

CPR CENTER FOR
PROGRESSIVE REFORM

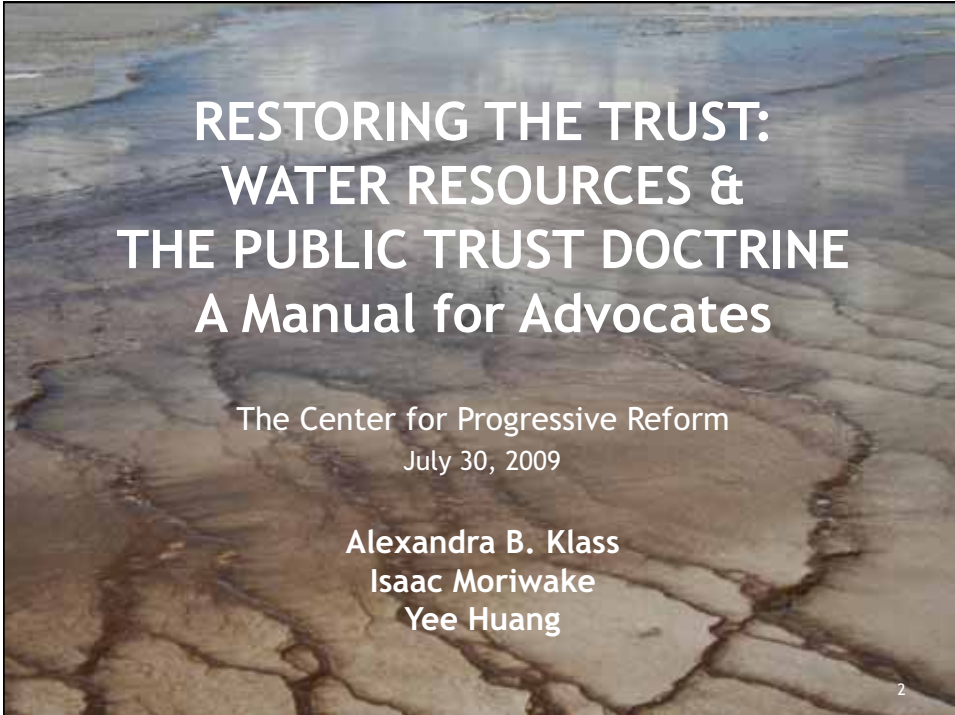
RESTORING THE TRUST: WATER RESOURCES & THE PUBLIC TRUST DOCTRINE A Manual for Advocates

The webinar will begin shortly. Please be aware that it will be recorded.

The conference line is 866.740.1260, access code 2502896. To mute your line, press *6. To unmute, press *7.

For technical assistance, please contact ReadyTalk, 800.843.9166.

1



RESTORING THE TRUST: WATER RESOURCES & THE PUBLIC TRUST DOCTRINE A Manual for Advocates

The Center for Progressive Reform
July 30, 2009

Alexandra B. Klass
Isaac Moriwake
Yee Huang

2

Today's Speakers



Alexandra B. Klass

Associate Professor,
University of Minnesota Law School &
CPR Member Scholar



Isaac Moriwake

Attorney,
Earthjustice Hawai'i



Yee Huang

Policy Analyst,
CPR

3

Webinar Agenda

- Introduction: The Public Trust Doctrine
- The Landscape: The Doctrine in Practice
- The Roles: The Doctrine & State Water Laws
- The Challenges of Using the PTD
- Pioneering Ahead: Hawai'i & the Water Resources Trust
- Q & A

