cultural unfamiliarity with the notion of private ownership among Hawaiian people, resulted in only 28,600 out of over 4 million acres of the Kingdom's lands being transferred to native Hawaiian tenants.[59] This awarding of "kuleana" lands to native tenants marked the second and final step of the Great Mahele.

50. CHINEN, *supra* note 23, at 15.

51. Greer, *supra* note 41, at 43.

52. *Id.*; *In re Kamehameha*, 2 Haw. at 722-23.

53. *Id.*; *In re Kamehameha*, 2 Haw. at 722-23.

54. *Pai 'Ohana v.* U.S., 875 F.Supp. 680, 686 (D. Haw. 1995), aff'd *sub nom*. *'Ohana v.* U.S., 76 F.3d 280 (9th Cir. 1996).

55. *Id.*; CHINEN, *supra* note 23, at 29.

56. *Id.*

57. *Id.*

58. Garovoy, *supra* note 11, at 527-28.

59. *Id.*

III. Differences Between Appurtenant and T & C Water Rights

Appurtenant water rights and T & C rights have many differences arising out of their origins, scope, and institutional applications. First, appurtenant rights have a basis in state common law, while the legislature created T & C rights by statute. Second, the scope of appurtenant water rights extends to any use of water that existed at the time of the Great Mahele, while T & C rights holders must show a continuous use. Third, the water code provides separate guidance to CWRM for the protection of appurtenant and T & C rights.

A. Bases of Appurtenant and T & C Water Rights

Appurtenant water rights and T & C rights have two distinct bases in Hawaiian law. In 1867, the Supreme Court of the Kingdom of Hawai'i clarified the common law origin of appurtenant water rights in *Peck v. Bailey*. Since *Peck*, Hawai'i has consistently relied primarily on the common law to guide the evolution of its appurtenant water rights. Conversely, T & C rights arise out of state statute, starting with the Kuleana Act in 1850, and being reaffirmed and expanded later by the Hawai'i State Legislature. Although the Hawai'i courts have decided a number of T & C cases, these decisions interpret the relevant statutes. Therefore, the basis of appurtenant water rights and T & C rights originates from two different areas of law.

1. Basis of Appurtenant Water Rights

Appurtenant water rights originate from the common law of Hawai'i. In 1867, the Supreme Court of the Kingdom of Hawai'i first clarified the existence of appurtenant rights in *Peck v. Bailey* by determining that Great Mahele land grants included water rights as appurtenant easements, if the original owner utilized the water at the time of transfer.[60] In *Peck*, both parties owned land in fee simple, and their land titles derived from transfers during the Great Mahele.[61] Peck and other nonnative plaintiffs owned a sugar mill and plantation situated on the Wailuku River on the island of Maui.[62] They alleged that they retained absolute title over all the water in the river. They based this assertion on the fact that their fee simple title was derived directly from a lower chief, who they claimed "had the right of lord paramount" over the entire river.[63] The plaintiffs sought to enjoin defendant Edward Bailey from extending a diversion of water and diminishing the

60. *Peck v. Bailey*, 8 Haw. 658 (1867).

61. *Id.* at 660-61.

62. *Id.* at 659.

63. *Id.*

amount of water being supplied to their sugar cane, thereby damaging their crops.[64]

The defendant owned land adjacent to the plaintiffs.[65] In addition to partially bordering the Wailuku River, the defendant's land also diverted water from the source of the river into a watercourse built and used during ancient times for growing taro.[66] Defendant used this water to irrigate his own sugar cane and based his rights to water on prescription and "immemorial usage."[67] Further, Bailey asserted that Peck and others had actually increased their own diversions in order to grow sugar cane, and their own actions caused the injury to plaintiffs' crops.[68] The resolution of this case included an analysis by the court that established the existence of water rights that transferred to the land along with the original title. These rights eventually became known in Hawai'i as appurtenant water rights.

In order to clarify the basis of the rights of the parties in *Peck*, the Supreme Court of the Kingdom of Hawai'i conducted a historical analysis of the Great Mahele and its resulting conveyances.[69] The court declared that the deeds and titles of all lands conveyed by the king or awarded by the Land Commission implicitly included water rights earned by "immemorial usage."[70] These waters passed with grants of land as an "easement appurtenant," even if not explicitly mentioned in the deeds.[71] Landowners who had water rights based on riparian ownership could not interfere with the appurtenant easements because those easements existed to benefit "lands through which the ancient water course extended."[72] Therefore, as part of the burden on the servient estate, a riparian landowner could not interfere with appurtenant water rights.[73] The court declared that an

64. *Id*. at 659.

65. *Id*. at 659-60.

66. *Id*.

67. *Id*. at 659.

68. *Id*. at 660.

69. *Id*. at 660-61.

70. *Id*. at 661 ("The same principle applies to all the lands conveyed by the King, or awarded by the Land Commission. If any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance.")

71. *Id*. ("An easement appurtenant to land will pass by a grant of the land, without mention being made of the easement or the appurtenances.").

72. *Id*. at 662.

73. *See Id*. ("Washburn, in his 2 vol. Real Property, p. 65, says a right to interfere with the natural [riparian] right to make use of water belonging to another . . . constitutes an easement. . . . Such an easement may be

appurtenant right holder could receive damages from a riparian landowner who interfered with the appurtenant right.[74] Ultimately, the *Peck* court determined that land grants transferred during the Great Mahele included water rights bundled with the land as appurtenant easements.

2. Basis of T & C Rights

Unlike appurtenant water rights, T & C rights originate not in the common law, but rather from state statutes. Although Hawai'i courts have decided a number of T & C cases, these decisions interpret the relevant statutes. This section discusses the origins of T & C rights, and their statutory basis.

a. Hawai'i Revised Statutes § 7-1

T & C rights were first recognized in 1850 in the Kuleana Act of the Great Mahele. In August 1850, the Kingdom of Hawai'i passed the Kuleana Act, including language ensuring that native tenants "shall not be deprived of the right" of exercising certain traditional practices.[75] These rights included gathering and taking certain plants for private use, as well as the right to "drinking water and running water."[76] Over a century later, in 1955, the state legislature enacted Hawai'i Revised Statutes (HRS) §7-1, which included roughly the same language as that in the Kuleana Act.[77] This

acquired by grant, or by adverse enjoyment so long continued as to raise a legal presumption of a grant.").

74. *Id*. at 661-62.

75. MIIKE, *supra* note 41, at 59.

76. *Id*.

