

2-15-2020

Making Waves: Using Hawaii's and California's Public Trust Doctrines to Bring Gender Equality to Professional Big-Wave Surfing

Natalie Holtz

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Holtz, Natalie (2020) "Making Waves: Using Hawaii's and California's Public Trust Doctrines to Bring Gender Equality to Professional Big-Wave Surfing," *California Western Law Review*. Vol. 56 : No. 1 , Article 9.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol56/iss1/9>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

MAKING WAVES: USING HAWAII'S AND CALIFORNIA'S PUBLIC
TRUST DOCTRINES TO BRING GENDER EQUALITY TO
PROFESSIONAL BIG-WAVE SURFING

TABLE OF CONTENTS

INTRODUCTION.....	284
I. BACKGROUND.....	289
A. <i>Big-Wave Contests</i>	289
B. <i>The North Shore's Contest Calendar</i>	291
C. <i>The North Shore's Shore Water Rules</i>	293
D. <i>Desired Criteria from North Shore Permit Applications Under the Shore Water Rules</i>	295
II. CALIFORNIA REGULATORY AGENCIES FORCE INCLUSION AND PAY EQUITY AT TITANS OF MAVERICKS COMPETITION THROUGH THE CALIFORNIA COASTAL ACT AND CALIFORNIA'S PUBLIC TRUST DOCTRINE	299
A. <i>The Coastal Act Requires the California Coastal Commission to Maximize Access and Recreational Activities for All People</i>	301
B. <i>"The Waves Do Not Discriminate:" The California State Lands Commission Invokes the Public Trust Doctrine</i>	303
III. THE NORTH SHORE'S PERMITTING PROCESS EVALUATED THROUGH THE LENS OF THE PUBLIC TRUST DOCTRINE.....	306
A. <i>Background of Hawaii's Public Trust Doctrine: History, Constitutional Provisions, and Statutes</i>	306
B. <i>Hawaii Embraces Illinois Central and Federal Navigable Waters Trust</i>	308
C. <i>Hawaii Recognizes a Range of Public Trust Protected Uses</i> ..	309
D. <i>Hawaii Supreme Court Adopts a Public-Focused View of Public Trust Doctrine in Freshwater Permit Case, In Re Water Use Permit Applications</i>	310
IV. THE NORTH SHORE'S SURF CONTEST CALENDAR'S PREFERENTIAL TREATMENT OF MEN-ONLY COMPETITIONS VIOLATES HAWAII'S PUBLIC TRUST DOCTRINE	314
A. <i>Honolulu Has a Duty to Promote the Most Equitable and Beneficial Use of the North Shore Waters Under In Re Water</i>	

284 CALIFORNIA WESTERN LAW REVIEW [Vol. 56]

<i>Use Permit Applications</i>	314
<i>B. Honolulu Has a Duty to Actively Promote the Public Trust Doctrine in Its Decision-making Process and Favor Public over Private Interests</i>	316
<i>C. “Mitigating Impacts” to the Community Should Mean Finding Ways to Increase Access: Not Planning for Trash Removal and Traffic Control</i>	317
<i>D. Both the California Regulatory Agencies and Honolulu Have Authority Under the Public Trust Doctrine and Are Expected to Use it to Maximize Access to Their Ocean Waters</i>	318
CONCLUSION	319

INTRODUCTION

*“Girls do fine when it comes to housework, raising children, doing office work, doing the twist and even riding ankle snappers at Malibu. But one thing I can’t stand is girls riding (or attempting to ride) big waves.”*¹

Buzzy Trent, 1963 article in Surf Guide magazine

Modern big-wave surfing traces its roots to a surf break called Makaha,² Hawaiian for “fierce.”³ Buzzy Trent and a handful of other surfers began riding this legendary wave off Oahu’s west coast in the 1940s.⁴ In 1953, a photograph of this group surfing a 30-foot wave found its way into California newspapers, triggering an exodus of new surfers to Hawaii.⁵ These newcomers were addicted to surfing big waves, but Makaha did not break often.⁶ In their pursuit of more big

1. Janna Irons, *Sexism in Big-Wave Surfing Isn’t Dead Yet*, OUTSIDE MAG. (Feb. 8, 2018), <https://www.outsideonline.com/2278221/sexism-big-wave-surfing-isnt-dead-yet>.

2. RIDING GIANTS (Sony Pictures Classics 2004); *see also Big Wave Surfers, CLUB OF THE WAVES*, <https://clubofthewaves.com/feature/big-wave-surfers/> (last visited Sept. 4, 2019).

