What Do We Care About Most

At 10:49 a.m. EDT, July 20, 1996 the Space Shuttle Columbia lifted off launch pad 39-B at the Kennedy Space Center for what would become the longest and most complex shuttle mission up to that time. Aboard Columbia was astronaut Charles E. Brady, Jr., a brilliant physician who was also a former Blue Angels fighter pilot.

As Chuck Brady looked at Hawai‘i from space he asked himself the question, “What do I care about the most?” From his unique geographical position, he was a witness for humanity of the condition of Earth. He developed anxiety watching the deterioration of the Earth day after day, but found solace when, during its rotation, he saw Hawai‘i. It was the most beautiful, pristine, healthy-appearing part of the planet--green islands shining in the middle of the Pacific Ocean. From space, he made a pact with himself to travel to Hawai‘i to encourage its protection.

As the director of the Department of Land and Natural Resources for the State of Hawai‘i (“DLNR”), it was my good fortune to be the one Chuck Brady came to visit in fulfillment of his personal pledge in 1996. He told me the clearest of his revelations in space was that everything he cared about--his family, his community, his nation--was dependent on a fragile, seemingly small planet that was under siege.

To understand the creation of the environmental court for the State of Hawai‘i is to ask the question the islands inspired Chuck Brady to ask: “What do we care about the most?” The environmental court’s purpose is to protect the land, air, and water that give Hawaii life. The state motto recognizes that the lives of Hawaii’s people depend on how the environment is treated: “The life of the land is perpetuated in righteousness.”

The Hawai‘i Constitution contains provisions unique among state constitutions mandating that natural resources, including “natural beauty,” be conserved and protected for “future generations” and that such resources be developed and utilized “in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” No other state has elevated protection of “natural beauty” to the level of a constitutional mandate; nor has any state mandated that natural resources be managed in furtherance of self-sufficiency. Hawaii’s Constitution also is one of only seven state constitutions that guarantee to every citizen “the right to a clean and healthful environment[.]”

The idea of a court designed to protect our natural resource heritage arose on Maui through the patient, enduring leadership of Jan Dapitan and her volunteer colleagues who administer Keep the Hawaiian Islands Beautiful, a nonprofit organization dedicated to beautification of America, and more specifically, Maui.

With the support of Senator Gilbert Keith-Agaran, Senator Mike Gabbard, Representative Chris Lee, and Governor Neil Abercrombie, the Court was established pursuant to Act 218 with a start date of July 1, 2015. The stated purpose of the act...
“is to promote and protect Hawaii’s natural environment through consistent and uniform application of environmental laws by establishing environmental courts.” In support of this purpose the legislature found “that the continued maintenance and improvement of Hawaii’s environment requires constant vigilance and continued stewardship to ensure its lasting beauty, cleanliness, uniqueness, and the stability of its natural systems, all of which enhance the mental and physical well-being of Hawaii’s people.” The legislature concluded the protection of the environment required greater participation by the judiciary to ensure that the State upholds its public trust duty to protect the environment for future generations. The legislature further finds that Hawaii’s natural resources are compromised every day resulting in numerous violations of the law. An environmental court will better ensure that the State upholds its constitutional obligation to protect the public trust for the benefit of all beneficiaries.

2014 Haw. Sess. Laws Act 218 § 1 at 737-38. Thus, with the establishment of the environmental court, the legislature sought to better ensure just treatment of Hawaii’s environmental treasure.

What is happening to what we care about most?

A second question useful to understanding the environmental court of Hawai’i is: “What is happening to what we care about most.” What is happening to the land, air, and water upon which our immediate and global communities depend? At a global level, climate change is often declared the most important issue facing humanity. Three hundred thousand people gathered at the United Nations in New York to make this point on September 22, 2014.

As a member of the three hundred thousand, United Nations Secretary-General Ban Ki-moon described the importance of climate change: “This is the planet where our subsequent generations will live ... there is no ‘Plan B,’ because we do not have ‘Planet B.'”

One of the world’s most acclaimed environmental jurists, Brazil Supreme Court Justice Antonio Benjamin, has described climate change as the single most important legal issue facing judges globally. He made that observation in his remarks prepared for Hawaii’s environmental court judges at the judicial training in Honolulu on May 22, 2015.