77. *Compare Id*. ("The amendment of 1851 is as follows, with the language that was deleted from the preceding 1850 act in parenthesis: When the landlords have taken allodial titles to their lands, the people on each of their lands, shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, (should they need them,) but they shall not have a right to take such articles to sell for profit. (They shall also inform the landlord or his agent, and proceed with his consent.) The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, (should they need them,) on all lands granted in fee-simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.") with HAW. REV. STAT. § 7-1 (1955) ("Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own

statute provided an identical list of gathering and water rights, stating that when the lord of any Hawaiian lands received fee simple title, the former tenants living on those lands "shall not be deprived of" those enumerated rights.[78]

b. Hawai'i Revised Statutes § 1-1

The second origin of T & C rights comes from a separate1955 statute—HRS § 1-1—but did not actually gain any substantive meaning until 1982. This statute adopted the common law of England as the common law of the State of Hawai'i, subject to other superior laws and "Hawaiian usage."[79] In *Kalipi v. Hawaiian Trust Co.*, the Supreme Court of Hawai'i interpreted the "Hawaiian usage" exception in HRS § 1-1 as a statutory codification of something "akin to the English doctrine of custom."[80] The court then used this as a basis to extend T & C rights beyond those activities enumerated in HRS § 7-1.[81] After *Kalipi*, instead of only being able to establish T & C rights for the gathering and taking of certain plants, native Hawaiians can also establish them under HRS § 1-1, based on custom.

B. Scope and Elements of Appurtenant and T & C Water Rights

As a result of their different bases, appurtenant water rights and T & C rights also have different scopes and elements to establish each type of right. Landowners can receive appurtenant rights for water on their property, so long as any use existed when the land first transferred to fee

private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.").

78. HAW. REV. STAT. § 7-1 (1955).

79. HAW. REV. STAT. § 1-1 (1955) ("The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.").

80. *Kalipi*, 656 P.2d at 750-51.

81. *Id.*

simple ownership during the Great Mahele.[82] Any individual can establish a T & C right by showing (1) the right "[has] been established in practice" prior to November 25, 1892;[83] (2) continuous use since November 25, 1982;[84] and (3) the individual(s) attempting to establish the right "are descendants of native Hawaiians who inhabited the islands prior to 1778."[85] In addition to these different requirements, the code also treats appurtenant water rights and T & C rights uniquely within the state water management system. Ultimately, the scope of both these rights is as varied as their bases.

1. Scope and Elements of Appurtenant Water Rights

Establishing the elements and scope of appurtenant water rights began in the common law when the *Peck* court determined that an appurtenant right holder does not need to show continuous use.[86] Later, the Hawai'i Supreme Court in *Reppun v. Board of Water Supply* declared that the use only needed to have existed at the time of a property's original transfer into fee simple ownership during the Great Mahele.[87] The *Reppun* court also made decisions concerning the severance and quantification of appurtenant water rights. In addition to these cases, the water code statutorily clarifies the scope of appurtenant rights within the state water management system, by requiring appurtenant rights holders to apply for water use permits.

a. Common Law Clarifications of Scope for Appurtenant Rights

The *Peck* case first clarified the scope of appurtenant water rights. The *Peck* court determined how to establish these rights, and the purposes allowed under the common law. In 1982, the Hawai'i Supreme Court further clarified the scope of appurtenant rights under the common law in *Reppun*, which expanded upon the *Peck* decision, specifically addressing issues of quantification and severance of appurtenant water rights.

82. *Reppun*, 656 P.2d at 71.

83. PASH, 903 P.2d at 1268 ("One of the most dramatic differences in the application of custom in Hawai'i is that the passage of HRS § 1-1's predecessor fixed November 25, 1892 as the date Hawaiian usage must have been established in practice.") (citations omitted).

84. *Kalipi*, 656 P.2d at 751 ("Where these practices have, without harm to anyone, been continued, we are of the opinion that the reference to Hawaiian usage in § 1-1 insures their continuance for so long as no actual harm is done thereby.").

85. PASH, 903 P.2d at 1270 (internal quotations omitted).

86. *Peck*, 8 Haw. at 664.

87. *Reppun*, 656 P.2d at 71.

i. *Peck v.* Bailey

In *Peck*, the court determined that, in order to prove the existence of an appurtenant water right, a landowner must make a showing that the land in question had utilized water from the beginning of legal memory,[88] or "time immemorial."[89] The *Peck* court did not state that the use needed to be continuous, only that it conform "to the ancient usage," and not expand beyond that scope.[90] Interestingly, however, the court also declared that once a landowner has established appurtenant water rights, he or she may use them for any purpose, so long as that use does not injure the rights of others.[91]

In order to determine whether the parties in *Peck* had received appurtenant water rights with their land grants, the court looked to the language of the land titles that each party held.[92] After examining the titles, the court stated that all parties involved had implicit appurtenant water rights attached to their lands, which originated from the first transfer of the properties into fee simple ownership.[93] Peck and others made no showing that they had any other explicit "pre-eminent rights" granted by their titles, which would supersede the appurtenant rights.[94] The court believed that defendant Bailey had diverted only the waters allowed to him, and that Peck and others had diverted beyond what their rights allowed.[95] As a result, the court denied the plaintiffs' request for injunctive relief.[96]

ii. *Reppun v.* Board *of* Water Supply

In 1982, the Supreme Court of the State of Hawai'i clarified the scope of appurtenant water rights in *Reppun v. Board of Water Supply*. *Reppun* involved a claim against the Board of Water Supply of the City and County of Honolulu (BWS) by six taro farmers.[97] The BWS drilled a tunnel into a dike system that fed water to the Waihee Stream on the island of Oahu, thereby

88. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.18 cmt. g (2000) ("English law required use from 'time immemorial,' which came to mean the beginning of legal memory.").

89. *Peck*, 8 Haw. at 662-63.

90. *Id.* at 664.

91. *Id.* at 665.

92. *Id.* at 664-65.

93. *Id.* at 672.

94. *Id.* at 664.

95. *Id.* at 664-65.

96. *Id.* at 673.

97. *Reppun*, 656 P.2d at 60.

reducing the stream flow.[98] This stream provided a continuous flow of water to plaintiffs, Reppun and others, which they diverted to irrigate their taro crops.[99] Plaintiffs alleged that they had appurtenant rights to this continuous flow because these lands were used for taro cultivation at the time of their initial conversion into fee simple ownership during the Great Mahele.[100] In response, the BWS claimed that prior transfers of ownership in certain parcels of plaintiffs' lands contained reservations of water rights in the deed to the transferor which effectively severed the appurtenant water rights from the land. Therefore, the issue in *Reppun* concerned whether BWS could continue its diversions, thereby reducing the stream flow and injuring plaintiffs' taro crops.