3. Matt Warshaw, *Makaha*, ENCYCLOPEDIA OF SURFING, <https://eos.surf/entries/makaha/> (last visited Sept. 4, 2019).

4. *See* RIDING GIANTS *supra* note 2.

5. *Id.*

6. *Id.*

waves, these surfers discovered Oahu's famous North Shore nestled up to taro farms and pineapple fields.⁷

Women are rarely mentioned in recounts of big-wave surfing's early days.⁸ Instead, you hear the names Buzzy Trent, George Downing, and Greg Noll.⁹ But the truth is, women have also been riding big waves for a long time.¹⁰ In 1959, then fifteen-year-old Linda Benson became the first woman to ride a wave at Waimea Bay.¹¹ She estimated the wave to be about eighteen feet tall.¹² In the 1970s, Margo Oberg, the first woman to receive a prize-money check for a surf contest, regularly surfed huge waves at Sunset Beach on Oahu's North Shore.¹³ In 2005, Keala Kennelly became the first woman to tow-in to the "ridiculously frightening"¹⁴ Tahitian wave, Teahupoo.¹⁵

Over the years, the popularity of big-wave surfing ebbed and flowed, and the first big-wave contest was not held until 1984.¹⁶ Until

7. *Id.*

8. If they are, usually it is one woman in particular: Gidget. Gidget's eponymous movie is said to have been a major cause of the worldwide number of surfers shooting from approximately five thousand to two to three million in just five years. *See id.*

9. *See id.*

10. *See id.*; see also Kim Cross, *Women (Finally!) Get a Big-Wave Heat at Mavericks*, OUTSIDE MAG. (Jan. 29, 2018), <https://www.outsideonline.com/2277561/mavericks> ("The simple truth is, women have been surfing big waves for decades, despite the cultural undertow of a brotherhood that really would rather they didn't.").

11. Chelsea Burcz, *The Champ: Linda Benson*, PILGRIM SURF + SUPPLY (June 16, 2016), <https://pilgrimsurfsupply.com/blogs/news/117738948-linda-benson>.

12. *Id.*

13. Matt Warshaw, *Oberg, Margo*, ENCYCLOPEDIA OF SURFING, <https://eos.surf/entries/oberg-margo> (last visited Mar. 22, 2019).

14. Bruce Jenkins, *A Brief History of Women's Big-Wave Surfing*, S.F. CHRON. (Dec. 24, 2016), <https://www.sfchronicle.com/sports/article/A-brief-history-of-women-s-big-wave-surfing-10815938.php>.

15. *See* Robert Pursell, *Keala Kennelly Catches Massive Teahupoo Wave, Love from Kelly Slater*, ADVENTURE SPORTS NETWORK (July 28, 2015), <https://www.adventuresportsnetwork.com/sport/surf/keala-kennelly-catches-massive-teahupoo-wave-love-kelly-slater/>; see also *Surfing*, KEALA KENNELLY, <https://kealakennelly.com> (last visited Mar. 22, 2019).

16. While the Eddie is recognized as the oldest big-wave competition, the inaugural Eddie competition in 1984 was not a traditional big-wave competition because it was held in only eight-foot surf. The following year, a twenty-foot height

2010, however, every big-wave invitation-only competition was closed to women.¹⁷ It was not until the Nelscott Reef Big-Wave Classic in Oregon that women were allowed to surf in a big-wave competition, and even then, the surfing was an exhibition, or an “expression session,” not a competition.¹⁸ Keala Kennelly, “the best female big-wave surfer on earth,”¹⁹ won. She surfed sixty-foot wave faces—a height equal to about one-fifth the height of the Statue of Liberty²⁰—in conditions that blew a male competitor’s eardrums and made him throw up underwater.²¹ She took home \$0 in prize money.²²

Kennelly, a native Hawaiian,²³ still works four to five days a week.²⁴ On her way to the gym to train, Kennelly said, “I still bartend and I work as a DJ. I won Jaws and I got equal prize money, and I got \$20,000 but after taxes . . . cool. That’s my salary for surfing for the year: \$20K.”²⁵ She continued: “I don’t know how many men make a living doing this, but let me put it this way: I’m sure the top ten big-wave male surfers don’t have second and third jobs.”²⁶

requirement was implemented and the contest was moved to Waimea Bay. See Matt Warshaw, *Quiksilver in the Memory of Eddie Aikau*, ENCYCLOPEDIA OF SURFING, <https://eos.surf/entries/quiksilver-in-memory-of-eddie-aikau-the/> (last visited Sept. 14, 2019).

17. Cross, *supra* note 10.

18. *Id.*

19. Daniel Duane, *The Fight for Gender Equality in One of the Most Dangerous Sports on Earth*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/interactive/2019/02/07/magazine/women-surf-big-wave.html>.

