Appendix D
Summary of the Law Relevant to Dams in Hawai‘i

Table of Contents

1 History of Dam Law in the United States and Hawai‘i .........................2
  1.1 Evolution of Federal Dam Law: The Result of Floods and Disasters ...... 2
  1.2 The National Dam Inspection Act.......................................................... 4
  1.3 National Dam Safety Program Act......................................................... 5
  1.4 The Hawai‘i Dam Safety Act of 1987.................................................... 6

2 History of Water Law in Hawai‘i...............................................................8
  2.1 Water Law in Pre-Contact Hawai‘i.......................................................... 10
  2.2 The Kingdom of Hawai‘i......................................................................... 11
  2.3 Territorial Water Law............................................................................. 12
  2.4 Statehood Water Law............................................................................ 15
    2.4.1 McBryde v. Robinson...................................................................... 15
    2.4.2 Robinson v. Ariyoshi...................................................................... 16
  2.5 The Hawai‘i Constitution Preserves the Public Trust Doctrine.............. 18

3 Potential Liability for Dam Accidents in Hawai‘i.................................18
  3.1 Potential Private Owner Civil Liability for Dam Accidents................ 18
    3.1.1 Potential Liability Under Hawai‘i Common Law.............................. 19
    3.1.2 Duty of Care and Duty to Warn...................................................... 22
    3.1.3 Reasonable Use Doctrine of Flood Control....................................... 23
    3.1.4 Implied and Express Easements...................................................... 25
    3.1.5 Joint and Several Liability.............................................................. 26
  3.2 Sovereign Immunity and Dam Accidents............................................. 27
    3.2.1 Sovereign Immunity and Water....................................................... 31
    3.2.2 Sovereign Immunity and Failure to Warn........................................ 32
    3.2.3 Sovereign Immunity and the Cities and Counties of Hawai‘i............. 33
  3.3 Potential Criminal Liability............................................................... 35
    3.3.1 Manslaughter................................................................................ 36
    3.3.2 Assault in the Second Degree........................................................ 37
    3.3.3 Recklessly Endangering the Public................................................ 37
    3.3.4 Criminal Property Damage............................................................. 38
Summary of the Law Relevant to Dams in Hawaiʻi

A primary focus of the investigation is to provide recommended legislation. To help put such recommended legislation in context, this Appendix provides an overview of certain aspects of the law as it exists today. It addresses, in summary fashion, three related but distinct areas of law.

First, it provides a synopsis of the evolution of state and federal statutes specific to dams in the United States. This includes a broad overview of the development of dam law at the federal level. It also describes the evolution of dam law in Hawaiʻi from the genesis of the federal dam program to the Hawaiʻi Department of Natural Resources administrative procedures for dam safety.

Second, the Appendix provides a general introduction to Hawaiʻi water law, summarizing its history and the current status of the law. In Hawaiʻi, the state holds water in trust for the benefit of the people under the concept of the “Public Trust Doctrine.” This development of the Public Trust Doctrine has its roots in traditional Hawaiian customs and practices, and culminates in the Hawaiʻi Constitution.

Third, the Appendix summarizes some of the other legal doctrines not specifically related to dams that may nonetheless impact liability for dam accidents in Hawaiʻi. This section covers concepts such as potential civil liability for dam owners for the breach of dams and sovereign immunity. This section necessarily paints with a broad brush and is intended only as a general overview. It does not reflect many subtleties that undoubtedly will be explored and argued in great detail in the ongoing litigation. The purpose is not to provide a definitive treatment of this subject, but rather to provide sufficient background to give context to the recommended legislation.
1 History of Dam Law in the United States and Hawai‘i

Today both public and private owners use dams. Dams and the water they contain serve many practical purposes; hydroelectric power, drinking water reservoirs, recreational lakes, and irrigation. Dams also help protect from flooding. Flood control and the safety of communities below dams were the reason the Federal government began regulating the design and construction of dams at the turn of the 20th century. History shows that Federal control of dams was often controversial, with the primary arguments focusing on the level of regulation and funding the federal government provided.

1.1 Evolution of Federal Dam Law: The Result of Floods and Disasters

Early political leaders believed federal aid for flood control was unconstitutional. They believed that the federal government should not be allowed to spend tax dollars to make improvements that benefited only a particular locality. While the Constitution did not specifically prohibit federal funding of “internal improvements,” neither did it clearly authorize them. The issue was hotly contested until 1824, when, the U.S. Supreme Court interpreted the Commerce Clause to permit the Federal government to finance and construct river improvements for flood control. This led to a series of Flood Control Acts that were specific to the control of the Mississippi River at the end of the 19th century.

Federal legislation specifically directed to dams began with the drafting of the Rivers and Harbors Acts of 1890 and 1899, requiring the Army Corps of Engineers (the

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2 Id. at 5
3 Id. at 5
“Corps”) to regulate construction of dams built to harness hydroelectric power. In reaction to the rapid construction of hydroelectric dams during this time, Congress passed the General Dam Act of 1906 and 1910, regulating hydroelectric facilities on navigable waterways. This Act, however, applied only to federal or state-owned obstructions affecting navigable waterways and did not expressly appropriate funds for flood control. Dam safety and protection of human life and property did not become a legislative priority until the passage of the 1936 Flood Control Act.

In March of 1936, several enormous storm systems moved across the northeastern United States, letting loose a deluge of 10 to 30 inches of water on 87 cities, towns, and villages and killing 107 people.⁴ Over 56,000 people were driven from their homes in the disaster.⁵ Pennsylvania was the hardest hit of all the northeastern states. Of the 107 people killed in the floods, 84 died in Pennsylvania.⁶ This was the second major flood to occur in Pennsylvania in fifty years.⁷

In response to these disasters, Congress passed and President Roosevelt signed the first piece of legislation to provide for flood relief throughout the country, the Flood Control Act of 1936.⁸ Most of the responsibility for planning and designing federal flood control projects was assigned to the Corps. Under the authority of the Flood Control Act of 1936, the Corps developed into the foremost flood control agency in the nation. This legislation gave the Federal Government the ability to create dams and levees to prevent floods. It did not create any sort of controls or regulations for private dams, however.

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⁴ Id. at 58
⁵ Id. at 58
⁶ Id. at 58
⁷ The Johnstown Flood disaster occurred on May 31, 1889. It was the result of several days of extremely heavy rainfall that breached the large dam upstream of Johnstown, Pennsylvania. This breach unleashed a torrent of 20 million gallons of additional water, killing over 2,200 people and causing $17 million in damage. Information from the Johnstown Flood National Park service website - http://www.nps.gov/jofl/
⁸ Arnold, “The Evolution of the 1936 Flood Control Act” supra at 65
This fact was brought to light by a series of dam failures in the 1970’s, most notably the Buffalo Creek Flood of February 26, 1972. In Buffalo Creek, a coal slurry impoundment dam built by the Pittston Coal Company burst and flooded the lower valley. The incident killed 125 people and completely leveled the town of Saunders, West Virginia.

1.2 The National Dam Inspection Act

The Buffalo Creek devastation prompted the passage of the National Dam Inspection Act of 1972 (“National Dam Inspection Act”), which authorized federal regulation of privately owned dams for the first time.

The National Dam Inspection Act authorized the Army Corps of Engineers to inventory and inspect privately owned dams in the U.S. Unfortunately, funding for full implementation of the act was not provided until a series of catastrophic dam failures in 1976 and 1977. The National Dam Inspection Act provided funding for the Honolulu Army Corps of Engineers and Hawai‘i Department of Land and Natural Resources (“DLNR”) to complete an inventory of dams in the State of Hawai‘i and perform Phase I inspections of 53 high hazard private dams between 1977 and September 1981.