Justice Benjamin also observed that judges are called upon to address climate-change ramifications to all areas of law, including insurance and contracts, but they do not receive clear guidance from the legislative or scientific community.8 Noted environmental law professor Mary Wood9 teaches that climate change is humanity’s most important legal issue because degradation of land, air, and water is leading to destabilization of the ecosystems upon which successful economies and concomitant human rights depend.

At a recent international environmental law conference for judges convened by the Supreme Court of India on March 14, 2015, the Hawai’i environmental court was discussed in the context of its importance to environmental rule of law internationally. Among judges and justices from around the world, including Justice Antonio Benjamin, mere was wide recognition that Hawai’i is the place most identified as the ideal environment. By all measures, the term environment is usually identified globally as a positive concept associated with the natural world. Among environmental ecosystems, the more favorably regarded are warm coastal areas with beaches. Of all the world’s beach locations, Hawai’i is the most recognized for its natural beauty. Thus, under this analysis, Hawai’i is the location most widely perceived as Earth’s ideal environment.

As the most enduring global image of an ideal environment, Hawai’i provides a crucial juxtaposition to the alarming environmental issues normally perceived by the world community. These issues commonly have grave implications: the poisoning of the sacred Ganges River in India, decreased life expectancy for people in the world’s most contaminated cities, destruction of the world’s most important forest in the Amazon, radiation poisoning from the Tohoku tsunami, devastation of the marine ecosystem in the Gulf of Mexico from petroleum contamination, the recently declared states of emergency in California due to drought, and the oil spill that fouled the coastline of Santa Barbara. Faced with epic demonstrations of environmental damage to the Earth’s ecosystems, the world community needs a beacon of hope--a place of transcendent
beauty where the power of nature is renowned for inspiration and healing.

As broadly acknowledged by the assembled judges in India, that place is Hawai‘i. With this view, *7 judges and justices from courts represented at the India conference shared Astronaut Chuck Brady’s conviction—and the conviction of the Hawai‘i State Legislature—that Hawai‘i’s environment is a treasure for humanity that must be treated justly.

The National Green Tribunal of India offers an example for Hawai‘i of informed, independent enforcement of the environmental rule of law. The “Green Tribunal” has attained the distinction of the world’s leading environmental court. To reduce air pollution in New Delhi, it ordered the seizure of certain polluting vehicles and prohibited open burning of waste.11 To address pollution of the sacred Ganges River, the court prohibited the discharge of toxic effluent.12 It ordered the cessation of “rat hole” mining by young boys who caused river pollution and often died while digging deep holes to extract coal.13 In the course of deciding over 7,000 cases, the Green Tribunal developed significant jurisprudence supporting fundamental principles of international environmental law.14 The Supreme Court of India and the Green Tribunal are also supporting Hawai‘i’s environmental court.

In a truly generous measure of its sincere interest in the success of the Hawaii environmental court, the Supreme Court of India sent the presiding Judge of the National Green Tribunal, the Honorable Justice Swatanter Kumar to Hawai‘i. Justice Kumar met with the Hawai‘i Supreme Court and the University of Hawaii Law School in June 2015. He was a principal participant at the environmental court conference at the University of Hawai‘i on June 26, 2015.15

Hawai‘i faces resource challenges. There is consensus that Hawaii’s preeminent natural resource, upon which life and the economy depend, is drinking water.

The Pearl Harbor Aquifer is the most important aquifer on the island of O‘ahu and currently supplies about 100 million gallons per day of fresh groundwater mainly for public supply. Decisions related to future infrastructure development and alternate sources of fresh water, *8 including desalinization, will depend on the long-term sustainability of the groundwater resources in the Pearl Harbor aquifer.

Groundwater head levels in Pearl Harbor, which supplies 60 percent of O‘ahu’s municipal water, have declined by one-half since 1910. Salinity of water pumped by some wells in the eastern part of the Pearl Harbor aquifer have risen in recent years.16

Maui’s water supply is another example of the challenge facing a core natural resource. For example, data illustrates that the Iao aquifer’s water levels have declined to 50 percent of predevelopment water levels, levels of chloride have surpassed the U.S. Environmental Protection Agency secondary drinking water guideline of 250 milligrams per liter, and the transition zone level of the freshwater lens has reduced from 823 feet in 1985 to 667 feet in 2007.17 The future of Hawaii’s naturally occurring water systems is likely to involve legal decision-making by Hawaii’s environmental court.