20. *How Long is 60 Feet?*, THE MEASURE OF THINGS, <http://www.bluebulbprojects.com/measureofthings/results.php?comp=length&unit=ft&amt=60&sort=cnt&p=11> (last visited Sept. 13, 2019).

21. Keala Kennelly, *Women’s Big Wave Surfing Triumphs*, INERTIA (Nov. 10, 2010), <https://www.theinertia.com/surf/womens-big-wave-surfing-keala-kennellytriumphs-nelscott-reef/>.

22. Cross, *supra* note 10.

23. *Bio*, KEALA KENNELLY, <http://kealakennelly.com> (last visited Mar. 30, 2019).

24. Telephone Interview with Keala Kennelly, Prof’l Big Wave Surfer (Feb. 19, 2019) [hereinafter Keala Kennelly Interview].

25. *Id.*

26. *Id.*

In the past several years, women's big-wave surfing has taken strides towards equality.²⁷ In 2016, the Committee for Equity in Women's Surfing ("CEWS"), a group consisting of female big-wave surfers, an attorney, and an activist, lobbied the California Coastal Commission to get women admitted to the then men-only Titans of Mavericks big-wave competition in Half Moon Bay, California.²⁸ When the California Coastal Commission conditioned the renewal of the then-contest organizer's permit on the addition of a women's heat, it argued it had authority to do so under the California Coastal Act, which gives it authority to maximize access to California's shores.²⁹ During the writing of this paper, the contest organizer, the World Surf League ("WSL"), cancelled the scheduled 2020 contest citing "logistical challenges."³⁰ Since then, a private individual has been trying to organize a contest for the 2020 season, but as of the writing of this paper, it is unclear whether this contest will go forward.³¹

While the above were important steps, the fight for gender equality in big-wave surfing is far from over. Today, of the annual professional or pro-am surf contests held on the North Shore of Oahu, almost all of them are men-only.³² Some of these contests, like the Pipe Masters, have been going on for decades and bring millions of dollars in revenue to Hawaii each year.³³ Only one professional or pro-am contest on the

27. See generally Duane, *supra* note 19.

28. *Id.*

29. CAL. COASTAL COMM'N, COASTAL DEVELOPMENT PERMIT AMENDMENT, STAFF REPORT ADDENDUM FOR W11A CDP AMENDMENT NUMBER 2-15-1458-A1 (CARTEL MANAGEMENT, INC.), at 13 (Nov. 1, 2016), <https://documents.coastal.ca.gov/reports/2016/11/w11a-11-2016.pdf> [hereinafter 2016 CALIFORNIA COASTAL COMMISSION PERMIT].

30. Dion Lim, *Future of Mavericks Surf Competition Uncertain After World Surf League Pulls out of Event*, ABC7 (Aug. 30, 2019), <https://abc7news.com/sports/mavericks-competition-future-uncertain-after-host-pulls-out/5503477/>.

31. Telephone Interview with Sabrina Brennan (Dec. 12, 2019); see also Elliot Almond, *Why a College Student Who Doesn't Surf Is Trying to Reboot a Mavericks Contest*, SANTA CRUZ SENTINEL (Jan. 2, 2020), <https://www.mercurynews.com/2020/01/02/why-a-college-student-who-doesnt-surf-is-trying-to-reboot-a-mavericks-contest/>.

32. See discussion *infra* Section II.

33. Jeff Hawe, *Surf Competition Pumps Millions into Oahu Economy: Vans Triple Crown of Surfing Draws Global Attention While Boosting Local Businesses*,

calendar is women-only.³⁴ This contest, the Queen of the Bay, is a big-wave contest,³⁵ but it has never run.³⁶ After years of effort, the Queen of the Bay was granted a permit in 2017, but has not run—for three consecutive seasons—because the waves have not been big enough.³⁷ While at first glance this may seem like bad luck, the Queen of the Bay has one of the worst time slots on the North Shore calendar.³⁸

This article submits the City and County of Honolulu’s (“Honolulu”) permitting process violates Hawaii’s public trust doctrine by favoring professional all-male surfing events. Part I provides a background for big-wave surfing competitions and delves into the logistics of the North Shore’s permitting process. Part II explores how the California Coastal Commission and State Lands Commission used their authority under the California Coastal Act and California’s public trust doctrine to force gender inclusion and pay equity in the Titans of Mavericks competition. Part III examines how Honolulu’s water event permitting practices violate Hawaii’s public trust doctrine and Hawaii’s

HAW. BUS. (Dec. 8, 2017), <https://www.hawaiiibusiness.com/surf-competition-pumps-millions-into-oahu-economy/>.