In order to decide whether BWS could continue to diminish the Waihee stream flow, the Supreme Court of Hawai'i analyzed the origin and scope of appurtenant water rights. The court first reaffirmed prior Hawai'i case law establishing state ownership of water in all natural watercourses located within state boundaries.[101] The court then noted the difficulties that Hawai'i experienced in creating a western structure of property rights that also respected the ancient Hawaiian system of natural resource allocation.[102] After stating that the issue in *Reppun* required a consideration of "the ancient system of allocation," the court affirmed that, "appurtenant water rights are incidents of land ownership."[103] This language in *Reppun* strengthens the idea that appurtenant water rights apply directly to parcels of land, and not to individuals.

In clarifying the scope of appurtenant water rights, the *Reppun* court began to shift away from the "time immemorial" standard of the *Peck* court and the common law doctrine of custom. Although the *Reppun* court cited *Peck* as the "foundation" of appurtenant water rights,[104] it declined to use the "time immemorial" language in its definition.[105] This exclusion of the *Peck* "time immemorial" standard signifies the *Reppun* court's intent to separate appurtenant water rights from any preexisting similarities to the common

98. *Id.*

99. *Id.*

100. *Id.* at 61.

101. *Id.* at 66-67 (citing McBryde v. Robinson, 504 P.2d 1330, 1339 (Haw. 1973)).

102. *Id.* at 66-68.

103. *Id.* at 70.

104. *Id.* at 70-71 (citing *Peck*, 8 Haw. at 662) ("In the first of our recorded cases governing water rights the nature and foundation of these [appurtenant] rights were described....").

105. *Id.* at 71.

law doctrine of custom.[106] The western custom doctrine generally requires that a common law custom must have existed from "time immemorial."[107] Evidence exists, however, which supports the idea that the P*eck* court did not fully understand the meaning and relevance of specific western legal terms it used in that opinion.[108] The court could have easily misinterpreted "time immemorial" because of that term's origin in the western doctrine of custom. A decision on the part of the more westernized R*eppun* court to discontinue use of this standard for appurtenant water rights further supports this proposition. Although the R*eppun* court acknowledged the P*eck* court's definition of appurtenant rights, which included the "time immemorial" language,[109] the court in R*eppun* required only that the lands used water "at the time of their original conversion into fee simple [ownership]."[110] This standard established in R*eppun* serves as the current measure for the scope of appurtenant water rights. The Hawai'i Supreme Court also examined the issues of severance and quantification in R*eppun*. First, the court determined whether the prior reservations of water rights on plaintiffs' properties had effectively severed the appurtenant rights from the land. Prior owners of plaintiffs' lands had transferred the lands, specifically retaining "all the right, title, and interest of the Grantor to water," in the deed.[111] Citing a prior case, the court stated that appurtenant water rights are inalienable apart from the fee, so landowners can use them only in connection with "that particular parcel of land to which the right is appurtenant."[112]

However, the court determined that nothing in the nature of appurtenant water rights prevents an owner from extinguishing them by providing in a transfer deed that the appurtenant rights shall not pass to the

106. PASH, 903 P.2d at 1262 n. 26 (Haw. 1995) (discussing the "time immemorial" standard as an element of the common law doctrine of custom).

107. 25 C.J.S. Customs and Usages § 4 (2013).

108. S*ee* Territory v. Gay, 31 Haw. 376, 383-88 (1930) (describing confusion among early Hawaiian courts between the terms "appurtenant" and "prescriptive"). S*ee also* Antonio Perry, Assoc. Justice of the Supreme Court of Hawai'i, Remarks at the Annual Dinner of the Hawaiian Bar Association (June 15, 1912) (transcript available in the University of Hawai'i Library).

109. R*eppun*, 656 P.2d at 70-71 (citing Peck, 8 Haw. at 662).

110. I*d*. at 71.

111. I*d*. at 61.

112. I*d*. at 71. (citing McBryde v. Robinson, 504 P.2d 1330, 1341 (Haw. 1973)).

transferee of the dominant estate.[113] Thus the *Reppun* court held that the prior grantor of certain lands of the plaintiffs had effectively extinguished the appurtenant water rights by attempting to sever and reserve them.[114]

In order to quantify the appurtenant rights that the grantor had not extinguished, the court attempted to determine "the quantum of water utilized at the time of the Mahele," but cautioned that "requiring too great a degree of precision in proof would make it all but impossible to ever establish such rights."[115] In order to sufficiently consider the interests of all parties, especially a respect for the ancient allocation system, the court held that when the means currently used for cultivating "traditional products" on a parcel of land approaches "those utilized at the time of the Mahele," there is a presumption that the amount of water necessary for such cultivation "sufficiently approximates" the quantity of water entitled as an appurtenant right.[116] *Reppun* remains the definitive decision regarding the scope of appurtenant water rights.

b. Statutory Clarifications of Scope for Appurtenant Rights

The most important and contentious provision of the water code concerning the scope of appurtenant rights arguably exists under a section concerning appurtenant rights in the part of the code related to water use regulation. That provision initially seems to suggest that appurtenant rights holders can exercise their rights completely free from the scrutiny and regulation of CWRM. The provision unequivocally states that nothing in the part of the code related to water-use regulation shall "deny" the exercise of a legitimate appurtenant right.[117] Viewed in isolation, that sentence seems to suggest that appurtenant rights would fall outside of the purview of the code and, thus, CWRM. Such a view, however, fails to take into account the

113. *Id.* ("For while easements appurtenant may not be utilized for other than the dominant estate, there is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferee of the dominant estate.") (internal quotations and brackets omitted).

114. *Id.*

115. *Id.* at 72.

116. *Id.*

117. HAW. REV. STAT. § 174C-63 ("Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant water right shall be issued upon application. Such permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62.").

subsequent language of the statutory provision, which states that water use permits for appurtenant rights "shall be issued upon application," and that those permits "shall be subject" to other provisions of the code related to permit revocations and use declarations. That language makes it clear that the legislature intended for CWRM to have some authority to regulate appurtenant rights, specifically within the permitting framework. Therefore, when looking at the entire statutory provision as a whole, it becomes clear that an appurtenant right holder likely must apply for a water use permit, and that those permits could limit an otherwise unrestrained use of water by the right holder. To the extent that the permit or its requirements act to completely deny the exercise of appurtenant rights, however, the code would prohibit them. Although, CWRM could potentially impose requirements and regulations on appurtenant rights holders that limit, but do not deny, the exercise of a legitimate right. Ultimately, appurtenant rights holders should apply for water use permits, and CWRM should grant those permits subject to regulations that do not completely deny the exercise of the appurtenant right.