Loss of forest watersheds that replenish the aquifers is another significant issue. As the Pearl Harbor aquifer diminishes, so does the watershed upon which its recharge depends.

Hawai‘i has already lost one-half of its natural forest cover. The islands’ native forests are among the world’s biological treasures, sheltering more than 10,000 native species—more than 90 percent of which are endemic or unique to Hawai‘i. All total, there are 48 different native Hawaiian forest and woodland types and more than 175 different species of native trees, the vast majority of which are found nowhere else in the world. For all their biological richness, these forests have been characterized as among the most endangered in the world.18 Deterioration of forests and its connection to the state’s economy and environment will likely be an important subject for the environmental court.

Climate change is a signature environmental issue for Hawai‘i locally. The significance to Hawai‘i of climate change gives credence to the views of Justice Benjamin and Professor Wood *9 that there is no more important issue facing humankind and its courts.
Mayor Kirk Caldwell recently warned that iconic Waikiki beach faces problems caused by global warming:

[T]he unfortunate fact of global warming and the sea level rising is that our beaches on Waikiki continue to erode on a regular basis .... Waikiki Beach is one of the most famous beaches in the world .... Without the beach we wouldn’t be where we are today. It brings in billions in revenues, and it’s what keeps tourists coming back year after year. But it’s not just for the tourists. About 30,000 people live in Waikiki, and they enjoy going to the beach, too.”

The manner in which resources are expended to protect beaches, whether through coastal hardening, sand replenishment or coastal land condemnation will spawn legal disputes arising from private claims and agency actions. It is likely these disputes will ultimately be resolved in the environmental court.

Climate change poses threats to coral. Coral is an anchor species in Hawaii’s ocean ecosystem. As noted by the DLNR as recently as June 10, 2015, coral reefs are the foundation of the Hawaiian aquatic ecosystems and damage to them suggests a deterioration of the whole ecosystem. DLNR officials suspect that climate change and warming sea temperatures are contributing to the stress on the reefs, making them more vulnerable to disease and bleaching. Activities that affect the coral reef system, are likely to be considered by Hawaii’s environmental court.

**Administration of the Hawai’i Environmental Court**

The utilization of environmental courts as a means to achieve law-based protection of the environment is new to the United States. As Chief Justice Recktenwald noted during the Environmental Court Judicial Conference on May 22, 2015, while nearly forty countries have developed environmental courts, the United States has only two statewide environmental courts. Hawaii’s jurisdiction is the broader of the two. Its environmental courts encompass civil and criminal cases in district and circuit courts.

The jurisdictional subject matter of Hawaii’s environmental court is specifically defined by reference to particular statutes. More broadly, a jurisdictional catch-all provision also provides for assignment of cases to the environmental court whenever “the chief justice determines that due to [the] subject matter of [the issues] assignment is required to ensure the uniform application of environmental laws.”

To recognize the extraordinary reach of this jurisdictional declaration, consider that every natural resource can fall within its purview: water; forests; streams; beaches; air; mountains; terrestrial and marine animals and plants; state parks with their associated issues of litter; graffiti; and illegal camping. Notably, cultural resources are also within the jurisdiction of Hawaii’s environmental court.

Does the ordering of all natural resource laws under one court matter? No new regulatory laws were added to address resources needs. No additional funding for natural resource protection was allocated to the Department of Land and Natural Resources. The Judiciary did not receive supplemental funds to support the environmental court. Nonetheless, can the environmental court be administered in such a way that its purpose is realized? Can the environmental court “better ensure that the State upholds its constitutional obligation to protect the public trust for the benefit of all beneficiaries[?]” Will the environmental court merely aspire to achieve its purpose, or will it be an authentic means to effectively implement the environmental rule of law?

The strategic positioning of environmental legal issues with one court does bespeak an opportunity for historic change. The public trust is a useful example of a rule of environmental law that can benefit from an enhanced knowledge-base gained by an environmental court judge. It is an evolving doctrine with a genesis in common law, followed by elevation of the doctrine to the level of a constitutional mandate pursuant to *12* article XI, section 1 and article XII, section 7 of the Hawai’i constitution.

The specialized knowledge-base of an environmental court judge practiced in public trust issues would also provide an
understanding of the doctrine’s effect on standing and the proper framework for applying the public trust doctrine to water or other natural resources.