The Water Resources Development Act of 1986 (“WRDA”) reflected a general agreement that non-federal interests should shoulder most of the financial and management burdens for local water resource management, and that environmental

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10 Id. at p. 14.
11 Public Law 92-367, August 1972
13 Including the 1976 Teton Dam failure, which caused $1 billion in damages and 14 deaths Idaho; another flood in Johnstown in 1977 caused by the failure of the Laurel Run Dam; and the 1977 Taccoa Falls Bible College Dam failure in Georgia that killed 39 Bible college students.
considerations are intrinsic to water resources planning. The WRDA granted individual states the power to legislate and oversee sovereign dam safety programs. As a result of WRDA, in 1986 the Federal government delegated dam safety to the states. Fourteen years later, a uniform set of guidelines was codified in the National Dam Safety Program Act of 2000.

1.3 National Dam Safety Program Act

The National Dam Safety Program Act of 2000 (“NDSPA”) established general guidelines and criteria for individual state dam safety programs. Under NDSPA, the Federal Emergency Management Agency (“FEMA”) is responsible for coordinating efforts to secure the safety of dams throughout the United States.

The program makes federal funds available to the states. States are primarily responsible for protecting the public from dam failures of non-federal dams and pursuing initiatives that enhance the safety and security of dams posing the greatest risk to people and property. National performance criteria are used to determine a state’s eligibility. The funds are used for inspecting and monitoring dams, training dam operators, analyzing data, purchasing equipment, and assisting in the preparation of Emergency Action Plans (“EAP”) to be followed in the event of a dam failure. The grants have totaled approximately $3.5 million per year over the last eight years. The Act allows states to apply for financial assistance in two ways. Primary assistance is available for states attempting to meet the budgeting requirements and ten criteria outlined in the National Dam Safety Program Act. Advanced assistance is

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provided to states that meet the primary assistance requirements and are working toward meeting advanced requirements and standards such as FEMA’s Model State Dam Safety Program. The Association of State Dam Safety Officials reports that Hawai‘i received $8,657 in NDSPA grants in 1998; $17,106 in 1999; and a total of $92,928 from 2000-2002.

In December of 2006, Congress passed the Dam Safety Act of 2006, which reauthorizes the National Dam Safety Program Act of 2000 for an additional 5 years and increases appropriations for the Program.

### 1.4 The Hawai‘i Dam Safety Act of 1987

Concurrently with the above federal developments, and to meet the need for dam safety, Hawai‘i adopted the Hawai‘i Dam Safety Act of 1987, codified in HRS § 179D. The purpose of the Act is to protect the health, safety, and welfare of the citizens of the State of Hawai‘i by detailing the inspection and regulation of dams in the state. The law defines what constitutes a dam in Hawai‘i, the liability for damages caused by a dam failure, and assigns responsibility for dam regulation to the Hawai‘i DLNR.

Under HRS 179D, the DLNR has several powers and responsibilities including establishing design standards for dams, investigating dam operations and maintenance,

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17 Introduction to ASDSO’s Model State Dam Safety Program (March 1998), p. iii.
19 109th Congress, 2d Sess., S.2735
20 HRS § 179D – purpose statement
21 HRS § 179D-6
and approval of construction permits. These responsibilities are detailed in the Hawai‘i Administrative Rules ("HAR") for dam safety, HAR § 13-190.

Under the Administrative Rules, private dam owners have the primary responsibility to operate, maintain and inspect their own dams to insure public safety.

Before working on, altering, or removing an existing dam the owner shall file an application for the work and secure the written approval of the DLNR.

To ensure the public safety, the DLNR must inspect dams once every five years. During the inspection dam owners must disclose information sufficient to enable the DLNR to determine conditions of dams and reservoirs in regard to their safety, including the installation, maintenance, and monitoring of necessary instrumentation. The DLNR also has the responsibility to respond to and investigate complaints regarding unsafe dam conditions. After receiving a complaint that a dam owner is improperly maintaining or operating a dam, DLNR must inspect the dam or reservoir to determine if a danger to life or property may result from “overtopping, seepage, settlement, erosion, cracking, earth movement, earthquakes, and failure of bulkheads, flashboard, gates, and conduits” of the

22 HRS § 179D-6
23 Administrative Rules are regulations established through a public review and hearing process, set by HRS § 91. Here, a proposed rule, or amendment to an administrative rule, is drafted by the DLNR, approved by the Board of Land and Natural Resources ("BLNR") for public meetings/hearings, and reviewed by the Department of the Attorney General ("AG"). Then the draft rule is vetted at public meetings and/or hearings, where the public can give formal testimony on the draft rule. The rule is revised, if necessary, and then submitted to the BLNR for final approval. Subsequently, it is reviewed again by the AG, signed by the Governor, and filed with the Lieutenant Governor. Upon completion of these procedures, the administrative rule has the effect of law. The Administrative Rules for dams and reservoirs are codified under Hawai‘i Administrative Rules, TITLE 13, Department of Land and Natural Resources, Subtitle 7, Water and Land Development, Chapter 190, Dams and Reservoirs. HAR § 13-190 et seq.
24 HAR § 13-190-40 (a)
25 HAR § 13-190-21
26 HAR § 13-190-21
27 HAR § 13-190-40(c)
28 HAR §13-190-34 - Complaints as to unsafe conditions.
If an unsafe condition exists, the Department shall notify the owner to take actions necessary to render the condition safe, including breaching or draining a dam that is beyond repair.

Certain dams in Hawai‘i remain unregulated. DLNR dam rules do not apply to: 1) a water barrier that is less than six feet in height regardless of the storage capacity, 2) a barrier that stores less than fifteen acre-feet\(^1\) of water, regardless of its height,\(^2\) and 3) dams or reservoirs that do not pose a threat to human life or the property of someone other than the dam owner.\(^3\)

In passing the Hawai‘i Dam Safety Act, the Hawai‘i State legislature determined that dam regulation is proper under the police powers of the state.\(^4\) This police power is an extension of the duties of the state, commonly referred to as the duty and power of the Sovereign. Another sovereign duty in Hawai‘i is to maintain the natural resources of the land for the benefit of the people.\(^5\) This is commonly referred to as the Public Trust Doctrine.

## 2 History of Water Law in Hawai‘i

Hawai‘i water law follows the “Public Trust Doctrine.” The Public Trust Doctrine is an English common law principle providing that the State holds title to certain natural resources for the benefit of the public.\(^6\) Pre-contact Hawai‘i had similar concepts of sovereign control of natural resources; the ali‘i and konohiki controlled the use of water

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\(^{29}\) HAR §13-190-34 (b)
\(^{30}\) HAR § 13-190-34 (c)
\(^{31}\) Acre-foot is the amount of water that will cover 1 acre of land under one foot of water. One acre-foot equals 325851 gallons of water. 15 acre-feet equal 4,887,771 gallons of water.
\(^{32}\) HAR §13-190-1 (c).
\(^{33}\) HAR § §13-190-3.3
\(^{34}\) HRS § 179D-2
\(^{35}\) Hawai‘i Constitution Art XI section 7
\(^{36}\) David C. Slade, Putting the Public Trust Doctrine to Work 1 (2d ed. 1997), Coastal States Organization.
and the land for the benefit of the people. Contemporary Public Trust Doctrine, while founded upon ancient concepts, has become an important factor in water resource management, affecting both public and private water rights in Hawai‘i.\(^\text{37}\)

Hawai‘i amended the state constitution in 1978 to reflect the Public Trust Doctrine as it related to water.\(^\text{38}\) Section 1 of Article XI states that “for the benefit of present and future generations the State ... shall conserve and protect Hawai‘i’s natural beauty and all its natural resources, including ... water ... .”\(^\text{39}\) Furthermore, Section 1 states “all public natural resources are held in trust by the State for the benefit of its people.”\(^\text{40}\) Section 7 of Article XI declares that the “State has an obligation to protect, control, and regulate the use of Hawai‘i’s water resources for the benefit of the people,” and also provides for the creation of a water resources agency.\(^\text{41}\)

Pursuant to this section of the constitution, the Hawai‘i legislature enacted the State Water Code in 1987, further defining the scope of the Public Trust Doctrine and also establishing the Commission on Water Resource Management to oversee water management.\(^\text{42}\) The State Water Code provides that “[i]t is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use.”\(^\text{43}\)

Water law in Hawai‘i has evolved over four distinct time periods.\(^\text{44}\) The first period, pre-contact Hawai‘i, emphasized shared use rights. The second period, the Kingdom of Hawai‘i, initiated the transition toward individual ownership of water. The

\(^{37}\) Herb Kawainui Ka‘ne, Ancient Hawai‘i 460-61 (1997), Kawaihui Press.