While appurtenant rights holders generally must apply for a water use permit and remain subject to regulations imposed by CWRM, an exception to that requirement seems to exist for holders with rights located on "kuleana or taro lands." Such holders seemingly do not have to apply for a permit or curtail their use at all in compliance with any code regulations. In the statutory provision of the code related to Native Hawaiian Water Rights, the legislature declared that appurtenant rights located on "kuleana and taro lands * * * shall not be diminished or extinguished" by a failure to apply for a permit.[118] The legislature's use of the word "diminished," instead of "denied," serves as evidence that it intended for appurtenant rights located on kuleana and taro lands to remain uninhibited—or undiminished—despite a failure of rights holders to apply for a permit. Accordingly, when reading the above-referenced provision on appurtenant rights in the section on water use regulation and the provision related to Native Hawaiian Water Rights, in uniformity, it initially appears that the code requires all appurtenant rights holders to apply for a water use permit. Additionally, the code requires that CWRM must grant those permits, and, then, the appurtenant right becomes subject to any applicable code provisions, as well as their corresponding regulations. However, for those appurtenant rights located on kuleana and taro lands, an appurtenant right remains completely undiminished despite its holder's failure to apply for a permit. Thus, it appears that the code establishes a unique and possibly undesirable

118. HAW. REV. STAT. § 174C-101(d) ("The appurtenant rights of kuleana and taro lands * * * shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.").

incentive for appurtenant rights holders to exclude themselves from CWRM's oversight by simply not applying for a permit.

2. Scope and Elements of T & C Water Rights

Clarifying the scope of T & C water rights began with the Supreme Court of the Kingdom of Hawai'i in 1858 determining that the Kuleana Act protected certain gathering rights of native tenants.[119] Later, the Hawai'i Supreme Court declared that T & C rights apply only to native Hawaiians who can show a continuous use that existed since November 25, 1892.[120] Unlike appurtenant water rights, the code does not expand or restrict the scope of T & C rights beyond what the courts have provided.

a. Hawai'i Revised Statutes § 7-1

The Hawai'i courts have defined both the purpose and scope of HRS § 7-1, thereby clarifying the individuals and rights protected by the statute. In 1858, the Supreme Court of the Kingdom of Hawai'i determined that the legislature enacted the Kuleana Act specifically to ensure and protect the rights of native Hawaiian tenants during the Great Mahele.[121] Subsequently, in 1982, the Supreme Court of the State of Hawai'i declared that the scope of HRS § 7-1 protected gathering of only those items specifically enumerated within the statute, nothing more.[122] The court determined that any person lawfully residing on a parcel of land could gather those items enumerated in the statute.[123] In addition to clarifying the enumerated gathering rights, the Supreme Court of Hawai'i has determined that the statutory "drinking water" and "running water" language merely codified the doctrine of riparian rights in Hawai'i.[124] However, unlike the appurtenant water rights in *Peck* and

119. *Oni v. Meek*, 2 Haw. 87, 95 (1858)

120. *Kalipi*, 656 P.2d at 751. *See also* PASH, 903 P.2d at 1270.

121. *Oni*, 2 Haw. at 95 ("That it was the intention of the Legislature to declare, in this enactment, all the specific rights of the [tenants] (excepting fishing rights) which should be held to prevail against the fee simple title of the [landlords], we have no doubt.").

122. *Kalipi*, 656 P.2d 745, 750 (Haw. 1982) ("Similarly, the limiting of gatherable items to those enumerated in the statute is a result dictated by the language of the statute.").

123. *Id.* at 749.

124. *McBryde Sugar Co., Ltd. v. Robinson*, 504 P.2d 1330, 1344 (Haw. 1973) ("It would appear that in light of history and historical background of the Hawaiian Kingdom, the provision of the law enacted on August 6, 1850 which reserves to property owners the 'right to drinking water and running water,' was a codification or statutory enactment of the doctrine of riparian

Reppun, this statute does not provide any rights to divert water from the source.

b. Hawai'i Revised Statutes § 1-1

The Hawai'i Supreme Court has also specified certain factors that an individual must show in order to establish T & C rights under HRS § 1-1. Individuals attempting to establish a T & C water right must show that (1) the right "[has] been established in practice" prior to November 25, 1892;[125] (2) the practice at issue must have continued since November 25, 1892;[126] and (3) the individual(s) attempting to establish the right "are descendants of native Hawaiians who inhabited the islands prior to 1778, and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1."[127] Courts must balance "the respective interests and harm once it is established that the application of the customary use has continued in a particular area."[128] Where an individual can meet each of these factors, HRS § 1-1 serves to protect such traditional and customary practices, which could include diversions of water.

Arguably, the Hawai'i Supreme Court's interpretation of HRS § 1-1 as adopting the doctrine of custom in *Kalipi* supports a proposition that appurtenant and T & C rights both derive from the same principle because of the *Peck* court's use of the "time immemorial" standard. However, Hawaiian courts have clarified that that standard is no longer an element associated with either type of right. As mentioned above, however, appurtenant rights do not derive from the doctrine of custom, as evidenced by the *Reppun* court's elimination of the "time immemorial" language as a standard.[129] Further, in 1995, the Supreme Court of Hawai'i also explicitly rejected the use of a standard based on "time immemorial" when determining T & C

rights recognized as part of the common law by the English and Massachusetts courts.").

125. PASH, 903 P.2d at 1268 ("One of the most dramatic differences in the application of custom in Hawai'i is that the passage of HRS § 1-1's predecessor fixed November 25, 1892 as the date Hawaiian usage must have been established in practice.") (citations omitted).

126. *Kalipi*, 656 P.2d at 751 ("Where these practices have, without harm to anyone, been continued, we are of the opinion that the reference to Hawaiian usage in § 1-1 insures their continuance for so long as no actual harm is done thereby.").

127. PASH, 903 P.2d at 1270 (internal quotations omitted).

128. *Kalipi*, 656 P.2d at 751.

129. *See supra p.* 20-21.

rights.[130] Thus only current commonality between the origins of appurtenant rights and T & C rights is the "time immemorial" language, which the Supreme Court of Hawai'i made clear is not a part of either type of right.