34. Ashtyn Douglas, *Women Get Their Shot at Waimea Contest: The Queen of the Bay Returns to Waimea Bay This Fall*, SURFER (June 18, 2018), <https://www.surfer.com/features/the-queen-of-the-bay-is-back/>; *Red Bull Queen of the Bay October 1-November 21, 2019, Event Update*, RED BULL, <https://www.redbull.com/us-en/events/queen-of-the-bay> (“While we did not receive the necessary swell, we are proud to support women’s big wave surfing with the first ever Women’s Waimea Bay Championship.”) (last visited Dec. 24, 2019).

35. The Queen of the Bay is formally known as the “Women’s Waimea Bay Championship.” *Id.*

36. *See id.*; *see also* *Red Bull Queen of the Bay*, RED BULL, <https://www.redbull.com/us-en/events/queen-of-the-bay> (last visited Mar. 31, 2019).

37. *See supra* note 36 and accompanying text.

38. *See Activities and Programs, Calendar of Permitted North Shore Events from September 2018 - May 2019*, CITY & CTY. OF HONOLULU, DEP’T OF PARKS & RECREATION, <http://www.honolulu.gov/parks/program/182-site-dpr-cat/21046-north-shore-shore-water-event-information.html/> (last updated Mar. 27, 2019) [hereinafter *Contest Calendar*]; *see also* Justin Housman, *Did You Know: There’s a Women’s Big-Wave Contest at Waimea This Fall: Waiting Period for Women’s Waimea Bay Championship Opens This Week*, SURFER (Oct. 5, 2017), <https://www.surfer.com/features/by-god-theres-an-all-womens-big-wave-event-at-waimea/>; Santorini Dave, *The Best Time of Year to Visit Hawaii*, SANTORINI DAVE, <https://santorinidave.com/best-time-to-visit-hawaii> (last visited May 31, 2019) (“The biggest waves tend to hit the north shores of all islands in winter . . . especially in December and January.”).

constitution under Hawaiian case law. Part IV compares the legal authority relied upon by the California Coastal Commission and State Lands Commission at Mavericks to the laws governing Honolulu to suggest Hawaii is similarly bound to make the North Shore water event calendar more equitable to women. Finally, this Comment concludes by exploring and proposing solutions to challenges facing women big-wave surfers.

I. BACKGROUND

A. *Big-Wave Contests*

Unlike regular surf contests, there are only a handful of big-wave contests; they are rare because the conditions have to be perfect.³⁹ A break will be reserved for weeks or even months in what is known as a “holding” or “waiting period.”⁴⁰ However, the contest will not go forward if conditions are not right.⁴¹ What classifies as a big wave? This is a difficult question to answer because desired wave heights vary from contest to contest. For instance, in 2019, the Nelscott Reef Pro sought wave heights of thirty-plus feet.⁴² Meanwhile, the WSL’s Big Wave Tour requires waves to be at least consistently twenty-five feet on their face.⁴³ To further complicate matters, there are different ways of calculating wave height.⁴⁴ The Hawaiian method measures height from the back of the wave, while the Bascom method measures the wave from sea level to top while looking at it from the shore.⁴⁵ If the

39. See Jesse McKinley, *Bruising Surf at a Rare Big-Wave Event in Hawaii*, N.Y. TIMES (Dec. 8, 2009), <https://www.nytimes.com/2009/12/09/us/09surf.html>.

40. See *Contest Calendar*, *supra* note 38.

41. See Marcus Sanders, *No Mavericks Challenge This Week: Big, Clean Surf Expected—But “Waiting for More Optimum Conditions”*, SURFLINE (Dec. 16, 2018), <https://www.surfline.com/surf-news/monday-officially-no-go-mavericks-challenge/41284>.

42. NELSCOTT REEF PRO, <http://nelscottsurf.com/pro/> (last visited Mar. 31, 2019).

43. *The Big Wave Tour Explained*, WORLD SURF LEAGUE (Sept. 26, 2018), <http://www.worldsurfleague.com/posts/349509/the-big-wave-tour-explained>.

44. *How to Measure Wave Height in Surfing*, SURFER TODAY, <https://www.surfertoday.com/surfing/how-to-measure-wave-height-in-surfing> (last visited Mar. 31, 2019).