\(^{38}\) Haw. Const. art. XI, sections 1 and 7

\(^{39}\) Haw. Const. art. XI, sections 1 and 7

\(^{40}\) Haw. Const. art. XI, sections 1 and 7


\(^{43}\) Id. at 174C-2(a) (1988).

third period, the Territory of Hawai‘i, created private owner water rights. During this period, territorial courts rejected the shared use values and group rights previously recognized in Hawai‘i’s water law. The fourth period, statehood, reconciled traditional Hawaiian water law and English common law and returned control of water to the Sovereign.

2.1 Water Law in Pre-Contact Hawaii

Traditional Hawaiian society before contact with the outside world was characterized by a complex religious, governmental and cultural system that reflected a communal relationship between the people. Taro was the nutritional staple of pre-contact Hawai‘i.

The collection and distribution of water was essential for the cultivation of taro. The community worked together to manage water for cultivation. Unused water was diverted back to the streams, or to lower taro beds. Those who needed water had the right to use the water, as long as they contributed to building and maintaining the irrigation system. The need for cooperation and for coordination of tasks associated with planting, watering, tending, and harvesting taro shaped relationships between individuals, families, and communities. Authority for the distribution of water rested in the ali‘i.

Typically this responsibility was delegated to the konohiki, who were responsible for the health of the stream, distributing water use, and maintaining equal access and resolving

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46 http://www.bishopmuseum.org/research/natsci/waipiostudy/teachers/resources/
47 Carol Wilcox, Sugar Water: Hawai‘i’s Plantation Ditches 26 (1996), University of Hawai‘i Press.
48 http://www.bishopmuseum.org/research/natsci/waipiostudy/teachers/resources/
50 Id.
water disputes.51 The was a strong relationship between water and community; the Hawaiian word for law, kānāwai, originally meant regulations regarding water.52

In 1894, Emma Metcalf Nakuina, a Commissioner of Private Ways and Water Rights for the Kona Oʻahu district, described traditional Hawaiian water rights and some customs pertaining to dams:

All auwais tapping the main stream were done under the authority of a Konohiki of an Ahupua’a, Ili or Ku. In some instances the konohikis of two or three independent lands -- i.e., lands not paying tribute to each other -- united in the work of auwai making, in which case the konohiki controlling the most men was always the recognized head of the work. No auwai was permitted to take more water than continued to flow in the stream below the dam. It was generally less, for there were those living makai or below the same stream, and drawing water from it, whose rights had to be regarded. Any dam made regardless of this well recognized rule, were leveled to the bed rock by the water right holders below, and at any rebuilding, delegates from each dam below were required to be present to see that a due proportion of water was left in the stream.53

2.2 The Kingdom of Hawaiʻi

In 1840 Kamehameha III signed the first constitution of the Kingdom of Hawaiʻi. This constitution proclaimed that although all property belonged to the crown “it was not his private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head and had the management of landed property.”54 The law governing the regulation of water, passed in 1839, also treated the resource as a benefit reserved to the community with the sovereign as manager. Specifically, the law “Respecting Water for Irrigation”55 provided that the distribution of water was based on taxes paid to the

51 Reppun, 65 Haw. at 540, citing Perry, “A Brief History of Hawaiian Water Rights” at 7 (1912).
52 Reppun, 65 Haw. at 540, citing Perry at 3.
53 Thomas J. Riley, Where Taro is King, Native Planters: Hoʻokupa Kalo, Vol. 1 No. 1 at 40
54 Hawaiʻi Const. of 1840 in Fundamental Laws of Hawaiʻi 3 (1904).
55 Laws of 1842 in “Fundamental Laws of Hawaiʻi” 29 (1904). “In all places which are watered by irrigation, those farms which have not formerly received a division of water, shall when this new regulation respecting lands is circulated, be supplied in accordance with this law, the design of which is to correct in full all those abuses which men have introduced. All those farms which were formerly denied a division of
crown, thereby suggesting that the control of all waters lay with the central government rather than the landlords. The law surrounding water use still followed the ancient kapu system.

The Great Mahele of 1848 instituted a system of private property ownership that ended the old land system. Following the Great Mahele, a “fairly complicated system of water rights prevailed . . . consisting of three different rights – appurtenant, surplus, and prescriptive.”

Appurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land. Surplus water was the amount of “water remaining in a stream after all appurtenant water rights were met,” and was reserved to the konohiki. Prescriptive water rights allowed “a water user . . . [to] gain a prescriptive right [which was] good against both appurtenant and surplus water rights.”

2.3 Territorial Water Law

During the Territorial years, a European based system of land ownership prevailed. This ownership of land was extended to the water as the economy and culture of the islands switched from taro to sugar. This treatment of water as a commodity served the water, shall receive their equal proportion. Those bounties which God has provided for the several places should be equally distributed, in order that there may be an equal distribution of happiness among all those who labor in those places. The allowance of water shall be in proportion to the amount of taxes paid by the several lands. For it is not the design of this law to withhold unjustly from one, in order to unjustly enrich another according to the old system which has been in vogue down to the present time. That the land agents and the lazy class of persons who live about us should be enriched to the impoverishment of the lower classes who with patience toil under their burdens and in the heat of the sun is not in accordance with the designs of the law . . . Such is considered to be the proper course by this law, regulating the property of the kingdom; not in accordance with the former customs of the country which was for the chiefs and land agents to monopolize to themselves every source of profit.”

Reppun, 65 Haw. at 540, 656 P.2d at 71 (1982)

Id.

Id.

Id.
the needs of Hawai‘i’s increasingly powerful sugar industry which required large amounts of water for irrigation.

This difference in these concepts water ownership is shown in the difference between growing taro and sugar. For taro to grow, water is needed to flow over the plant, but very little water is actually consumed. Agriculture based on taro encourages water sharing. On the other hand, to grow and process sugar requires a tremendous amount of water. To produce 1 pound of sugar takes 4000 pounds of water, 500 gallons. One ton of sugar takes 4000 tons of water, a million gallons. One million gallons of water a day is needed to irrigate 100 acres of sugarcane. In an agriculture based on sugar, the consumption of water was vital for survival, which is why the sugar growers fought so hard to get and keep water.