4

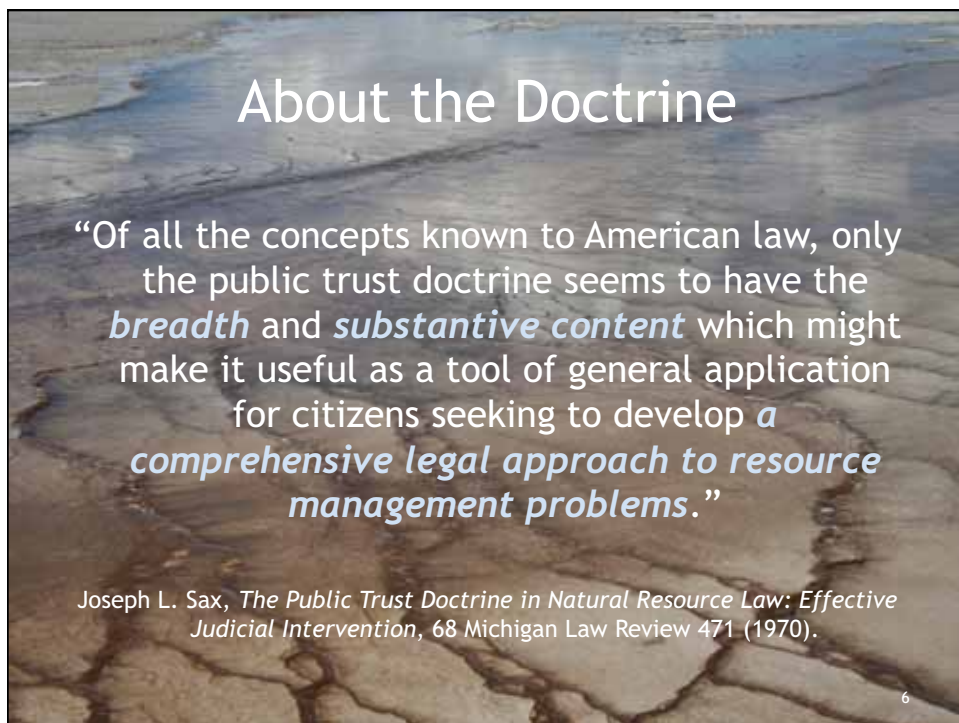


CPR  CENTER FOR
PROGRESSIVE REFORM

*Special thanks to the Park Foundation
for making this project possible.*

www.progressivereform.org
www.cprblog.org

5



About the Doctrine

“Of all the concepts known to American law, only the public trust doctrine seems to have the *breadth* and *substantive content* which might make it useful as a tool of general application for citizens seeking to develop a *comprehensive legal approach to resource management problems.*”

Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Michigan Law Review 471 (1970).

6

About the Doctrine

Trustee	The State
----------------	------------------

Trust Principal	Certain Natural Resources
	<ul style="list-style-type: none"> • Traditionally, navigable waters and lands submerged beneath them • Extension to all water resources

Beneficiaries	Present and Future Generations
----------------------	---------------------------------------

Purposes	Certain Public Uses
	<ul style="list-style-type: none"> • Traditional public uses: navigation, commerce, and fishing • Modern public uses: recreation and environmental and aesthetic preservation

7

About the Doctrine

Generally, successful public trust cases fall into two categories:

Litigant	Type of Case
Environmental Groups	Citing the doctrine as a <i>limit on state action</i> that relinquishes or compromises trust resources <ul style="list-style-type: none"> • San Carlos Apache Tribe v. Superior Court (Ariz. 1999)
The State	Citing the doctrine <i>in support of state action</i> that protects trust resources from private actors <ul style="list-style-type: none"> • Avenal v. State, 886 So.2d 1085 (La. 2004)

8

About the Doctrine

- Outcome? Improved management of natural and water resources

```
graph TD; A[Require states to fulfill public trust duties]; B[Require states to apply public trust principles in decision-making]; C[Require states to democratize control over the use of trust resources]; D[Require accountability and citizen empowerment];
```