Specialized knowledge of an experienced environmental court judge encompasses technical as well as legal issues, e.g., hydrology as it pertains to Hawaii’s aquifers and surface water; marine biology as it relates to illegal harvesting of coral and other marine resources; meteorology as it relates to el nino global warming and sea-level rise; geology as it relates to shoreline hardening and beach replenishment. Thus, organizing technical as well as legal environmental issues under one court will facilitate informed, efficient, and consistent application of Hawaii’s environmental laws.

Every county prosecutor, the state public defender, the attorney general, the Natural Resources Section of the Hawaii State Bar Association, the chief judges of every state judicial circuit, the DLNR, and the William S. Richardson School of Law have joined to make the court effective and fair. Through every phase of the creation of the environmental court, Chief Justice Recktenwald has led with a clear, steady belief that the Judiciary and Hawai‘i bar will make the court a success. It was his vision to gain insights from other jurisdictions with environmental courts, including Vermont and India. He personally organized close collaboration within the Judiciary, including neighbor island staff and judges.

Deputy Administrative Director for the Courts Iris Murayama, Legislative Coordinator Karen Takahashi, and the Chief Court Administrators for each circuit were empowered by the Chief Justice with full license to develop the environmental court. Judges Barbara Richardson and Jeannette Castagnetti designed calendaring systems for the District and Circuit Courts. The wise counsel, meticulous attention to detail, and good cheer of all partners nurtured the “roll-out” of a court poised to meet its mandate. Chief Judge Joseph Cardoza captured the core feeling among the team when he noted: “This is historic.”

Footnotes

a1 Associate Justice Michael D. Wilson was appointed to the Hawai‘i Supreme Court on April 17, 2014, after serving as a Circuit Court judge of the First Circuit since May 10, 2000. Prior to his appointment as a Circuit Court judge, Justice Wilson was the Director of the Department of Land and Natural Resources, Chair of the Board of Land and Natural Resources, Chair of the State Water Commission and a Trustee of the Kahoolawe Island Reserve Commission.


3 Haw. Const., art. XI, § 1. Conservation and Development of Resources, states: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

4 Id.


Id.


Justice Benjamin will address the Hawai‘i bar in September, 2016 when he attends the conference of the International Union for the Conservation of Nature as the chair of its legal commission. The conference is expecting approximately 7,000 international participants.

See, January 30, 2015 lecture of Philip H. Knight, Professor of Law and Faculty Director of the Environmental and Natural Resources Law Center at the University of Oregon School of Law available at http://klcc.org/post/publictrust-doctrine-will-courts-protect-naturalresources.


For example, the precautionary principle, intergenerational equity, and polluter pays.

Justice Kumar was appointed chief judge of the National Green Tribunal after his mandatory retirement from the India Supreme Court at the age of 65.


Honolulu Star Advertiser, May 19, 2015.

Honolulu Star Advertiser, June 10, 2015.
Vermont also has a statewide environmental court.

The Chief Justice designated the following judges as environmental court judges in the State of Hawai‘i, effective July 1, 2015: Jeannette H. Castagnetti; Karen X Nakasone; James H. Ashford; William M. Domingo; Shirley M. Kawamura; Lono J. Lee; Linda K. Luke; Clarence A. Pacarro; Barbara P. Richardson; Paul B. Wong; Joseph E. Cardoza; Adrienne Heely; Kelsey T. Kawano; Ronald Ibarra; Greg K. Nakamura; Barbara T. Takase; Melvin H. Fujimaru; Margaret K. Masunaga; Randal G. Valenciano; Kathleen N. Watanabe; Trudy K. Senda; and Edmund D. Acoba.