During the Territorial period (circa 1893-1959), the Territorial Court made decisions regarding land titles granted during the Kingdom of Hawai‘i that reflected a combination of Hawaiian law and English common law. These decisions were applied to surplus water, konohiki water, prescription and inter-basin water transport and appurtenant water. In 1904 the Territorial Court determined konohiki stewardship over water resources of an ahupua‘a were exclusive ownership rights that could be freely sold. Misinterpreting traditional Hawaiian custom, the court determined the ancient law permitted private ownership of surplus waters, explaining:

Surplus water. This, in our opinion, is the property of the konohiki, to do with as he pleases, and is not appurtenant to any particular portion of the ahupua'a. By ancient Hawaiian custom this was so. Originally the King

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60 Carol Wilcox, Sugar Water: Hawai‘i’s Plantation Ditches 1 (1996) University of Hawai‘i Press.
62 Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.,15 Haw. 675 (1904)
63 Id.
was the sole owner of the water as he was of the rest of the land and could
do with either or both as he pleased. . . . An argument based upon public
policy or upon the necessity or wisdom of encouraging the cultivation of
the soil upon a scale unknown and impossible in ancient times, cannot be
of assistance, for a determination that the surplus water belongs, in
accordance with ancient Hawaiian custom, to the konohiki is not less in
favor of an enlarged measure of cultivation that would be a determination
that such water belongs to the present holder of a particular portion of the
ahupua’a.

The Territorial Court also implemented concepts of pure English common law
regarding public lands in the territory. This is how the concept of the Public Trust
Doctrine came to Hawai‘i. In 1899 the Territorial Court adopted the public trust doctrine
in *King v. Oahu Ry. & Land Co.* In this case, the Territorial Court applied the standard
developed in United States Supreme Court case *Illinois Central Rail Road v. Illinois.*

The Territorial Court concluded that “[t]he people of Hawai‘i hold the absolute rights to
all its navigable waters and the soils under them for their own common use,” and that
 “[t]he lands under the navigable waters in and around the territory of the Hawaiian
Government are held in trust for the public uses of navigation.”

As time passed under the territorial government, the Territorial Court moved
further and further away from traditional Hawaiian principles. In 1930 the Territorial
Court of Hawai‘i held that Gay and Robinson, a sugar company owning land within an
ahupua‘a, owned the “normal surplus water” of the stream and could use the waters
however it wished, regardless of impacts to downstream users. In this decision, the

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64 11 Haw. 725 (1899).
(1892)
66 *King,* 11 Haw. 725
67 *Territory v. Gay,* 31 Haw. 376, 388 (1930),

*Appendix D*  14  *Summary of the Law*
Territorial Court applied English common law. This use of English common law in settling water rights would continue until Hawai‘i became a state in 1959.

### 2.4 Statehood Water Law

After Hawai‘i became a state in 1959, the newly appointed justices to the Hawai‘i Supreme Court were born and raised in Hawai‘i, and had knowledge of both English law and Hawaiian traditions. These justices sought to correct what they perceived as misinterpretations of Hawaiian traditions made by the Territorial Court.

#### 2.4.1 McBryde v. Robinson

The Hawai‘i Supreme Court in *McBryde Sugar Co. v. Robinson* is generally described as having set aside many prior misinterpretations of Hawaiian traditions made by the Territorial Courts. In *McBryde*, the Hawai‘i Supreme Court reexamined the water rights law and rejected the concept of private ownership of water, holding:

1) section 7-1 of the Hawai‘i Revised Statutes imposed the “natural flow” doctrine of riparianism upon the waters of the State; 2) riparian water rights attach only to land adjoining a natural watercourse; and 3) the right to use water by virtue of riparian rights or by virtue of its application to the land at the time of the Mahele (i.e. appurtenant water rights) applies only for its use on those same riparian and appurtenant lands.  

The Hawai‘i Supreme Court ruled that for all waters flowing in natural courses, the ownership remained in the citizenry with the State as trustee. The Hawai‘i Supreme Court extensively reviewed English common law riparianism and its understanding of Hawaiian usage and held that riparian lands (property along streams) carry rights to use water flowing within the stream as long as such use does not prejudice the riparian rights.

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69 McBryde I, 54 Haw. at 186-87, 504 P.2d at 1338-39.  
70 McBryde I, 54 Haw. at 174, 504 P.2d at 330
of other lands. The court decided that under the Public Trust Doctrine, the state was required to hold established riparian rights superior to other water use rights. Although under *McBryde*, the State gained wider latitude in administering and allocating stream flows remaining after appurtenant and riparian water rights were satisfied, rights to divert water away from watersheds of origin and concepts of prescriptive rights obtained through adverse use are inconsistent with *McBryde*.\(^\text{71}\)

A long series of challenges followed the *McBryde* decision. Sugar plantations argued that the state had deprived them of property without just compensation, contrary to the due process clause of the U.S. Constitution. After a pitched legal battle spanning nearly fifteen years, the U.S. Supreme Court held that the case was not “ripe” for its decision because the plantations had not shown that the State was actually depriving them of water pursuant to the *McBryde* decision.

### 2.4.2 Robinson v. Ariyoshi

In 1982, the Hawai‘i Supreme Court further explained *McBryde* in *Robinson v. Ariyoshi*,\(^\text{72}\) making it clear that the “sovereign rights” rule of *McBryde* stemmed from the Public Trust Doctrine. The Court in *Robinson* held that the “State’s ownership . . . [is] a retention of such authority to assure the continued existence and beneficial application of the resource (i.e., water) for the common good.”\(^\text{73}\) Furthermore, the Court explained that this reservation was more than simply an affirmation of police powers, but instead indicated that the State had “retained on behalf of the people an interest in the waters of the kingdom which the State has an obligation to enforce and which necessarily limited

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\(^{71}\) McBryde I, 54 Haw. at 174, 504 P.2d at 330

\(^{72}\) 658 P.2d 287 (Haw. 1982).

\(^{73}\) Id. at 310.
the creation of certain private interests in waters.” Robinson therefore confirmed the state’s continuing duty under the Public Trust Doctrine to protect the public interest in water resources.

The Supreme Court also took the opportunity in Robinson to explain why the earlier territorial courts had misinterpreted Hawaiian law with regard to water rights. Chief Justice William Richardson explained:

The only cases treating ‘surplus water’ as private property are to be found during the territorial period, when the judiciary was not a product of local sovereignty. While the decisions of the territorial courts were unquestionably binding upon the parties before it, we doubt whether those essentially federal courts could be said to have definitively established the common law of what is now a state. So long as the federal government was sovereign its authority to frame the law was unquestionable, but upon our assumption of statehood our own government assumed the whole of that responsibility, absent any explicit federal interest. And it is from our authority as a state that our present common law springs.

The court pointed out the major water rights cases decided by the Territorial Supreme Court were inconsistent with its view of the law.

The Hawai‘i Supreme Court also explained the McBryde opinion did not supplant the konohikis with the State as the owner of surplus waters in the sense that the State is now free to do as it pleases with the waters. In McBryde the Hawai‘i Supreme Court held that at the time of the introduction of fee simple ownership to these islands the king reserved the ownership of all surface waters. By this reservation, a public trust was imposed upon all the waters of the kingdom.

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74 Id. at 310 n.31.
75 Robinson, 65 Haw. at 667 n.25, 658 P.2d at 306 n.25.
77 Robinson, 65 Haw. at 673-74, 658 P.2d at 310 (certified questions from the 9th Cir.) (citations omitted).
2.5 The Hawai‘i Constitution Preserves the Public Trust Doctrine

Following these and other water rights cases, the people of Hawai‘i “elevated the public trust doctrine to the level of a constitutional mandate.” Article XI, section 1 of the Hawai‘i Constitution, entitled “Conservation and Development of Resources,” provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’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. All public natural resources are held in trust by the State for the benefit of the people.

In 2006 the Hawai‘i Supreme Court determined that the “duties imposed upon the State are the duties of a trustee and not simply the duties of a good business manager.”

As guardian of the water, the State “must not relegate itself to the role of a 'mere umpire' . . . but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.”