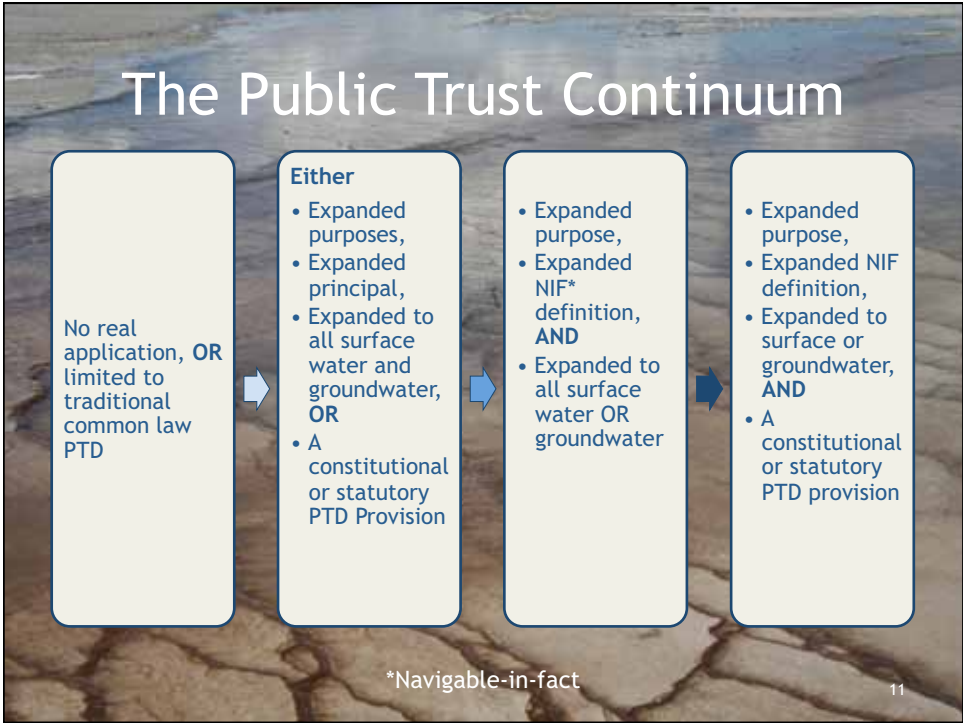
9

The Landscape

The Public Trust Framework

```
graph TD; A[Common Law] <--> B[Constitutional Provisions]; A <--> C[Statutory Provisions]; B <--> C;
```

10



The Roles: Protecting Groundwater

“[T]he existence, origin, movement, and course of [ground] waters, and the causes which govern and direct their movements, are *so secret, occult, and concealed* that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be *practically impossible.*”

Houston & T.C. Ry. Co. v. East, 81 S.W. 279 (Texas 1904) (emphasis added).

13

The Roles: Protecting Groundwater

Judicial Application

- *Mono Lake* (by implication), California Supreme Court
- *Waiahole*, Hawai'i Supreme Court

Legislative Action

- Grassroots campaign by the non-profit Vermont Natural Resources Council
- “It is the policy of the state that the groundwater resources of the state are held in trust for the public.”
Vt. St. Ann. tit. 10, § 1390(5)

14

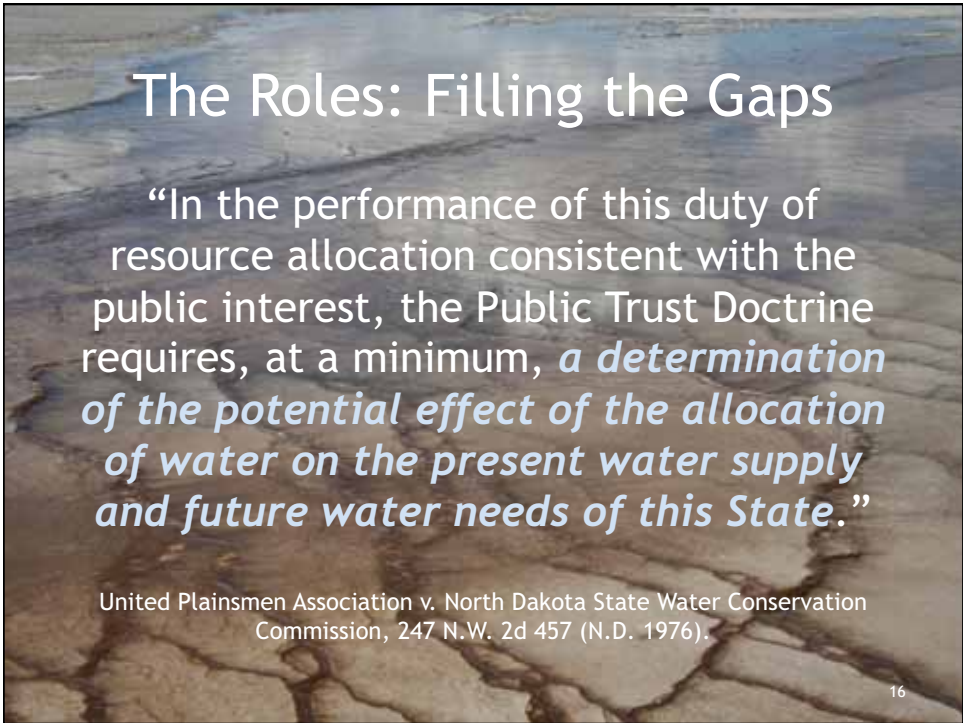


The Roles: Defending State Action

“[N]or shall private property be taken for public use, without just compensation.”