C. Institutional Application of Appurtenant and T & C Water Rights

The water code provides for the institutional application of both appurtenant water rights and T & C rights. Unlike appurtenant rights, however, T & C rights also have explicit protections granted by the state constitution.[131] The Hawai'i Supreme Court has defined what actions CWRM must take in order to ensure constitutionality in the allocation of freshwater resources.[132] Ultimately, the code and constitution specify different requirements from CWRM depending on whether an appurtenant or T & C right exists.

1. CWRM's Application of Appurtenant Water Rights

The code establishes CWRM's application of appurtenant water rights within the state water management system. Under the code, CWRM has the authority to regulate appurtenant water rights, and ensure their protection.[133] This includes issuing permits to appurtenant rights holders.[134] The code states, however, that CWRM can also revoke and restrict surface water use permits (WUP) for appurtenant rights.[135]

a. The State Water Code

In 1987, after the *Peck* and *Reppun* decisions, the Hawai'i legislature enacted the code. The legislature included numerous protections, and a few restrictions, on appurtenant water rights. But although the legislature included thirty-six definitions in the code and CWRM has adopted thirty-two definitions in its implementing regulations, neither the statute nor the regulations include a definition of appurtenant rights.[136] Under its "General

130. PASH, 903 P.2d at 1262 n. 26 (adopting a standard of "long and general" usage).

131. HAW. CONST. art. XII, § 7.

132. *Na Wai Eha*, 287 P.3*d at* 148.

133. HAW. REV. STAT. § 174C-5(15) (1987).

134. I*d*. at § 174C-63.

135. I*d*. at §§ 174C-58, -62(c).

136. S*ee* HAW. REV. STAT. § 174C-3 (1987); *see also* Haw. Admin. Rules § 13-168-2 (Weil).

powers and duties" section, the code merely states that CWRM "shall determine appurtenant water rights," including their quantification.[137]

To determine what the code requires from CWRM regarding appurtenant water rights, users must look to the sections concerning (1) the regulation of water use and (2) Native Hawaiian water rights. The section on regulation of water use establishes a framework for designating watersheds within the state as "water management areas," which triggers the requirement to apply for a WUP. When determining whether to designate an area as a water management area, CWRM must consider the existence of serious disputes regarding the use of water resources.[138] Because of the unjust history that native Hawaiians have experienced in receiving Hawai'i's land and natural resources, including freshwater,[139] disputes about their existence would presumably qualify as serious. Once CWRM has designated a water management area, users must apply for a WUP.[140] In order to obtain a permit, applicants must establish that the proposed use meets the standard of "reasonable-beneficial,"[141] which includes the use of water in a manner consistent with the public interest.[142] The protection of appurtenant water rights clearly falls within the scope of the public interest,[143] and therefore CWRM must ensure that permit applicants show that a proposed use remains consistent with the protection of appurtenant water rights.

In addition to designation of water management areas, and permit requirements, the code specifically protects appurtenant rights by stating

137. HAW. REV. STAT. § 174C-5(15) (1987) ("[CWRM] shall determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter.").

138. *Id.* at §§ 174C-44(7), -45(3).

139. *See supra pp.* 9-11.

140. *Id.* at § 174C-48 ("No person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the commission.").

141. *Id.* at § 174C-49(a)(2) ("To obtain a permit pursuant to this part, the applicant shall establish that the proposed use of water . . . [i]s a reasonable-beneficial use as defined in section 174C-3 . . . .").

142. *Id.* at § 174C-3 ("Reasonable-beneficial use means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.") (internal quotations omitted).

143. Douglas W. MacDougal, *Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?*, 18 U. HAW. L. REV. 1, 50 (1996).

that nothing in the part of the code related to regulation of water use acts to deny an appurtenant water rights holder from exercising their right.[144] It also states that CWRM shall issue a WUP to an existing appurtenant rights holder upon application.[145] The code adds, however, that the permits issued under this provision are subject to revocation[146] and CWRM's authority to limit permits based on water shortages.[147] Collectively, these provisions grant appurtenant rights holders the automatic issuance of a WUP upon application, but the state may revoke or include restrictive terms in those permits.

2. CWRM's Application of T & C Water Rights

Both the state constitution and the water code explicitly provide the institutional application for T & C water rights. First, the constitution creates specific obligations that CWRM must carry out when making decisions that could potentially affect T & C rights.[148] Second, the code states that CWRM must not take any action which restricts the use of T & C rights.[149] Ultimately, both of these legislative directives create greater restrictions for CWRM when considering T & C rights, as opposed to appurtenant rights.

a. The Hawai'i Constitution

The Constitution of the State of Hawai'i provides protections for rights that native Hawaiians "customarily and traditionally exercised."[150] Article XII, section 7 imposes a mandatory duty on the state and its agencies to

144. HAW. REV. STAT. § 174C-63 (1987).

145. *Id.* (stating also, however, that these permits are subject to other specific sections of the code).

146. *Id.* at § 174C-58 ("After a hearing, the commission may suspend or revoke a permit . . . .").

147. *Id.* at § 174C-62(c) ([T]he commission may impose such restrictions on one or more classes of permits as may be necessary to protect the water resources of the area from serious harm and to restore them to their previous condition.").

148. *Na Wai Eha*, 287 P.3d at 148.

149. HAW. REV. STAT. § 174C-2(c) (1987).

150. HAW. CONST. art. XII, § 7 ("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.").

protect the exercise of these T & C rights,[151] including a duty on the part of the courts to "preserve and enforce" T & C rights.[152] In addition, CWRM has specific obligations under the Constitution when it determines T & C rights, which include articulating the extent T & C rights are practiced within a petition area, the impacts on T & C rights of a proposed action, and any action that CWRM will take in order to protect T & C rights.[153] Hawaiian courts have not extended these specific constitutional protections to appurtenant water rights. Therefore, this provision of the Constitution explicitly imposes an affirmative obligation to identify and take feasible measures to reasonably protect T & C rights, not appurtenant rights.

b. The State Water Code

The state water code also protects T & C rights, obligating CWRM to not issue permits that interfere with T & C rights. Part I of the code states that "[a]dequate provision shall be made for the protection of traditional and customary Hawaiian rights."[154] The Supreme Court of Hawai'i determined that this language, in addition to other statutes and the Constitution, brought T & C rights under the protection of the public trust doctrine.[155] This requires CWRM to "take the initiative in considering, protecting, and advancing" T & C rights "at every stage of the planning and decision making process."[156] Additionally, under the public trust doctrine, CWRM must consider cumulative impacts of all diversions on T & C rights

151. *Id*.