3 Potential Liability for Dam Accidents in Hawai‘i

3.1 Potential Private Owner Civil Liability for Dam Accidents

Historically the legal theory used to determine liability for dam failures was strict liability. The doctrine of strict liability authorizes recovery of damages upon a showing of injury. Fault of the owner is not required. The doctrine requires dam owners to act as

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78 Waiahole I, 94 Haw. at 131, 9 P.3d at 443
79 HAW. CONST. art. XI, § 7.
80 Kelly v. 1250 Oceanside Ptnrs, 111 Haw. 205, 230 (2006), citing Waiahole I, 94 Haw. at 142
81 Id.
82 Rylands v. Fletcher, L.R. 1 Ex. Ch. 265, 1 Eng. Rul. Cas. 236 (1866), aff'd, L.R. 3 H.L. 330, 1 Eng. Rul. Cas. 256 (1868)
insurers against property damage caused by their dams. Courts imposed absolute liability on dam owners for accidental overflows and for the escape of stored water.83

The source of the rule is the 1866 English decision *Rylands v. Fletcher.* In *Rylands* a mill owner was liable for damage caused by water escaping from a reservoir constructed on his land. The court’s decision turned on the fact that the defendant mill owner had brought onto his land, and stored, a dangerous substance that he failed to maintain. Justice Blackburn laid out the broad principle of absolute liability: 85

The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff’s default; or perhaps, that the escape was the consequence of vis major, or the act of God.

The only defense to strict liability is that the injury was not caused by defendant’s actions or occurrences on defendant’s property. Over the years, most states have rejected the application of strict liability in dam failure cases in favor of liability based on negligence. Hawai‘i follows this trend.

### 3.1.1 Potential Liability Under Hawai‘i Common Law

The first reported case in Hawai‘i involving water escaping a dam was in 1910. In *Hau v. Palolo Land and Improvement Co.* the Territorial court held that “the owner of a dam must use reasonable care and skill in constructing and maintaining the dam so that it will be capable of withstanding stream flow in times of ordinary, usual and expected

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85 Id. at 279-280.
freshets. If he does not do so, he will be liable for any injuries resulting from his negligence.”

This negligence basis was upheld in 1982 in the case of Cabral v. McBryde. On appeal, Cabral raised the issue of strict liability based on the doctrine of Rylands v. Fletcher. The Hawaiʻi Court of Appeals, citing the Hau decision from 1910, determined “the overwhelming preponderance of authority supports the rule that liability for damage caused by the escape of waters impounded in reservoirs or ponds, or confined in their flow to artificial ditches, depends upon proof of some act of negligence.” Therefore, McBryde was not strictly liable for damages suffered by the Cabrals' property due to water escaping McBryde’s irrigation ditch.

In Hawaiʻi negligence is defined as the “the failure to do what a reasonable and prudent person would ordinarily have done under given circumstances, as well as the doing of what such person would, under the circumstances, not have done.” The Hawaiʻi Supreme Court has developed a three-part test to determine if someone was negligent:

1. The existence of a duty on the part of the defendant to protect the plaintiff from injury
2. The failure of the defendant to perform that duty
3. Injury to the plaintiff from such failure of duty on the part of the defendant.

A Hawaiʻi dam owner’s violation of the DLNR dam safety rules does not automatically mean he or she is negligent. Negligence as a matter of law, also known as

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86 Hau v. Palolo Land & Improvement Co., 20 Haw. 172 (1910)
“negligence per se,” occurs when a person violates or ignores a statutory duty or acts in a way that a reasonable person would not have behaved. Jurisdictions are divided on the application of the negligence per se rule for the violation of a statute or regulation. In Hawai‘i, noncompliance with an established statutory standard is not “negligence per se,” but it is evidence of negligence. The Hawai‘i dam statute does not detail the duties of a dam owner, but the DLNR administrative rules do. The Hawai‘i Supreme Court has determined that if an administrative rule’s language is unambiguous, and its literal application is consistent with the policies of the statute, then courts will enforce the rule’s plain meaning.

The purpose of Hawai‘i Dam Safety Act is to “protect the health, safety, and welfare of the citizens of the State by reducing the risk of failure of such dams.” The DLNR administrative rules for dam maintenance describe the duties dam owners must observe in order to protect the safety of others in the community. If there is a reasonable and logical connection between the dam owner’s failure to observe the DLNR dam safety requirements and the injury suffered by the plaintiffs, the dam owner’s neglect may be used as evidence of negligence. If a jury determines a dam owner was negligent based on this evidence, the dam owner could be responsible for both the economic and non-economic damages that result from the accident. Economic and non-economic damages

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95 HAR §§ 13-190-40 (a-c)
97 HRS § 179D-2
include lost wages, wrongful death, loss of consortium, loss of support, loss of love and affection and emotional distress.

3.1.2 Duty of Care and Duty to Warn

Under traditional common law, a landowner’s duty of care for people entering his/her land depended upon the legal classification of the person, i.e., whether the person was an invitee, licensee, or trespasser. The Hawai‘i Supreme Court abolished these traditional common law distinctions in 1969 in *Pickard v. City and County of Honolulu*. The Hawai‘i Supreme Court concluded that under the traditional law no logical relationship existed between classes of persons and the exercise of reasonable care. The standard of care for Hawai‘i landowners is “to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual.”

In 1989, the Supreme Court of Hawai‘i refined the scope of liability of landowners in *Corbett v. Association of Apartment Owners of Wailua Bayview Apartments*. The Supreme Court announced the following rule:

If a condition exists upon the land which poses an unreasonable risk of harm to persons using the land, then the possessor of the land, if the possessor knows, or should have known of the unreasonable risk, owes a duty to the persons using the land to take reasonable steps to eliminate the unreasonable risk, or adequately to warn the users against it.

The basic duty to “use reasonable care for the safety of all persons reasonably anticipated to be upon the premises” generally applies to both private landowners and

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99 Id.
100 *Corbett v. Association of Apartment Owners of Wailua Bayview Apartments*, 70 Haw. 415
governmental entities.\textsuperscript{101} Control or dominion over the property is important in determining the existence of a duty to use “reasonable care.”\textsuperscript{102} In Hawai‘i, the common law standard to determine if a duty exists is based on a four-part test: \textsuperscript{103}

(1) A duty or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks
(2) failure on the defendant’s part to conform to the standard required: a breach of the duty;
(3) reasonably close causal connection between the conduct and the resulting injury; and
(4) actual loss or damage resulting to the interests of another.

If a landowner has a reservoir on his or her property, then the landowner may have a duty to inform people in the area of the risk associated with the reservoir.

3.1.3 Reasonable Use Doctrine of Flood Control

If a land owner has a dam and reservoir on his or her property, and the dam breaches, the dam owner may have the right to protect his or her property “as long as his interference with the flow surface water is not unreasonable” and does not cause harm to his neighbor’s property. This policy is known as the Reasonable Use doctrine for flood control and was adopted in Hawai‘i in 1970.\textsuperscript{104}

Floodwaters are often referred to as surface waters. Surface waters also include water from rainstorms. In the United States there are three common law rules regarding the disposal of surface water: (1) the common enemy rule which confers an absolute privilege on the possessor of land to dispose of surface water without regard to harm

\textsuperscript{101} Pickard v. City and County of Honolulu, 51 Haw. 134, 135 (1969)
\textsuperscript{102} Jones v. Halekulani Hotel, Inc., 557 F.2d 1308, 1310-11 (9th Cir. 1977)
\textsuperscript{103} Bhakta v. County of Maui, 109 Haw. 198, 211 (2005) citing Doe Parents No. 1 v. State, Dep't of Educ., 100 Haw. 34, 68 (2002)
\textsuperscript{104} Rodrigues v. State, 52 Haw. 156, 163 (1970).
caused to his neighbors; (2) the civil law rule which prohibits any change in the natural flow of surface water by the possessor of land; and (3) the reasonable use rule which allows each possessor of land to alter the flow of surface water so long as his interference with the flow is not unreasonable under the circumstances of the particular case.  