Physical Takings government action actually and physically displaces a private property owner	Regulatory Takings government action is tantamount to a physical taking
Just compensation required	“Background Principles” exception, including the public trust doctrine

15



The Roles: Filling the Gaps

“In the performance of this duty of resource allocation consistent with the public interest, the Public Trust Doctrine requires, at a minimum, *a determination of the potential effect of the allocation of water on the present water supply and future water needs of this State.*”

United Plainsmen Association v. North Dakota State Water Conservation Commission, 247 N.W. 2d 457 (N.D. 1976).

16

The Roles: Shaping the Rhetoric

“The beauty of the doctrine is that it makes old values new again. It is the wisdom of the ages applied to modern challenges. Its power in advocacy is that it is an old, entrenched doctrine.”

Chris Bzdok, Principal, Olson, Bzdok, & Howard P.C.

17

Limitations

One of many legal tools

Other developments in environmental law and natural resources management

Overall increased state and federal role in environmental protection

Challenges to Implementation

18

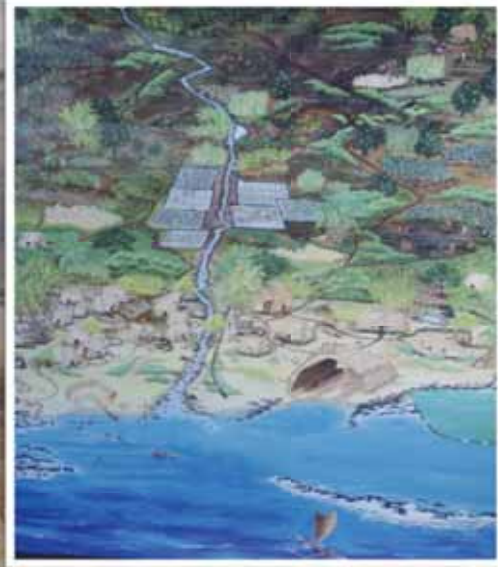
Pioneering
Ahead:
Hawai'i &
the Water
Resources
Trust