152. *Kalipi*, 656 P.2d at 748 ("For the court's obligation to preserve and enforce such traditional rights is a part of our Hawaii State Constitution . . . .").

153. *Na Wai Eha*, 287 P.3d at 148 (citing *Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Haw.*, 7 P.3d 1068, 1083-84 (Haw. 2000)) (internal quotations omitted) ("The court then provided an 'analytical framework' to guide the State in its decisions affecting native Hawaiian rights, specifying that the agency must, at a minimum, articulate: (1) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [state] to reasonably protect native Hawaiian rights if they are found to exist.").

154. HAW. REV. STAT. § 174C-2(c) (1987).

155. *Waiahole* I, 9 P.3d at 458 ("[W]e read 174C-2(c) to describe a statutory public trust . . . .").

156. *Id*. at 455.

and implement appropriate mitigation measures, which include using alternative sources of water that will not harm T & C rights.[157]

Another provision of the code mentions T & C rights as part of protecting instream uses of water when CWRM establishes instream flow standards. Whenever CWRM determines any flow standards within the state, it must also protect "beneficial instream uses of water."[158] The code includes the "protection of traditional and customary Hawaiian rights" in its definition of "instream uses."[159] Therefore, CWRM must ensure the protection of T & C rights anytime it sets flow standards for waters of the state. In order to ensure it fulfills this duty under the code, CWRM must specifically determine the individual streamflow necessary to protect all valid T & C rights.[160] As an additional part of its protection of instream uses, CWRM must also consider the effects on T & C rights when it undertakes the determination of designating a surface water management area,[161] and in drafting the state water resources protection plan.[162] If established as T & C rights by Hawaiian usage under HRS § 1-1, any continuous legitimate use of

157. *See Id.* at 455 ("As such, the Commission must not relegate itself to the role of a mere umpire passively calling balls and strikes for adversaries appearing before it, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process. . . . Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions in trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources.") (internal quotations and citations omitted).

158. HAW. REV. STAT. § 174C-71(4) (1987) ("In the performance of its duties the commission shall . . . [e]stablish an instream flow program to protect, enhance, and reestablish, where practicable, beneficial instream uses of water.").

159. *Id.* at § 174C-3 (1987) ("Instream uses include, but are not limited to . . . [t]he protection of traditional and customary Hawaiian rights.").

160. *Id.* at § 174C-71(1)(C) ("Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream.").

161. *Id.* at § 174C-45(1), (2) ("In designating an area for water use regulation, the commission shall consider . . . increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses . . .").

162. *Id.* at § 174C-31(d)(2) ("The water resource protection plan shall include . . . [h]ydrologic units and their characteristics, including the quantity and quality of available resource, requirements for beneficial instream uses and environmental protection . . .").

water to cultivate traditional native Hawaiian crops would receive all these protections.

The broadest protections of T & C rights granted by the code come for the statutory provisions related to Native Hawaiian Water Rights. The first relevant provision declares that the provisions of the code shall not abridge or deny T & C rights.[163] Then, similar to HRS § 7-1, the provision provides a list of activities that the code considers as T & C rights.[164] However, unlike HRS § 7-1, the code provision specifically states that the activities listed "shall include, but not be limited to" those enumerated. Thus, the code leaves open the question of whether and what types of additional activities would qualify for protection as T & C rights under its provisions. Additionally, unlike HRS § 1-1, this provision of the code does not seem to require a showing of continuous use in order to qualify as a T & C right. Therefore, potential T & C rights holders could seek the protections of the code by showing only that they are (1) ahupu'a tenants (2) who are descendants of Native Hawaiians who inhabited the islands prior to 1778, and (3) who practice one of the enumerated activities or some other activity that they can show qualifies as traditional and customary. The second relevant provision provides that, as with appurtenant rights, those T & C rights "assured in this section," will not "be diminished or extinguished" by a failure to apply for or to receive a water use permit. Therefore, as demonstrated, the code provides far greater protections for T & C rights than other constitutional or statutory provisions.

IV. Current and Potential Arguments For Future Assertions of Appurtenant and T & C Water Rights

A clearer understanding of the differences between appurtenant water rights and T& C water rights provides the basis for a critique of current arguments being made by legal practitioners, and the introduction of new potential alternative arguments. By moving away from the idea that appurtenant and T & C rights share a common nature, legal practitioners can create a more efficient process for establishing water rights for their native Hawaiian clients. This could result in a larger percentage of native Hawaiians receiving the water rights owed to them and allow CWRM to more effectively manage the state water system.

163. *Id.* at § 174C-101(c) ("Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.").

164. *Id.*

A. Arguments Being Made by Legal Practitioners That Fail to Take into Account the Differences Between Appurtenant and T & C Rights

Currently, a number of arguments question the separate nature of appurtenant and T & C rights. Legal practitioners who fail to take this difference into account argue that either (1) Hawai'i courts and the legislature should consider appurtenant rights as personal rather than real property, in the belief that this would result in appurtenant rights being awarded to native Hawaiian non-property owners; or (2) appurtenant rights used for cultivating taro or other traditional Hawaiian crops can become T & C rights. These arguments, however, overlook the separate basis and scope of both appurtenant and T & C rights.

1. Appurtenant Rights as Personal Rather That Real Property Based

Some legal practitioners seek to reclassify appurtenant rights as personal property rather than real property because they believe that appurtenant rights should only apply to native peoples. This argument posits that appurtenant rights should attach to an individual, rather than to land.[165] The reasoning behind this argument is that the realty-based definition conflicts with the Kuleana Act, which the legislature enacted to protect the rights of native Hawaiians only.[166] Attaching appurtenant rights to the individual, however, overlooks their real property-based origins and their consistent classification by the courts as appurtenant easements.

Appurtenant Hawaiian water rights originate in the common law, not the Kuleana Act.[167] When the *Peck* court first recognized appurtenant rights, it referred to the Kuleana Act only to provide a historical background to the Great Mahele process that transferred the King's lands to private ownership.[168] Specific language that the *Peck* court mentioned in the

165. Letter from David L. Martin, Native Hawaiian Advisory Council, to Keith W. Ahue, Chairman, State of Haw. Comm'n on Water Res. Mgmt. (Dec. 21, 1993) (on file with author) ("Presently, there is an expanding debate about the appurtenant right being attached to the land and not an individual.").

166. *Id.* ("We have been increasingly persuaded that the current "land-based" interpretation of the appurtenant water right is inconsistent with the Hawaiian language version of the Kuleana Act, which was passed to define the rights of Hawaiians, not non-Hawaiians.")