Prior to 1970, Hawai‘i followed the common enemy doctrine that allowed a landowner to protect his/her land without regard to the damage done to adjacent landowners. This policy was struck down in favor of the Reasonable Use doctrine for flood control in the Hawai‘i Supreme Court case of Rodrigues v. State.  

In Rodriguez, the State of Hawai‘i created a drainage culvert under a highway adjacent to the Rodrigues’ property. The State agreed to clear the culvert upon notification by the landowners that heavy rains were imminent. Heavy rains came, the landowners notified the State, and the State took nearly seven hours to arrive at the culvert to begin clearing it. The landowners' home was flooded. On appeal, the Supreme Court of Hawai‘i struck down the common enemy doctrine and adopted the “reasonable use rule” for flood control in Hawai‘i.

In writing the opinion of the court, Chief Justice Richardson acknowledged the prior use of the common enemy principle in Hawai‘i and explained why it was no longer applicable. In the final decision, the court held, “that each possessor of land may interfere with the natural flow of surface water for the development of his land so long as such interference is not unreasonable under the circumstances of the particular case.”

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105 Id.  
106 Id.  
107 Id.  
108 Id.  
109 Id.
3.1.4 Implied and Express Easements

For a reservoir to operate properly, water must flow to and from the reservoir. Typical dams in Hawai‘i have a canal or ditch running to and from the reservoir to supply and drain water from the reservoir. Dam owners may have express or implied easements for these canals.

If a Hawai‘i dam owner was the common owner of a property that contained a canal or ditch as well, and that owner then severed that ownership by selling individual properties to one or several owners, the dam owner could retain an express or implied easement to serve his reservoir over the property conveyed to the individual owners.\textsuperscript{110} The dam owner is the former quasi-dominant parcel and the individual property owner is the former quasi-servient parcel.\textsuperscript{111} The primary factor in determining whether the dam owner, as the grantor, retained an implied easement over the individual landowners in favor of its reservoir property is the parties' intent at the time the dam owner severed the parcels.\textsuperscript{112} The intent of the parties is shown by all the facts and circumstances under which the property was sold.\textsuperscript{113}

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\item \textsuperscript{110} Neary v. Martin, 57 Haw. 577 at 580 (1977) quoting 3 Powell on Real Property, § 411 “All implications of easements necessarily involve an original unity of ownership of the parcels which later become the dominant and servient parcels. When A owns Blackacre, it is not possible for A as the owner of the west half of Blackacre to have a true easement with respect to the east half of Blackacre; but it is both possible and frequent to find A using the east half of Blackacre for the service of the west half of Blackacre, as for example, when the east half of Blackacre contains drains, or sewers, or irrigation ditches, or roadways or stairways which increase the usability of the west half of Blackacre. It is then possible to describe A’s utilization of one part of Blackacre for the service of another part thereof as a quasi-easement, and to speak of the served part as the quasi-dominant tenement, and of the burdened part as the quasi-servient tenement. Where such a quasi-easement has existed and the common owner thereafter conveys to another the quasi-dominant tenement, the conveyee is in a position to claim an easement by implication with respect to the unconveyed quasi-servient tenement.”
\item \textsuperscript{111} Tanaka, 43 Haw. at 123
\item \textsuperscript{112} Neary, 57 Haw. at 581-82,
\item \textsuperscript{113} Henmi Apartments, Inc. 3 Haw. App. at 559
\end{itemize}
In Hawai‘i, “it is a well established rule that an owner of an easement has the right and the duty to keep it in repair.”114 Similarly, Hawai‘i cases involving liability for maintaining a drainage easement, the owner of the dominant estate, which possessed an express and implied drainage easement over the servient estate was held liable for damages caused by failing to repair the drainage system on the servient estate.115 Therefore if a dam owner’s intake or drainage canal overflows and damages a “servient” parcel, the dam owner can be liable for the damages.

3.1.5 Joint and Several Liability

Joint and several liability can be defined as: “Liability that may be apportioned either among two or more parties or to only one or a few select members of the group at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.”116

In Hawai‘i, joint tortfeasors are defined as “two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.”117 Hawai‘i courts have said where “wrongdoers who negligently contribute to the personal injury of another by their several acts which operate concurrently so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable and may be joined in one action.”118

114 Levy, 50 Haw. at 497-98 The State of Hawai‘i owned an easement over the seawall that had been obtained for the purpose of providing a path for public travel. The Hawai‘i Supreme Court held that as the owner of the easement, the state had the duty to maintain the easement.
115 Powers, 524 A.2d at 668-69.
116 Blacks Law Dictionary, p. 933
117 HRS § 663-11
118 Castanha v. Fitzpatrick, 25 Haw. 508, (1920)
Two or more parties could be joint and severally liable for both economic and non-economic damages if their actions harm the environment, or were intentional. Similarly, parties could also be considered joint and several liable for economic and non-economic damages if their actions contributed to the injury or death of a person.

In 1999 the Hawai‘i Legislature abolished joint and several liability between private individual and the State of Hawai‘i or its officers and employees. Government liability is set at “no more than that percentage share of the damages attributable to the government entity.” A “government entity” includes any unit of State government, county, department, agency, or governing authority. The liability of a government entity includes vicarious liability for the acts or omissions of officers and employees. The vicarious liability of the State of Hawai‘i for the actions of its employees is called Sovereign liability and is covered in the State Tort Liability Act.

### 3.2 Sovereign Immunity and Dam Accidents

In 1957 Hawai‘i passed the State Tort Liability Act. Based on the act the State “waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”

The State Tort Liability Act did not create any cause of action where none existed before. The affect of the act is to waive immunity from traditionally recognized common-
law causes of action in tort, except for those expressly excluded.\textsuperscript{126} The Supreme Court determined that language “in the same manner and to the same extent as a private individual under like circumstances” definitely expresses the intent of the legislature that, for purposes of determining liability of the state in tort cases, all the accepted tort law relating to private parties is applicable.\textsuperscript{127} Liability of the State assumes that the State’s officers, employees, and agents commit an actionable tort during the course of their employment. The Hawai‘i State Tort Liability Act does not expand or create new tort actions based on sovereign duty.\textsuperscript{128}

In the past, the Hawai‘i Supreme Court has been hesitant to find the State liable for government related tort actions.\textsuperscript{129} There must be a reasonable limitation to the scope of duty of care owed by the State. If not, the State would be confronted with an “unmanageable, unbearable, and totally unpredictable liability.”\textsuperscript{130} Therefore, in determining whether there was a duty owed by the State to those injured in dam accidents for failing to inspect a dam, the court has to balance the policy considerations supporting recovery by the injured party against those favoring a limitation of the State’s liability.\textsuperscript{131}

The Supreme Court has observed that government is not intended to be an insurer of all the dangers of modern life, despite its ever-increasing effort to protect its citizens from peril.\textsuperscript{132} Despite the expanding expectation of government action, the Hawai‘i

\textsuperscript{126} Cootey v. Sun Inv., Inc., 68 Haw. 480 (1986)  
\textsuperscript{127} Uphurcsh v. State, 51 Haw. 150, (1969)  
\textsuperscript{128} Cootey v. Sun citing Wilson v. Nepstad, 282 N.W.2d 664, 676 (Iowa 1979)  
\textsuperscript{129} Waugh v. University of Hawai‘i, 63 Haw. 117, 135, (1980) quoting Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. at 207  
\textsuperscript{132} Cootey v. Sun 68 Haw. 480 (1986), citing Lorshbaugh v. Township of Buzzle, 258 N.W.2d 96, 102
Supreme Court has been hesitant to hold the government liable for all injuries sustained by private persons as a result of governmental activity, even though doing so would spread the losses over the largest possible base.\textsuperscript{133}