45. *Id.*

waves are not big enough, or the conditions are not right due to factors such as bad visibility, the competition will not run.⁴⁶ The annual Eddie Aikau contest (“the Eddie”), for instance, had its inaugural event in 1984 but has only run nine times.⁴⁷

While big-wave contests are rare, big-wave contests for women are even rarer. As of writing this article, women have about three yearly opportunities to compete in big-wave competitions: Pe’ahi, a WSL contest at Jaws on the Hawaiian island of Maui,⁴⁸ the Eddie,⁴⁹ and the Queen of the Bay.⁵⁰ Mavericks provides a fourth opportunity for women so long as it continues to run, but when the WSL decided to remove the contest from its Big Wave Tour, the contest’s future became more uncertain.⁵¹ Additionally, a handful of women have been invited to compete in the Eddie.⁵² That is the extent of the opportunities for women to participate in big-wave competitions: potentially Mavericks, the Queen of the Bay, for some, the Eddie, and one stop on the WSL’s Big Wave Tour.

46. See McKinley, *supra* note 39.

47. Matt Warshaw, *Quiksilver in Memory of Eddie Aikau*, *The*, ENCYCLOPEDIA OF SURFING, <https://eos.surf/entries/quiksilver-in-memory-of-eddie-aikau-the/> (last visited Mar. 31, 2019).

48. See *Contest Calendar* *supra* note 38; see also *Women’s Big Wave Tour Event Schedule*, WORLD SURF LEAGUE, <http://www.worldsurfleague.com/events/2018/wbwt> (last visited Mar. 31, 2019). Jaws is also commonly known as Pea’hi. *Id.*

49. Anna Dimond, *With Eddie Invite, Keala Kennelly Breaks New Ground (Again)*, WORLD SURF LEAGUE (Jan. 23, 2017), <https://www.worldsurfleague.com/posts/237206/keala-kennelly-breaks-new-ground-again>; see also Nina Wu, *‘The Eddie’ Unveils New Format and Lineup, Invites Record Number of Female Surfers*, STAR-ADVISER (Nov. 5, 2019), <https://www.staradvertiser.com/2019/11/05/hawaii-news/the-eddie-unveils-new-format-and-lineup-invites-record-number-of-female-surfers/>.

50. See *Contest Calendar* *supra* note 38.

51. See discussion *supra* Introduction.

52. See Wu, *supra* note 49.

B. The North Shore's Contest Calendar

*"If the surfing world has a shared mythology, then the North Shore of Oahu is its Olympus."*⁵³

William Finnegan

The North Shore is a fabled stretch of Hawaiian coastline on the north side of Oahu that boasts three of the most significant and in-demand surf breaks in the world: Pipeline, Waimea, and Sunset Beach.⁵⁴ Every surf competition organizer who wants to hold a contest on the North Shore must obtain a permit from Honolulu.⁵⁵ There are four parks on the North Shore from which these contests are held.⁵⁶ On December 29, 2018, Honolulu approved permit applications ensuring the following surfing events would run during their usual holding periods and locations in 2019, 2020, and 2021:

- Queen of the Bay, Waimea Beach Park, October 1–November 21 (women only);
- HIC Sunset Pro, Sunset Beach Park, October 27–November 9 (men only);⁵⁷
- Hawaiian Pro, Hale'iwa Ali'i Beach Park, November 13–24 (men only);⁵⁸

53. Matt Warshaw, *North Shore, Oahu*, ENCYCLOPEDIA OF SURFING, <https://eos.surf/entries/north-shore-2> (last visited Mar. 31, 2019).

54. *Id.*

55. *Amendment and Compilation of Title 19, Chapter 4, City and County of Honolulu Administrative Rules*, CITY & CTY. OF HONOLULU, DEP'T OF PARKS & RECREATION (July 18, 2018),

http://www.honolulu.gov/rep/site/dpr/rules/Shore_Water_Events_Amended_Effective_July_30_2018.pdf at 9 [hereinafter *Shore Water Rules*].

56. *See Contest Calendar, supra* note 38.

57. *See HIC Pro*, WORLD SURF LEAGUE, <https://www.worldsurfleague.com/events/2018/mqs/2832/hic-pro/results> (last visited June 3, 2019).

58. *See Hawaiian Pro*, WORLD SURF LEAGUE, <https://www.worldsurfleague.com/events/2019/mqs/3171/hawaiian-pro> (last visited Nov. 15, 2019); *The Eddie*, EDDIE AIKAU BIG WAVE INVITATIONAL, <https://www.theeddieaikau.com> (last visited Nov. 15, 2019).

