Tom Pierce
MauiLandLaw.com
TODAY’S “TRAIL MAP”

- Is there a clear path?
- Why worry?
- Wealth of trail law
- Who is responsible?
- Haleakala Trail
- A template
WHEN IT COMES TO TRAILS . . .
IS THERE A CLEAR PATH?
• Is it important to the public?
• May it be destroyed?
• May it be moved?
• May it be improved?
• May only certain people use it?
• Who may regulate it?
• Who owns it?
WHY SAVE ANCIENT TRAILS?
ANCIENT TRAILS IMPORTANCE . . .

OUR PAST?

OUR PRESENT?

OUR FUTURE?

Photo: Bryan Berkowitz
WHY RESEARCH ANCIENT TRAILS?

“If you don't know history, then you don't know anything. You are a leaf that doesn't know it is part of a tree.”

Michael Crichton
WHY SAVE ANCIENT TRAILS?

“The most effective way to destroy people is to deny and obliterate their own understanding of their history.”

George Orwell
WHY NOW?

“We'll be remembered more for what we destroy than what we create.”

Chuck Palahniuk
HAWAII’S WEALTH OF TRAIL LAW
APPLICABLE HAWAIIAN LAW
• Judiciary Act of 1892 (HRS § 1-1) **Encompasses:**
  
  – Hawaiian Laws
    • Fundamental Hawaiian Property Law
    • 1797 - Law of the Splintered Paddle (HI Const. Art. 9, § 10)
    • 1840 - Hawaiian Constitution
    • 1848 - Mahele (and subsequent reservation of rights)
    • 1850 - Kuleana Act (HRS § 7-1)
    • 1892 - Highways Act (HRS § 264-1(b))

  – Western Laws
    • Public dedication (common law)
    • Public Trust Doctrine (common law) (also HI Const. Art. XII, § 4)
Judiciary Act of 1892 (HRS § 1-1)

INSTRUCTION NO. 24

The applicable law at all relevant times was and is as follows:

The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage.
LAW
OF
HER MAJESTY LILIUOKALANI
QUEEN OF THE HAWAIIAN ISLANDS

CHAPTER LVII.

AN ACT

TO REORGANIZE THE JUDICIARY DEPARTMENT.

§1. Be it enacted by the Queen and the Legislature of the Hawaiian Kingdom:

§2. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.
INSTRUCTION NO. 26

In Hawaiian property law, land in its original state is public land and if not awarded or granted, such land remains in the public domain.
1797 - Law of the Splintered Paddle (HI Const. Art. 9, § 10)

Kānāwai Māmalahoe

Oh people,
Honor thy god;
Respect alike people both great and humble;
May everyone, from the old men and women to the children
Be free to go forth and lie in the road
Without fear of harm.
Break this law, and die.
INSTRUCTION NO. 25

The Kingdom of Hawaii Constitution of 1840, promulgated by King Kamehameha III, states:

KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all land from one end of the Islands to the other, thought it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I, was the head, and had the management of the landed property.
1848 – Mahele

INSTRUCTION NO. 27

In Hawaii, it is established that:

1. Prior to the Mahele of 1848, the people of Hawaii, through the sovereign, owned all of the land, including roads, in the Kingdom of Hawaii; and

2. After the Mahele of 1848, private roads could be constructed on private property, but roads that were formerly public remained so.

In this case, if you find that a trail or road was in existence prior to 1848, you must conclude that the trail or road is public.
1848 – Mahele (and reservation of rights)

“ua koe ke Kuleana o na Kanaka”

“But reserved are the rights of the people therein”
1850 - Kuleana Act

“... The springs of water, running water, and roads shall be free to all, should they need them on all lands granted in fee simple...”
INSTRUCTION NO. 28

The Highways Act of 1892 was and is the applicable law and states:

All roads and trails in the Hawaiian Islands, whether now or hereafter opened, laid out or built by the Government are hereby declared to be public highways.

All public highways once established shall continue until abandoned by due process of law.
“All roads, . . . trails . . . whether now or hereafter opened, laid out or built by the Government . . . are hereby declared to be public highways.

OWNERHIPS OF PUBLIC HIGHWAYS IN THE GOVERNMENT.