Government entities are mandated by law to perform a variety of activities that have no counterpart in the voluntary activities of private persons.\textsuperscript{134} Whether there is a duty of care owed by the government tortfeasor to the injured party should be determined by an analysis of legislative intent of the applicable statute or ordinance.\textsuperscript{135}

When analyzing a statute, a court’s primary responsibility is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself.\textsuperscript{136} If the terms of a statute are plain, unambiguous and explicit, the court is not at “liberty to look beyond that language for a different meaning.”\textsuperscript{137} The sole duty of the court is to give effect to the statute’s plain and obvious meaning. “\textsuperscript{138}

The Hawai’i Dam Safety Act requires the state to inspect dams. The Act also states, however, that there is no liability in the State for any action or failure to act:

Nothing contained in this chapter shall be construed to constitute a waiver of any immunity of the State and no action or failure to act under this chapter shall be construed to create any liability in the State, board, department, or its officers or employees, for the recovery of damages caused by such action or failure to act.”\textsuperscript{139}

\begin{footnotesize}
\begin{itemize}
\item 134 Id.
\item 135 Id.
\item 137 Id.
\item 138 \textsuperscript{T-Mobile USA, Inc. v. County of Hawai’i Planning Comm’n}, 106 Haw. 343, 352-53 (2005)
\item 139 HRS § 179D-4 (a) “
\end{itemize}
\end{footnotesize}
The State dam law also states that the dam owner has the legal duty to safely operate and maintain his dam, regardless of any actions by the state. 140

Even if the statutory language were not clear, the legislative history of the Hawai‘i Dam Safety Act suggests that the legislature did not intend the State be held liable for failure to inspect dams. While under debate, liability for dam accidents was a topic of concern. 141 The report of the Water and Land Use Committee hearing on the bill notes that the Hawai‘i Dam Safety Act “neither increases nor decreases the potential liability of the respective parties.” 142 Because the legislature did not foresee an increase of liability under the Act, and the State Tort Liability Act does not create a duty where none existed before, the State should not be liable for damages resulting from failure to inspect dams.

The State has undertaken the responsibility to inspect dams based on the delegation of oversight of private dams from the Federal government to the States in 1986. 143 In order to protect the health, welfare, and safety of the public at large, owners of private dams are required to include certain improvements and meet certain standards pertaining to dam safety. The inspection process by which the State approves or disapproves the safety of a dam reflects an effort by government to require the dam owner to meet his responsibilities under the dam safety rules, regulations, and laws. The

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140 HRS § 179D-4 (b) “Nothing in this chapter and no order, action, or advice of the State, board, department, or any representative thereof, shall be construed to relieve an owner or operator of a dam or reservoir of the legal duties, obligations, or liabilities incident to the ownership or operation of a dam or reservoir; provided that an owner or operator of a dam or reservoir shall not be liable for damages as a result of only natural causes such as earthquakes, hurricanes or extraordinary rains of an average recurrence interval in excess of two hundred fifty years.”
141 SC Rep. 365 Water Land Use, Development and Hawaiian Affairs on H.B. 1138 “Your committee also received testimony against the bill from HSPA (Hawai‘i Sugar Planters Association), which expresses concern that the requirements imposed by H.B. No. 1138 could result in tremendous expense.”
142 Id.
143 See Water Resources Development Act of 1986, discussed above.
primary responsibility of providing an adequate and safe dam rests with the dam owner, and not with the State.\textsuperscript{144}

3.2.1 Sovereign Immunity and Water

Even if the State is immune to liability for dam inspections under the Hawai‘i Dam Safety Act, an alternative potential theory of liability may lie in the State’s control and dominion over water and public land based on the Public Trust Doctrine.\textsuperscript{145} For example, in \textit{Littleton v. State},\textsuperscript{146} a plaintiff walking through Ewa Beach Park was injured when a piece of a telephone pole floating in the ocean struck her. The Hawai‘i Supreme Court determined that the waters were under the care and control of the State of Hawai‘i, thus the State had a duty of due care for the safety of persons in said waters, and a duty to warn the public of dangerous unnatural conditions.\textsuperscript{147}

Following \textit{Littleton}, the Hawai‘i Supreme Court continued to hold the State responsible for dangerous ocean conditions. \textit{Birmingham v. Fodor’s Travel Publications}, involved a body surfing injury in the ocean fronting Kekaha Beach Park.\textsuperscript{148} With respect to the duties of the State as the owner and occupier of the ocean waters, the Hawai‘i Supreme Court adopted the following two part test: (1) whether the condition causing the injury was a dangerous \textit{unnatural} condition, and (2) whether the State had actual or


\textsuperscript{145} \textit{HAW. CONST.} art. XI, § 7. (“All public natural resources are held in trust by the State for the benefit of the people.”).

\textsuperscript{146} 66 Haw. 55 (1982).

\textsuperscript{147} \textit{Littleton v. State}, 66 Haw. at 63 n. 2 (“This is not to say, however, that the State is under a continuing duty to inspect and warn of dangerous unnatural conditions along every inch of Hawai‘i’s coastlines. Such a requirement would place an unrealistic and intolerable burden upon the State. But on facts similar to Asato, or analogous thereto, the State does have a duty, at the very least, to warn the public of such dangerous unnatural conditions.”).

\textsuperscript{148} \textit{Birmingham v. Fodor's Travel Publications, Inc}, 73 Haw. 359 (1992)
constructive knowledge of the condition. The Court emphasized that unlike the telephone pole in Littleton, a wave is a naturally occurring phenomenon for which the State does not have a duty to warn.

A dam holding back water in a reservoir could certainly be considered an unnatural condition, based on Rylands v. Fletcher and Hawai‘i common law. Therefore a dam arguably meets part one of Birmingham, a dangerous unnatural condition. Because the State takes an active role in inspecting dams, potential plaintiffs could argue, “the State had actual or constructive knowledge of the condition,” which arguably could satisfy the second condition in Birmingham.

### 3.2.2 Sovereign Immunity and Failure to Warn

In 2003 the Hawai‘i State legislature passed a law regarding a landowners' liability for natural conditions on the land. The legislature passed this law in response to the highly publicized Sacred Falls cases. These cases arose out of a rock fall incident at Sacred Falls State Park on May 9, 1999, in which eight people were killed and another fifty were injured. The plaintiffs filed suit against the State alleging that it failed to adequately warn the public of the falling rock hazard. At the time of the incident there were multiple signs warning of the hazard of “Falling Rocks” and/or “Rock Slides” at Sacred Falls. Nevertheless, the court held that the State “should have posted more specific warnings in the area of greatest risk and in a manner that would adequately

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149 Birmingham, 73 Haw. at 378.
150 Id.
151 Act 82, entitled “Limitations on Public Entity Liability in Actions Based Upon Duty to Warn of Natural Conditions,” went into effect on July 1, 2003
152 Patricia Mathias NaPier and Jill Murakami Baldemor, LANDOWNER LIABILITY UNDER HAWAI‘I LAW, Hawai‘i Bar Journal (April 2004) citing In re: Sacred Falls Cases.
impress visitors with the extent of risk involved.”153 The court further found that the warning given at the waterfall area was “not commensurate with the severity or degree of danger known to exist in this area.” 154

This law may not apply to dams on state land. The Act defines improved public lands as “lands designated as part of the state park system, parks, and parkways under chapter 184, or as part of a county’s park system, and lands which are part of the Hawai‘i statewide trail and access system under chapter 198D, excluding buildings and structures constructed upon such lands.”155 A dam could be considered a “structure”, which are specifically excluded under the act. Therefore the State may not have a duty to post signs on dams, based on Act 82.