- Vans World Cup, Sunset Beach Park, November 25–December 6 (men only);⁵⁹
- The Eddie, Waimea Beach Park, December 1–February 29 (invitation-only, only four women invited);⁶⁰
- Da Hui Backdoor Shootout, ‘Ehukai Beach Park, January 4–16 (invitation-only, men only);⁶¹
- Sunset Open, Sunset Beach Park, January 18–28 (men only);⁶²
- Volcom Pipe Pro, ‘Ehukai Beach Park, January 29–February 10 (men only);⁶³ and
- Billabong Pipe Masters, ‘Ehukai Beach Park, December 8–20 (men only).⁶⁴

59. *Vans World Cup*, WORLD SURF LEAGUE, <https://www.worldsurfleague.com/events/2018/mqs/2854/vans-world-cup/results?resultsType=prizes> (last visited June 3, 2019).

60. *See Invitees*, EDDIE AIKAU, <https://www.theeddieaikau.com>, <https://www.theeddieaikau.com>. The Eddie invited Keala Kennelly in 2017 making her the first female invitee in the contest’s over 30-year history. During the writing of this article, contest organizers invited three additional female competitors. Wu, *supra* note 49; *see also* Dimond, *supra* note 49.

61. *See Contest Calendar*, *supra* note 38. The Da Hui Backdoor Shootout—which consists of teams—has a unique format. It has yet to invite women. Telephone Interview with Betty Depolito (Sept. 10, 2019) [hereinafter Betty Depolito Interview].

62. *Sunset Open*, WORLD SURF LEAGUE, <https://www.worldsurfleague.com/events/2019/mqs/2934/sunset-open/results?resultsType=prizes> (last visited June 3, 2019).

63. *Volcom Pipe Pro*, WORLD SURF LEAGUE, <https://www.worldsurfleague.com/events/2019/mqs/2941/volcom-pipe-pro/results?resultsType=prizes> (last visited June 3, 2019).

64. Gary Kewley, *Yeah!! WSL Announces Hawaii Permit Approval for 2019, 2020 & 2021*, SURF NEWS NETWORK (Dec. 29, 2018), <https://www.surfnewsnetwork.com/wsl-announces-hawaii-permit-approval-for-2019-2020-2021/>; *see also* *Billabong Pipe Masters*, WORLD SURF LEAGUE, <https://www.worldsurfleague.com/events/2018/mct/2856/billabong-pipe-masters/results?resultsType=prizes> (last visited June 3, 2019); *Pipe Invitational Called on for Day 1 of Billabong Pipe Masters*, VANS TRIPLE CROWN OF SURFING (Dec. 12, 2018), <http://www.vanstriplecrownofsurfing.com/billabongpipemasters2018/news-article/pipe-invitational-called-on-for-day-1-of-billabong-pipe-masters>; Dylan Heyden, *Female Surfers Want to Finish Their Season at Pipeline, Too*, INERTIA (July 2, 2019), <https://www.theinertia.com/surf/womens-billabong-pipeline-masters-oahu-north-shore-blue-crush>; *see also* Betty Depolito Interview, *supra* note 61.

Of these nine professional or pro-am surfing events, seven of them are men-only. Of the two events that include women, participation is severely restricted. One event, the Eddie, only recently began inviting women, and they account for less than 15% of the event's invitees.⁶⁵ The other event is the Queen of the Bay, which as described above, has yet to actually run.⁶⁶ The Billabong Pipe Masters is the last event in the WSL's Men's Championship Tour, and in recent years, has included a women's "showcase" heat, but this heat was not held in 2019.⁶⁷

This lack of gender equity on the North Shore calendar is exacerbated by the administrative rules (hereinafter the "Shore Water Rules") governing the permitting process. An in-depth examination of the Shore Water Rules reveals why the calendar is so inequitable to female athletes and exposes the challenges facing would-be contest organizers for women's events.

C. The North Shore's Shore Water Rules

The Shore Water Rules permit use of the North Shore parks for surfing events only from January 1 through May 31, and from September 1 through December 31.⁶⁸ While scheduling overlapping periods is prohibited, the director may allow a big-wave event to have a period of 90 days that overlaps with the waiting periods of other surf events. However, no big-wave event can overlap with the waiting period of another big-wave event.⁶⁹ Under the Shore Water Rules, a "big wave event" is defined as "a surf event requiring participants to paddle into waves of a minimum wave face of forty feet or higher."⁷⁰

In order to get the longer holding periods allowed for big-wave contests, the Queen of the Bay contest organizers must classify the competition as a big-wave event.⁷¹ The definition of "big wave" as

65. See *supra* note 64 and accompanying text.

66. See discussion *supra* Introduction.

67. Heyden, *supra* note 64; see also *Billabong Pipe Masters Hawaii 2019*, WORLD SURF LEAGUE, <https://www.worldsurfleague.com/events/2019/mct/2927/billabong-pipe-masters>.