Section 5. The ownership of all public highways and the real estate and property of the same shall be in the Hawaiian Government in fee simple.
APPLICABLE WESTERN LAW
• Judiciary Act of 1892 (HRS § 1-1) **Encompasses:**

  – Hawaiian Laws
    • Fundamental Hawaiian Property Law
    • 1797 - Law of the Splintered Paddle (HI Const. Art. 9, § 10)
    • 1840 - Hawaiian Constitution
    • 1848 - Mahele (and subsequent reservation of rights)
    • 1850 - Kuleana Act (HRS § 7-1)
    • 1892 - Highways Act (HRS § 264-1(b))

  – **Western Laws**
    • Public dedication (common law)
    • Public Trust Doctrine (common law) (also HI Const. Art. XII, § 4)
Public Dedication

Common law dedication may be accomplished without any statement, written or spoken, for one who invites or merely permits the public to use his or her land for a long period may be held to have made an offer of implied dedication.

The rationale behind this theory is that the owner is estopped to deny permanent public access where he has admitted the public to use the land over a long time.

There must be an offer and acceptance of dedication. When there is no express offer, the offer may be implied under the circumstances and the acceptance may also be implied by the nature of the public use.

In other words, the duration and type of public use can raise both the presumption of the owner’s intent (or offer) to dedicate land to public use, as well as constitute acceptance by the public.


Extended Use = Public Right of Way (depending)
Public Trust Doctrine

State must protect Kuleana rights. Haw. Const. art. XII, § 7

State must treat public lands “as a public trust for native Hawaiians and the general public.” Haw. Const. art. XII, § 4
WHO IS RESPONSIBLE?
Encourages purchasing accesses to coastal areas and inland recreation areas.

The legislature finds . . . that the absence of public access to Hawaii's shorelines and inland recreational areas constitutes an infringement upon the fundamental right of free movement in public space and access to and use of coastal and inland recreational areas....
Requires county to obtain access from subdivider,

Coastal areas and...
Inland areas

...to areas in the mountains where there are existing facilities for hiking, hunting, fruit-picking, ti-leaf sliding, and other recreational purposes, and where there are existing mountain trails.
HRS Chapter 198D (Na Ala Hele Program)

Administered by DLNR

Funded by highway fuel taxes and federal programs.

Must establish inventory of “all trails and accesses in the State” (private or public)

Classify each trail (function, type, theme, desired use intensity, etc.)

May regulate (to preserve integrity of trail, for public safety, for environment)

Shall examine legal issues relating to trails.

May indemnify landowners
Public Trustee (extra care)


When an agency or other deciding body considers an application for permits under circumstances that requires the deciding body to perform as a public trustee to protect a public trust resource, the agency or other deciding body must make findings sufficient to enable an appellate court to track the steps that the agency took in reaching its decision. An agency is encouraged to be clear; “clarity in the agency's decision is all the more essential ... where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.”

(Permit applicant has the burden of proof.)
HALEAKALA TRAIL
• Kingdom of Hawai‘i Public Works (1888-1889)
• Territory of Hawai‘i Public Works (1903-1905)
The Maui News (5/23/1903)

What Maui Gets.

The Maui Senators and Representatives have completed their caucus on the items in the Loan Bill which belong to Maui County. Their pro rata is $184,651.58 and they have agreed on appropriations in the sum of $184,600 (leaving out the $615.58), as follows:

Completion Kilu-Penoer Road, 3,000 Trail to summit Haleakula, 5,000
“It will be of general interest to the people of the Islands to learn that the Haleakala trail is now completed to the top of the crater.

And what has hither to been a somewhat difficult trip is now made easy to any one who can ride horseback.

. . . [O]ne may drive to Olinda which is but eight and one-half miles from the top of the Crater. . . .
43. The 70.3 acre parcel is what is depicted on the 1907 Map as "Grant 4817." and the 30.30 acre parcel is what is depicted on the 1907 Map as "Grant 5207." As shown on the excerpt from the 1907 Map below, these two grants are separated by "the Mountain Road to Haleakula" (as described in the grant), which becomes "Haleakula Trail" after it continues southeast into Kahikolu.