167. *See* MIIKE, *supra* note 41, at 96, 99 (including a discussion of appurtenant water rights within the section entitled "Summary of Water Rights under the Common Law").

168. *Peck*, 8 Haw. at 661.

Kuleana Act—restricting all transfers of land "subject to the rights of native tenants"—seems to be the basis that legal practitioners use for favoring an interpretation of appurtenant rights that applies them solely to native Hawaiians.[169] However, the *Peck* court did not use this language when it recognized the appurtenant rights.[170] The court did acknowledge that the Kuleana Act language restricting transfers of land subject to the rights of native tenants existed, but did not use the statute as a basis for recognizing any appurtenant rights.[171] This omission shows that the court knew about the language and purposefully declined to incorporate it into the appurtenant water rights analysis. As a result of the strictly common law basis for appurtenant rights, as opposed to a statutory one, consideration of the Kuleana Act's provisions does not belong in an analysis determining the scope and nature of these rights.

Hawaiian courts have consistently described appurtenant rights as common law, real property-based easements that exist as incidents of land ownership, unlike statute-based T & C rights. In *Peck*, in 1867, the Supreme Court of the Kingdom of Hawai'i used the terms "easement" and "appurtenant" multiple times in their decision to describe the right.[172] The court explained that an owner of land receives these easements as a benefit connected to the land, which supports the real property-based approach.[173] Additionally, in support of the real property-based notion of appurtenant rights, in 1930 the Supreme Court of the Territory of Hawai'i stated that appurtenant rights attached to land when the land first "passed into private ownership."[174] The Supreme Court of the State of Hawai'i has not reversed either of these decisions and, in *Reppun*, actually strengthened the position of appurtenant rights as land-based common law rights by determining that

169. *Id*. at 660-61.

170. *Id*. at 663-66.

171. *Peck*, 8 Haw. at 661.

172. *Id*. at 661-62, 669.

173. *Id*. at 661-63.

174. Territory v. Gay, 31 Haw. 376, 383 (1930) ("The same term has, however, sometimes been used to denote or to include rights not shown to have been acquired adversely or by prescription but which were being enjoyed by and were regarded as appurtenant to certain lands at the date when those lands first passed into private ownership by the generosity of the king and with the administrative assistance of the land commission. Whenever it has appeared that a kuleana or perhaps other piece of land was, immediately prior to the grant of an award by the land commission, enjoying the use of water for the cultivation of taro or for garden purposes or for domestic purposes, that land has been held to have had appurtenant to it the right to use the quantity of water which it had been customarily using at the time named.")

an attempt to sever or transfer the right apart from the fee results in extinguishment.[175] This means that appurtenant water rights are inalienable and must be bundled with particular land parcels so that no separate land and water estate exists. These cases affirm the fact that, unlike T & C rights, appurtenant rights attach to land and not an individual.

Hawaiian appurtenant water rights have always been considered real property-based appurtenant easements, as opposed to personal rights. By definition, appurtenant easements attach to a particular parcel of land based on its ownership.[176] Additionally, appurtenant easements must benefit the owner of the dominant estate. Generally, the owner of a dominant estate cannot transfer or sever the appurtenant right from the benefited property.[177] In 1867, the Supreme Court of the Kingdom of Hawai'i recognized appurtenant water rights in order to benefit nonnative parties that obtained private ownership in lands from the land commission during the Great Mahele.[178] The *Peck* court stated that this right also attaches to benefit these same lands for subsequent post-Mahele dominant estate owners.[179] In *Reppun*, the Hawai'i Supreme Court declared the inalienability of appurtenant rights apart from the dominant estate.[180] As a result of these determinations, appurtenant water rights maintain all the characteristics of appurtenant easements. This shows that Hawaiian courts have consistently and historically recognized appurtenant water rights as land based; therefore, the land-based approach to appurtenant rights remains as the current framework.

175. *Reppun*, 656 P.2d at 71 (citing the Restatement (First) of Property to clarify the effects of transferring or severing appurtenant rights).

176. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.5(1) (AM. LAW. INST. 2000) ("Appurtenant means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land.") (internal quotations omitted).

177. *Id*. at § 5.6 ("an appurtenant benefit may not be severed and transferred separately from all or part of the benefited property.").

178. *Peck*, 8 Haw. at 662 ("[T]his was clearly an easement for the benefit of those lands through which the ancient water course extended.").

179. *Id*. at 662 ("Washburn, in his 2 vol. Real Property, p. 65, says a right to interfere with the natural right to make use of water belonging to another, when it is connected with the occupation of lands, constitutes an easement in favor of the latter, as the dominant estate.").

180. *Reppun*, 656 P.2d at 71.

2. Appurtenant Rights as Traditional and Customary

Another argument by legal practitioners claims that appurtenant rights used for taro cultivation are actually T & C rights. For example, in a concurring opinion in the N*a* W*ai* E*ha* case, Justice Acoba of the Hawai'i Supreme Court endorsed this fusion by focusing on the provision in the code protecting T & C rights, which states that "[t]raditional and customary rights . . . shall include . . . the cultivation or propagation of taro."[181] Justice Acoba declared that this language about taro cultivation "statutorily protects . . . appurtenant rights to water."[182] This argument implicitly assumes that an appurtenant right would also become a protected T & C right if the owner used it to grow taro.

The code provision, however, does not actually recognize appurtenant rights as T & C rights, because distinctions based on type of use do not belong in either the appurtenant or T & C rights analysis. In order to establish a T & C right, a native Hawaiian individual must show the exercise of any continuous use existing prior to November 25, 1892.[183] To establish an appurtenant water right, one need only show that a parcel utilized water for any reason at the time of its original conversion into fee simple land.[184] The R*eppun* court specifically stated that appurtenant rights exist for any purpose which the owner deems necessary.[185] No authority exists to support the proposition that types of uses—specifically taro cultivation or propagation—can create a T & C right out of an appurtenant right. To simply assert, as Justice Acoba did, that an appurtenant water right becomes a T & C right once its owner uses the water to cultivate taro, completely misinterprets the differences between both types of rights.