68. Shore Water Rules, *supra* note 55, at 18–19.

69. *Id.* at 19.

70. *Id.* at 2.

71. Betty Depolito Interview, *supra* note 61.

forty feet has several implications for the Queen of the Bay.⁷² First, if the waves do not reach forty feet, which is almost a statistical certainty at the time of year the Queen of the Bay is scheduled, the contest cannot run.⁷³ Second, requiring the women to surf forty-foot waves could discourage potential participants from entering the contest. Third, because two “big-wave” contests cannot overlap, the Queen of the Bay cannot run on days when the big-wave contest following it (the Eddie, which is looking for at least forty-foot waves) would not run, i.e. twenty-foot days.⁷⁴

The Shore Water Rules pose other challenges in making the calendar more equitable to women. A new rule allows permits to last for three years, which means newcomers will have to wait until the existing permits expire to obtain a timeslot.⁷⁵ Additionally, recent changes to the Shore Water Rules completely eliminate an organizer’s ability to appeal Honolulu’s decision on the permit application.⁷⁶ During the public hearing on the Shore Water Rules, local Stacey Moniz lamented the change: “The [removal of the] right to appeal a decision by the director is clearly a directed action to deny due process to applicants.”⁷⁷

Further, “the conflict resolution process” provided in the rules seems to favor the more established contest organizers. Although Honolulu can schedule events over several months, applicants often want the same window, during late fall and winter, when the waves are

72. *Id.*

73. *Id.*

74. *Id.* For example, if on December 1st, during the Eddie holding period, the waves were twenty feet and the Queen of the Bay would like to run a contest, they could not because of their classification as a “big wave event.”

75. See Shore Water Rules, *supra* note 55, at 11; see also *City Changes to Rules for Shore, Surf Events to Go into Effect*, HAW. NEWS NOW (July 30, 2018), <http://www.hawaiinewsnow.com/story/38762505/new-rules-for-oahu-ocean-surf-events-to-go-into-effect/>.

76. *Public Hearing Notice Amendment and Compilation of Title 19, Chapter 4 City and County of Honolulu Administrative Shore Water Rules*, CITY & CTY. OF HONOLULU (July 29, 2018), <https://www.honolulu.gov/parks/default/park-locations/182-site-dpr-cat/26412-notice-of-public-hearing.html>.

77. *City Considers Changing the Way Permits for Ocean Events Are Issued*, HAW. NEWS NOW (July 3, 2018), <https://www.hawaiinewsnow.com/story/38570414/city-considers-changing-the-way-permits-for-ocean-events-are-issued/>.

2019]

MAKING WAVES

295

bigger.⁷⁸ In 2018, out of the twenty-six applications for the 2018–2019 season, all but three were “in direct conflict with each other.”⁷⁹ In these situations, when the department receives two applications requesting the same dates, they employ the conflict resolution process, described below.⁸⁰

D. Desired Criteria from North Shore Permit Applications Under the Shore Water Rules

To determine whose event will become part of the North Shore's calendar, Honolulu considers the following factors in each application and assigns a number of points. There are three main categories:

(1) submitted plans to comply with the permit requirements [This section evaluates whether, and to what extent, the application addresses the city's requirement for a plan to abide by the park's rules and regulations, to clean and restock restrooms, and to remove trash. This is worth 50% of the applicant's final score, and more points are awarded to applicants who not only meet the requirements, but go above and beyond them];⁸¹

(2) submitted plans to mitigate impacts to the community [This section addresses whether the application includes a plan to address traffic, noise control, crowd control, and local services access. It is worth 40% of the applicant's final score];⁸² and

(3) diversity. [Under this category, three points are awarded to events that fall beneath the 25th percentile of all applications for the season; two points are awarded to events that fall between the 25th and 75th percentile, and the top 25th percentile is awarded one point. The rules offer an example: if youth contests only comprise 20% of the applicants, then a youth contest applicant gets three points. This is worth 10% of the applicant's score].⁸³

78. See *Honolulu Mayor Asks World Surf League 'Please Don't Yank Contests' Following Permit Decision*, PAC. BUS. NEWS (Feb. 14, 2018), <https://www.bizjournals.com/pacific/news/2018/02/14/honolulu-mayor-asks-world-surf-league-please-dont.html>.

79. *Id.*

80. Shore Water Rules, *supra* note 55, at 21.

81. *Id.* at 22.

82. *Id.* at 22–23.

83. *Id.* at 23–24.