3.2.3 Sovereign Immunity and the Cities and Counties of Hawai‘i

The Hawai‘i Supreme Court has determined that although the State has sovereign immunity, the cities and counties of Hawai‘i do not.156 Typically under the common law, cities and counties are immune from tort liability arising out of actions involving “governmental functions” but are liable for claims based on “private or corporate functions,” a distinction that confused municipal tort litigation in Hawai‘i.157 In 1957 the Territorial Court removed this distinction and held that “where [a municipality’s] agents are negligent in the performance of their duties so that damage results to an individual, it is immaterial that the duty being performed is a public one from which the municipality

153 Id. at 43.
154 Id.
157 Mark v. City and County, 40 Haw. 338, 340 (1953) (“As to what is a governmental function and what is a corporate or ministerial act of a municipality is a question upon which there is a wide divergence of opinion. The cases are in hopeless confusion and even in the same jurisdiction often impossible to reconcile.”)
derives no profit or that it is a duty imposed upon it by the legislature."  

The Territorial Court then determined that sovereign immunity did not extend to the cities and counties of Hawai‘i.  

In 2004 the Hawai‘i Supreme Court upheld this decision in determining that the counties and cities of Hawai‘i do not fall within the Hawai‘i State Tort Liability Act. This decision overturned the previous 1973 Hawai‘i Supreme Court decision that municipalities did enjoy sovereign immunity as a “subdivision of the State.” Under the Hawai‘i State Tort Liability Act, the State has waived its immunity from liability for torts of its employees. The Act defines a State employee as including officers and employees of any State agency, and defines State agency as including the executive departments, boards, and commissions of the State. A county is not an executive department, board, or commission of the State. Thus, a county and its employees are not entitled to sovereign immunity.  

In 1963, the Hawai‘i Supreme Court determined that a county was liable for damages caused by private drains the county had adopted and maintained as part of the municipal sewer system. In Carter v. County of Hawai‘i, the Court determined, “that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care, in respect to the upkeep of drains and culverts constructed by third

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158 Kamu v. County of Hawai‘i, 41 Haw. 527, 552 (1957)
159 Kamu, 41 Haw. at 553 (“the immunity of the sovereign State rests on the doctrine that the State which makes the laws is immune to suit, but no such reasoning can be indulged in on behalf of a municipal corporation.”).
162 HRS § 662-1 “Definitions”.
163 Kahale v. City & County of Honolulu, 104 Haw. at 348.
persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof.”

If a county has adopted or maintained a former sugar plantation reservoir as part of the local water system, then the county could be liable for damages resulting from the breach of that dam. However, simply picking up trash and mowing the grass on the banks is not enough to show adoption by the county. There has to be some form of legal acceptance on the part of the county. Carter noted that, “A natural corollary to this rule is that there is no municipal responsibility for maintenance and upkeep of drains and culverts constructed by third parties for their own convenience, and the better enjoyment of their own property, unless such facilities be accepted or controlled in some legal manner by the municipality.”

Following the decision of Carter, a county can become responsible for a drainage system if it either (1) adopted (or “accepted”) a drainage system, or (2) assumed control of a drainage system. Therefore if the county has assumed control of a drainage easement over private land, the county has the duty to maintain the easement. If the county’s dam breaches, the county can be held liable for the damage caused to private landowners.

### 3.3 Potential Criminal Liability

The proposed legislation creates specific criminal penalties for certain wrongdoing involving dams. The current penal code also includes provisions that may be applicable if a dam owner’s wrongful actions cause a private dam to breach and thereby

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165 Id.
166 Carter, 47 Haw. at 78-79, 384 P.2d at 314
cause harm to persons or property. The following analysis is not intended to be exhaustive, merely illustrative.

### 3.3.1 Manslaughter

If a dam owner’s reckless modifications to a dam cause the dam to breach, which in turn causes the death of another, then the dam owner could be guilty of manslaughter. A person commits the offense of manslaughter if he or she recklessly causes the death of another person.

In this context, a person acts recklessly when he or she consciously disregards a substantial and unjustifiable risk that his or her conduct may cause the death of another. A risk is substantial and unjustifiable if, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the disregard of the risk involves a gross deviation from the standard of conduct that a law abiding person would observe in the same situation.

The difference between reckless and negligent as usually defined is one of kind, rather than degree. A reckless actor is aware of the risk and disregards it; the negligent actor is not aware of the risk but should have been aware of it.

There are two material elements for manslaughter, each of which the prosecution must prove beyond a reasonable doubt: that the defendant caused the death of another person, and that the defendant did so recklessly. In Hawai‘i, manslaughter is a Class A

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167 HAWJIC No. 9.09 citing H.R.S. § 707-702(1)(A), 702-206(3).
168 HAWJIC No. 9.09 citing H.R.S. § 707-702(1)(A), 702-206(3).
169 HAWJIC No. 6.04 citing HRS § 702-206(3).
170 HAWJIC No. 6.04 citing HRS § 702-206(3).
felony, which has a penalty of up to $50,000\textsuperscript{172} and a possible prison sentence of twenty (20) years in prison.\textsuperscript{173}

3.3.2 Assault in the Second Degree

If the dam owner’s reckless modifications of a dam result in serious bodily injury to another person, the dam owner could be found guilty of assault in the second degree.\textsuperscript{174} There are two elements to Assault in the Second Degree, each of which the prosecution must prove beyond a reasonable doubt: that the defendant caused serious bodily injury to another person, and that the defendant did so recklessly.

Assault in the second degree is a class C felony, which has a maximum penalty of five (5) years in prison.\textsuperscript{175} If the harm or injury is not serious, then the dam owner may be guilty of assault in the third degree for recklessly causing harm to another person.\textsuperscript{176} Assault in the third degree is a misdemeanor offense in Hawai‘i.\textsuperscript{177}

3.3.3 Recklessly Endangering the Public

If a dam owner modifies a dam in such a way that makes it unsafe to the general public, the dam owner could be guilty of reckless endangering in the first degree. There are three elements of the offense of reckless endangering in the first degree, each of which the prosecution must prove beyond a reasonable doubt: that the defendant employed widely dangerous means, and that the defendant did so intentionally, knowingly or recklessly, and that the defendant did so in a manner which recklessly

\textsuperscript{172} HRS § 706-640. Authorized fines
\textsuperscript{173} HRS § 706-659 – Sentence of imprisonment for a Class A felony.
\textsuperscript{174} HRS § 707-711 – Assault in the second Degree
\textsuperscript{175} HRS § 706-660 – Sentence of imprisonment for Class B and C felonies; ordinary terms.
\textsuperscript{176} HRS § 707-712 Assault in the third degree.
\textsuperscript{177} HRS § 707-712 Assault in the third degree.
placed another person in danger of death or serious bodily injury.\textsuperscript{178} “Widely dangerous means” includes explosion, fire, flood, avalanche, collapse of building, or any other means capable of causing widespread injury or damage.\textsuperscript{179} In Hawai‘i, reckless endangering in the first degree is a class C felony, which has a maximum fine of $10,000 and a maximum sentence of five (5) years.\textsuperscript{180}

3.3.4 Criminal Property Damage

A dam owner whose reckless modification of a dam results in damage to another person’s property could be found guilty of criminal property damage in the third degree. A person commits the offense of Criminal Property Damage in the Third Degree if he or she recklessly damages the property of another, without the other's consent, by the use of widely dangerous means.\textsuperscript{181} Criminal property damage in the third degree is a misdemeanor in Hawai‘i.

\textsuperscript{178} HAWJIC No. 9.25, citing HRS 707-713.
\textsuperscript{179} HRS § 708-800 – Definition of widely dangerous means.
\textsuperscript{180} HRS § 706-660 – Sentence of imprisonment for Class B and C felonies.
\textsuperscript{181} HAWJIC No. 10.08, citing HRS § 708-822(1)(A), 702-206(3).