Statutes specifically identified as reposing exclusively within the jurisdiction of the environmental court are: Haw. Rev. Stat. chapters: GD Protection of Caves; 6E Historic Preservation; 6K Kaho‘olawe Island Reserve; 128D Environmental Response Law; 171 Public Lands, Management and Disposition of; 172 Land Commission Awards; Surveys; 173 Reclamation of Lands; 173A Acquisition of Resource Value Lands; 174 Water and Land Development; 174C State Water Code; 179 Flood Control and Flood Water Conservation; 179D Dams and Reservoirs; 180 Soil and Water Conservation Districts; 180C Soil Erosion and Sediment Control; 181 Strip Mining; 182 Reservation and Disposition of Government Mineral Rights; 183 Forest Reserves, Water Development, Zoning; 183B Hawaiian Fishponds; 183C Conservation District; 183D Wildlife; 184 State Parks and Recreation Areas; 185 Land Fire Protection Law; 186 Tree Farms; 187A Aquatic Resources; 188 Fishing Rights and Regulations; 188F West Hawai‘i Regional Fishery Management Area; 189 Commercial Fishing; 190 Marine Life Conservation Program; 190D Ocean and Submerged Lands Leasing; 193 Conservation: Employment Programs; 194 Invasive Species Council; 195 Natural Area Reserves System; 195D Conservation of Aquatic Life, Wildlife, and Land Plants; 195F Forest Stewardship; 196 Energy Resources; 196D Geothermal and Cable System Development; 197 General Provisions Relating to Aquatic Resources and Wildlife; 198 Conservation Easements; 198D Hawai‘i Statewide Trail and Access System; 199 Conservation and Resources Enforcement Program; 199D Civil Natural Resource Violations Act; 200 Ocean Recreation and Costal Areas Programs; 200D Kaneohe Bay Regional Council; 339 Litter Control; 339D Electronic Waste and Television Recycling and Recovery Act; 340A Solid Waste; 340E Safe Drinking Water; 342B Air Pollution Control; 342C Ozone Layer Protection; 342D Water Pollution; 342E Nonpoint Source Pollution Management and Control; 342F Noise Pollution; 342G Integrated Solid Waste Management; 342H Solid Waste Pollution; 342I Special Wastes Recycling; 342J Hazardous Waste; 342L Underground Storage Tanks; 342P Asbestos and Lead; 343 Environmental Impact Statements; 508C Uniform Environmental Covenants Act; and Title 12, Conservation and Resources.

Pursuant to Hawai‘i Administrative Rules § 13-5-2, cultural resources are included in the definition of natural resources.


See, e.g., Robinson v. Ariyoshi, 65 Haw. 641, 673-74 n.31, 658 P.2d 287, 310 (1982). The court announced the public trust doctrine finding that the State as the owner of surplus waters [was not] free to do as it pleases with the waters of our lands ... at the time of the introduction of fee simple ownership to these islands the king reserved the ownership of all surface waters. (citation omitted). ... we believe by this reservation, a public trust was imposed upon all the waters of the kingdom .... This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of the State’s ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good. Id.

In re Water Use Permit Applications, 94 Haw. 97, 131, 9 P.3d 409, 443 (2000) (Waiahole 1); Kelly v. 1250 Oceanside Partners, 111 Haw. 205, 140 P.3d 986 (2006) (pursuant to article XI, section 1 of the Hawai‘i Constitution, the County of Hawai‘i had an affirmative duty to protect coastal waters under the public trust doctrine. 111 Haw. at 226, 140 P.3d at 1006; pursuant to article XII, section 7, the water commission failed to abide by its public trust duty to protect native Hawaiian traditional and customary

30 *In re Iao Ground Water*, 128 Haw. 228, 287 P.3d 129 (2012)(“a public trust claim can be raised by members of the public who are affected by potential harm to the public trust ... any member of the general public ha[s] standing to raise a claim of harm to the public trust.”). *Id.* at 282, 287 P.3d at 183 (Acoba, J., concurring)(citations omitted)(quotation marks omitted).

31 Recently, in *Kauai Springs, Inc. v. Planning Comm’n of Cnty. of Kauai*, 133 Haw. 141, 172, 324 P.3d 951, 982 (2014), the Court set out a formula for applying the public trust doctrine to water resources.

32 As a result of Chief Justice Recktenwald’s collaboration with Professor Raj Kumar, Dean of India’s Jindal Global Law School, William S. Richardson School of Law Dean Aviam Soifer and Assistant Dean Denise Antolini, Justice Swatanter Kumar represented India’s Green Tribunal at the environmental court conference at the University of Hawai‘i on June 26, 2015.

33 See, e.g., the proposed environmental court civil information sheet, Form 2-A, available at http://www.courts.state.hi.us/docs/proposed_rule_changes/MEMO_HRCPForm%202A_032515(2).pdf.

19-AUG HIBJ 4