44. Grants 4037 and Grant 5207 are described in the original land titles by triangulation stations still in place where Olinda Road is on the ground today.

45. During one of my field trips between Grant 4037 and Grant 5207, I observed a point near the Haleakula Trail which is not within the recorded right of way. Some landowners believe this is a common occurrence.

47. When I plot the "Haleakula Trail" shown on the 1907 Map excerpt at 43 above, it is slightly northeast of the "Haleakula Center Trail" shown on the 1922 Map. See Exhibit AC-7 (and below).

48. In 1915, HRC conveyed the Kula Pipeline Easement to the Territory of Hawaii. Call number "15" of the easement boundaries describes a point on the Haleakula Trail to describe the pipeline location (discussed further below). The Haleakula Trail shown on the 1907 Map is in close proximity to the location described in the Kula Pipeline Easement. See Exhibit AC-8 (and below).
CENTERLINE OF HALEAKALA CRATER TRAIL
BASED ON “1922 MAP” AND FIELD INSPECTIONS

AFFECTING TMK 2-2-3-005-004

BEGINNING AT THE NORTHWESTERN END OF THE CENTERLINE OF THIS HALEAKALA CRATER TRAIL, AT
THE CENTER OF THE SOUTHWESTERN TERMINUS OF OLINDA ROAD, A PUBLIC RIGHT-OF-WAY, THE
COORDINATES OF SAID POINT OF BEGINNING REFERRED TO GOVERNMENT SURVEY TRIANGULATION
STATION “PUU NIANIAU”, STATE PLANE COORDINATES, NAD83, ZONE 2, BEING 171,001.71 FEET NORTH
AND 1,774,444.78 FEET EAST AND RUNNING BY GRID AZIMUTHS MEASURED CLOCKWISE FROM TRUE
SOUTH:

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>306°00'</td>
<td>553 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
<tr>
<td>2</td>
<td>29°20'</td>
<td>160 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
<tr>
<td>3</td>
<td>56°15'</td>
<td>300 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
<tr>
<td>4</td>
<td>1°55'</td>
<td>80 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
<tr>
<td>5</td>
<td>289°00'</td>
<td>390 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
<tr>
<td>6</td>
<td>316°50'</td>
<td>375 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
<tr>
<td>7</td>
<td>334°55'</td>
<td>290 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
<tr>
<td>8</td>
<td>332°40'</td>
<td>1080 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
<tr>
<td>9</td>
<td>358°55'</td>
<td>300 FEET AFFECTING TMK 2-2-3-005-004;</td>
</tr>
</tbody>
</table>

SP-317
Ala Kahakai National Historic Trail Comprehensive Management Plan
Purpose of the Trail

- To preserve, protect, reestablish as necessary, and maintain a substantial portion of the ancient coastal *ala loa* (long trail) and associated resources and values, along with linking trails on or parallel to the shoreline on Hawai‘i Island.

- To provide for a high quality experience, enjoyment, and education — guided by Native Hawaiian protocol and etiquette — while protecting the trail’s natural and cultural heritage and respecting private and community interests.
Community Vision for the Trail

Communities along the route expressed a vision for this national historic treasure. The Ala Kahakai NHT will:

- preserve ancient and historic trails within the corridor and tell the stories of those who use them
- provide access to practice traditional lifestyles and mālama ʻāina (care for the land)
- protect sacred sites, historic places, and natural areas
- become a living classroom for educating Hawaiʻi’s people and visitors

- offer opportunities for community partnerships based on the ahupuaʻa concept
- create safe and well-kept places for spiritual, cultural, and recreational practices
- unite local communities around common goals to preserve Hawaiʻi’s culture and environment
The Ala Kahakai NHT is a dynamic, living cultural resource reflecting the values of an island people and their continuing responsible relationship with their community, land, and ocean resources.

What we will preserve, protect, and interpret:

- stories of stewardship and the cultural heritage of an island people including oral histories, newspaper accounts, diaries, archives, photographs
- remnants of the *ahupua'a* land management system that allowed for cultural and economic self-sufficiency and sustainable abundance
- connection of the *ahupua'a* system and cultural stewardship values and patterns to management of the Ala Kahakai NHT