Trust Resources



Trust Use

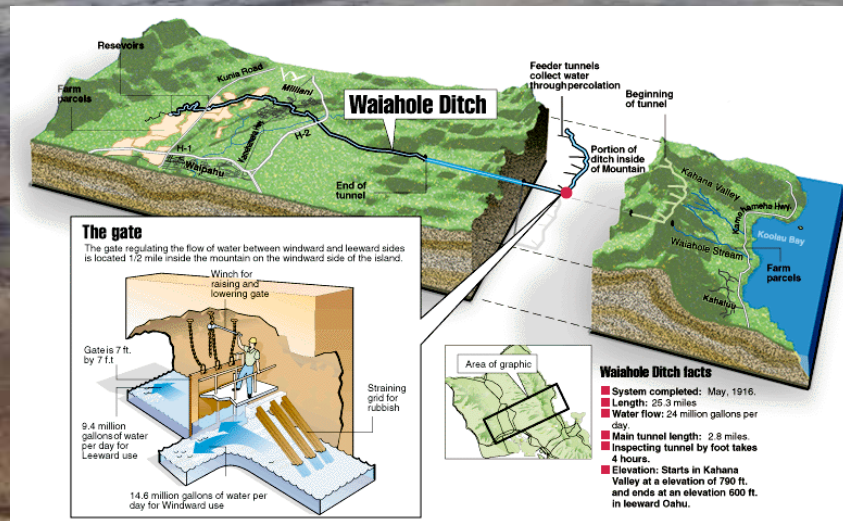


21

Trust Uses

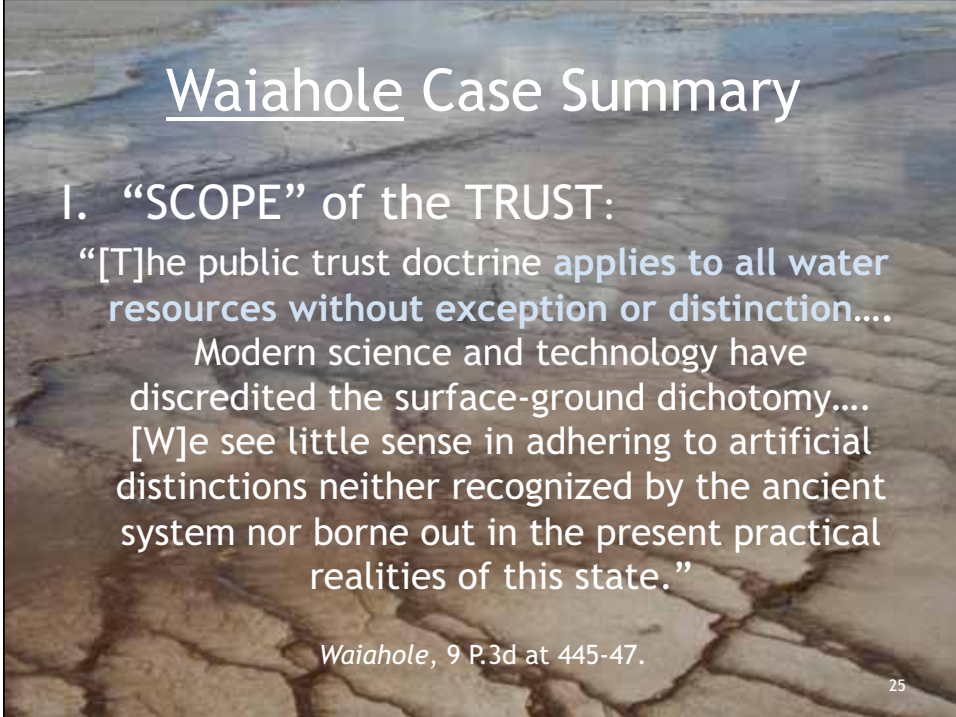


Offstream Diversion: The Waiahole Ditch



Hawai'i Water Law in a Nutshell

- Kingdom Law: Water as Trust
- Territorial Law: Shift to Prior Appropriation
- State Law: Reassertion of Riparianism and Public Trust Principles
 - McBryde/Robinson cases (1973 to 1989)
 - Haw. Const. art. XI, §§ 1, 7 (1978)
 - Water Code (1987) (“regulated riparianism”)
 - In re Waiahole Ditch, 94 Haw. 97, 9 P.3d 409 (2000), and its progeny



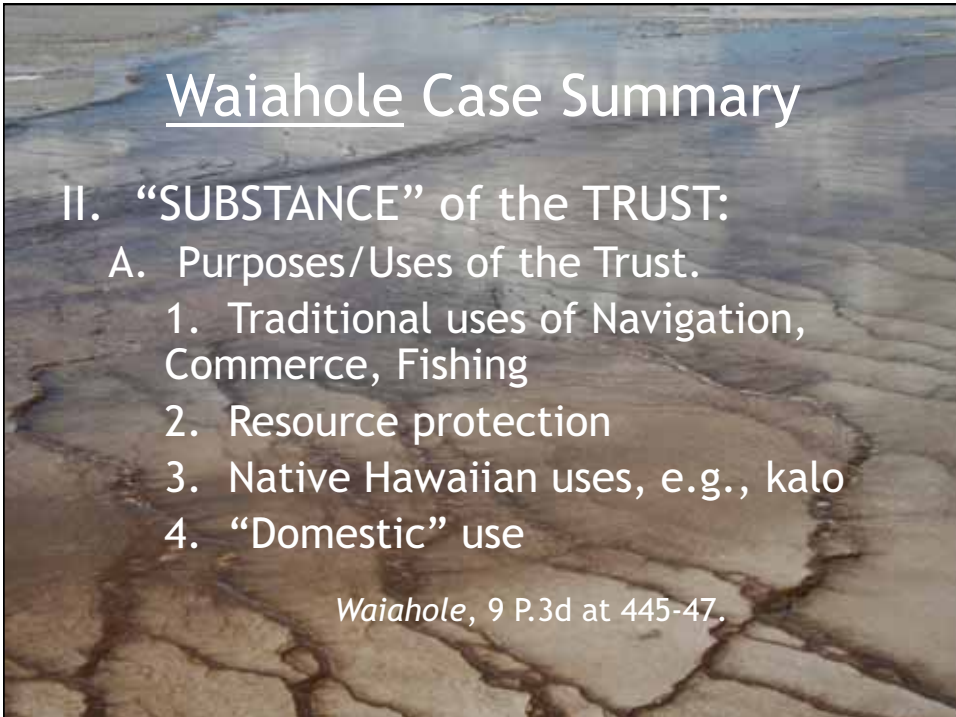
Waiahole Case Summary

I. “SCOPE” of the TRUST:

“[T]he public trust doctrine **applies to all water resources without exception or distinction....**
Modern science and technology have discredited the surface-ground dichotomy.... [W]e see little sense in adhering to artificial distinctions neither recognized by the ancient system nor borne out in the present practical realities of this state.”