Courts should not treat appurtenant water rights as T & C rights because to do so would misconstrue the nature of both and may lead to unintended results. The state legislature codified T & C rights to specifically protect native Hawaiians.[186] Presumably, native Hawaiian legal practitioners present their arguments to ensure maximum resource distribution to natives. However, conflating appurtenant and T & C rights could potentially result in non-Hawaiians receiving more water. As a result of their classification as appurtenant easements, appurtenant water rights attach to the land and only transfer along with conveyances of land. Therefore, non-Hawaiian landowners may have appurtenant water rights attached to their

181. N*a* W*ai* E*ha*, 287 P.3d at 171 (Acoba, J., concurring) (citing HAW. REV. STAT. § 174C-101(c)).

182. I*d*.

183. PASH, 903 P.2d at 1268, 1270.

184. R*eppun*, 656 P.2d at 71.

185. I*d*. at 70.

186. S*ee supra* pp. 13-14.

land.[187] T & C water rights holders, however, must make a showing that they descend from native Hawaiians who inhabited the islands prior to1778.[188] If appurtenant rights holders could transform their right into T & C by merelydiverting their water use to the cultivation and propagation of taro, non-Hawaiian landowners could claim T & C rights without being descendants of native Hawaiians. This could potentially shift water rights from native to nonnative Hawaiians, and subvert the underlying rationale for T & C rights as protecting native Hawaiian tenants. Ultimately, ownership of a dominant estate, not the use of water, defines an appurtenant right.[189] Additionally, one can only establish T & C water rights by proving native Hawaiian descendency and continuous use. As a result, courts should not attempt to redefine appurtenant water rights as T & C rights based on the cultivation of taro because this interpretation fails to take into account the additional factors required to establish each type of right.

B. Potential Arguments for The Assertion of Both Appurtenant and T & C Water Rights

Instead of conflating appurtenant and T & C rights, native Hawaiian legal practitioners should attempt to establish both types of rights according to their separate bases. For example, instead of using only the appurtenant rights framework to obtain water for growing traditional crops such as taro, native Hawaiians should also assert their rights to grow such products under the T & C framework. Determining appurtenant rights typically requires looking to the original award or grant from the land commission.[190] If native Hawaiians never took part in the Mahele process and did not receive an award or grant, however, they would receive no appurtenant rights. But individuals in this situation could still prove rights to water for growing taro under HRS § 1-1 and the Constitution by establishing native Hawaiian descendence and a continuous use of water on the land predating November 25, 1892. Additionally, ahupua'a tenants who

187. M*cBryde*, 504 P.2d at 1341 (determining that non-Hawaiian sugar plantation owners had appurtenant water rights).

188. S*ee supra* pp. 16-17.

189. R*eppun*, 656 P.2d at 70 ("[A]ppurtenant rights are incidents of land ownership."); P*eck*, 8 Haw. at 665 ("If land has a water right, it will not be contended that the water shall be used forever for the same crop, be it [taro] or cane. It may be used for any purpose which the owner may deem for his interest, always taking care that any change does not affect injuriously the rights of others.").

190. Hutchins, *supra* note 51, at 105 (describing various forms of evidence used in a determination of appurtenant water rights, and including the land commission's awards and records).

are descendants of pre-1778 native Hawaiians could assert T & C protections under the code without establishing a continuous use. Upon making such a showing, those parties would receive a personal, nontransferable right to water to cultivate traditional crops like taro. This right would not fall under the classification as an appurtenant right, but would serve similar purposes, limited only to the particular proven use.

In addition to claiming T & C rights to water for purposes of growing taro and other traditional crops, native Hawaiian parties should also begin presenting arguments to the Hawai'i Supreme Court giving these rights a higher priority than appurtenant water rights. The Hawai'i Supreme Court determined that the public trust doctrine protects both T & C[191] and appurtenant rights,[192] requiring CWRM to consider and protect both types of rights at every step of the decision making process.[193] However, thecourt also stated that no priorities exist among categories of public trust uses.[194] In the future, parties should argue that the court erroneously failed to recognize prioritization between appurtenant and T & C water rights based on their separate origins, given that appurtenant water rights have their genesis in the common law,[195] while T & C rights to water for traditional cultivation originate from HRS § 1-1.[196] The Hawai'i Supreme Court has determined that individuals can establish T & C rights under HRS § 1-1 based on Hawaiian usage. This statute requires that any rights established by Hawaiian usage would supersede common law rights, as it states that "[t]he common law [of England and America] . . . is declared to be the common law of [Hawai'i] . . . except as otherwise expressly provided . . . or established by Hawaiian usage."[197] Therefore, HRS § 1-1 requires the state of Hawai'i to recognize common law rights only unless otherwise established by Hawaiian usage. The statutory designation of priorities creates a hierarchy between appurtenant and T & C rights, whereby common

191. *Waiahole* I, 9 P.3d at 449 ("[W]e continue to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.").

192. *Id.* at 449 n. 34 ("The trust's protection of traditional and customary rights also extends to the appurtenant rights recognized in *Peck*.").

193. *See supra* pp. 26-27.

194. *Waiahole* I, 9 P.3d at 454 ("Given the diverse and not necessarily complementary range of water uses, even among public trust uses alone, we consider it neither feasible nor prudent to designate absolute priorities between broad categories of uses under the water resources trust.").

195. *See supra* pp. 11-13.

196. *See supra* pp. 13-14.

197. HAW. REV. STAT. § 1-1 (1955).

law appurtenant rights may only exist to the extent they do not infringe upon T & C rights established by Hawaiian usage. Therefore, native Hawaiian T & C rights to water for traditional crops, as established by Hawaiian usage, should become a priority use among public trust purposes over appurtenant rights that are available to both natives and nonnatives.

V. Conclusion

In the process of allocating certain water rights to parties, including setting instream flows,[198] CWRM must take into account the differences between appurtenant and T & C water rights.[199] For example, appurtenant rights have a basis in the common law, while T & C rights originate from state statutes. Additionally, the scope of appurtenant rights applies to any use of water that exists during a parcel's initial transfer into fee simple ownership,[200] while T & C rights apply to native Hawaiians who can show a continuous use since November 25, 1892.[201] To adequately fulfill its duties and ensure that rights holders receive the appropriate quantities of water, CWRM must acknowledge each of these rights and their implications for appropriately applying each type of right within the state water management system. A lack of clarity exists as the result of new arguments which attempt to blur the clear distinctions between both types of rights.[202] Understanding the origins of appurtenant rights in the common law and T & C rights by statutory creation will allow legal practitioners to efficiently address inaccurate assumptions about the nature of these rights. Furthermore, legal practitioners can also begin to make different arguments which will ideally result in more informed decision making from CWRM and better prospects for a greater distribution of the state's water resources to native Hawaiians.

198. S*ee supra* pp. 20-21.
199. S*ee supra* at pp. 22-27.
200. S*ee supra* at p. 18-19.
201. S*ee supra* at pp. 21-22.
202. S*ee supra* at pp. 26-32.