Waiahole, 9 P.3d at 445-47.

25



Waiahole Case Summary

II. “SUBSTANCE” of the TRUST:

A. Purposes/Uses of the Trust.

1. Traditional uses of Navigation, Commerce, Fishing
2. Resource protection
3. Native Hawaiian uses, e.g., kalo
4. “Domestic” use

Waiahole, 9 P.3d at 445-47.

Waiahole Case Summary

B. State's Powers and Duties.

1. State's "continuing authority... precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes."
2. State has "affirmative duty" to take trust into account and protect it whenever feasible (citing Mono Lake).

Waiahole Case Summary

3. Presumption favoring trust uses:
The trust "effectively prescribes a 'higher level of scrutiny' for private commercial uses.... In practical terms, this means that the **burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust.**"

Waiahole Case Summary

4. More Trust Requirements:

- must not act as an “umpire passively calling balls and strikes,” but take initiative to advance public rights
- must consider cumulative impacts and implement mitigation, incl. alternative sources
- planning and decisionmaking from “global, long-term perspective.”
- “openness, diligence, and foresight”

Waiahole, 9 P.3d at 453-55.

Public Trust Tools

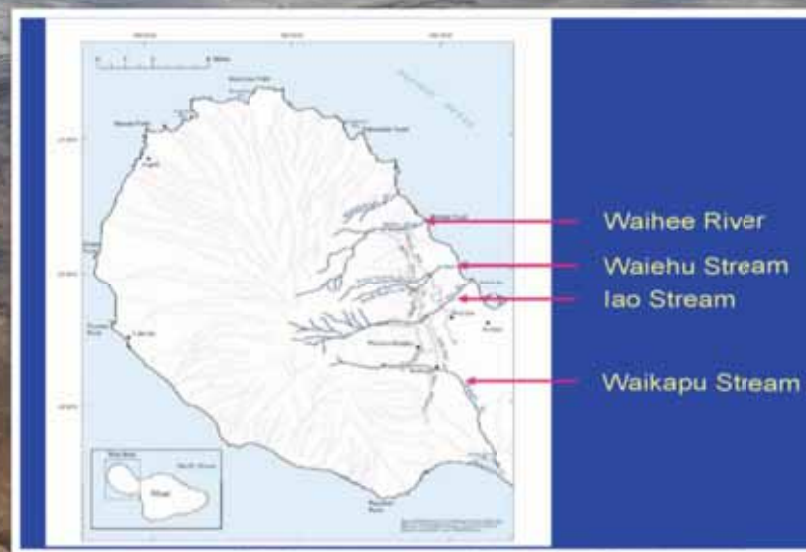
- Limitation on Transfer
- Shield against Takings Claims
- Process Mandate
- Preferential Burden Shifting
- Heightened Judicial Standard of Review
- Constitutional Foundation

- Public Trust as Paradigm/Discourse

Hawai'i Nuances

- HI “Water Resources” Trust
 - Origins in Kingdom “common law”
 - Common, Overarching Public Trust “Principles”
- HI Water Code
 - Comprehensive regulatory framework
 - “[T]he doctrine continues to inform the Code’s interpretation, define its permissible ‘outer limits,’ and justify its existence,” *Waiahole*, 9 P.3d at 445.

Next Steps: Na Wai Eha on Maui





Questions?

- To send a written question, type your question into the chat box
- To ask a question over the telephone, click on the “raise hand” button below the chat box
 - To UNMUTE your telephone line, press *7
 - To MUTE your telephone line, press *6

Thank you for participating

- Audio and slides for this presentation will be archived on CPR's website, www.progressivereform.org
- The *Manual* and 50-state index will also be available online later this summer
- Questions or comments?
Please contact Yee Huang by email (yhuang@progressivereform.org) or by phone (202.747.0698, ext. 6)