Applications receiving the highest scores become part of the triennial North Shore calendar.⁸⁴

Honolulu has not always allocated points in this way. In the early 2000s, applications were evaluated by the below categories:

(1) community relations record (60%) [Whether the applicant effectively addressed community traffic concerns in the past and how the event has previously benefitted the local community];

(2) diversity of events (20%) [Whether the event provides the city with diverse water shore events. This includes the track record of event, e.g. how long the event had been in existence]; and

(3) diversity of participants (20%) [E.g. whether the event provided opportunities for female participants].⁸⁵

In 2003, Honolulu sparked controversy when it cut the World Bodyboard Championship from the calendar and relegated the event to a timeslot with smaller waves.⁸⁶ A local bodyboarder, Carol Phillips, said she was “stunned” when Honolulu cut the women’s competition, fearing Honolulu would favor big-money men’s events.⁸⁷ Public discontent over a lack of representation for non-board surfing events in the contest calendar, like stand up paddle and bodysurfing, endures.⁸⁸ Despite this, the permitting process seems to exacerbate rather than alleviate these problems.

Under the Shore Water Rules, the mayor may establish an advisory committee to assist the Parks and Recreation Department in resolving conflicts, but restrictions on who is chosen for the committee are nearly nonexistent.⁸⁹ The only restriction is that committee members cannot

84. *Id.* at 21–24.

85. *Nalu v. City of Honolulu*, 103 Haw. 313 (Ct. App. 2003).

86. Rita Beamish, *On Oahu, Surf’s Up and So Are Tempers*, WASH. POST (Mar. 2, 2003), https://www.washingtonpost.com/archive/politics/2003/03/02/on-oahu-surfs-up-and-so-are-tempers/ebc72785-79dd-44be-a054-e73d024f43c6/?utm_term=.bf2dfae34dfe.

87. *Id.*

88. *See also* Moanike’ala Nabarro, *Contest Organizers Strike Down City’s Permitting Process*, KITV (July 4, 2018), <https://www.kitv.com/story/38575867/contest-organizers-strike-down-citys-permitting-process> (quoting retired Honolulu lifeguard Mark Cunningham: “The balance of the permit hours [too heavily favors] board surfing and I think it needs to be a bit more equitable and just for other board riding or wave riding forms.”).

89. Shore Water Rules, *supra* note 55, at 21.

2019]

MAKING WAVES

297

include someone applying for a permit.⁹⁰ Currently, the informal advisory committee consists of three local male surfers.⁹¹ Further, if no advisory committee is appointed, applications are evaluated by three department employees. Some applicants have complained that letting the approval or denial of their permit be determined solely by Honolulu employees, without allowing applicants to be involved in the decision-making process, is unjust.⁹² In 2003, the organizers of the Da Hui Backdoor Shootout filed a lawsuit against Honolulu alleging “they were victims of ‘the arbitrary discretion of four employees [while they] were not even allowed under the stated criteria and rules to be involved in the decision-making process.’”⁹³

Relatedly, Betty Depolito, a lifelong surfer and native Hawaiian, worked for eight years⁹⁴ before finally securing a permit to put on the Queen of the Bay in 2017.⁹⁵ While this might seem like progress, Queen of the Bay occupies the timeslot between October 1 and November 21, which is right on the outskirts of when the real winter waves hit.⁹⁶ Depolito applied for this period knowing it did not conflict with the other big-wave events, increasing her chances of actually getting a permit. During a phone interview, she explained: “The [City recently] said, ‘Oh, you can file for any time period,’ and it’s like, no, we really can’t, because if we go through the conflict resolution process [the other, more established contest organizers] are going to get more

90. *Id.*

91. Mindy Pennybacker, *City Invites Comments on New Surf Meet Rules*, STAR ADVISER (June 2, 2018), <https://www.staradvertiser.com/2018/06/02/breaking-news/city-invites-comment-on-new-surf-meet-rules/> (specifically, the committee consists of surfers Keone Downing, Brian Keaulana, and Tony Moniz).

92. *Nalu v. City of Honolulu*, 103 Haw. 1228 (Ct. App. 2003).

93. *Id.*

94. Haven Livingston, *Just Add Water: Women Excited About Big Wave Contest at Waimea*, SANTA CRUZ SENTINEL (Oct. 8, 2017), <https://www.santacruzsentinel.com/2017/10/08/haven-livingston-just-add-water-women-excited-about-big-wave-contest-at-waimea/>.

95. Douglas, *supra* note 34.

96. *Contest Calendar*, *supra* note 38; *see also* Shane Nelson, *Big Wave Season Begins on Oahu's North Shore*, TRAVEL WEEKLY (Nov. 18, 2012), <https://www.travelweekly.com/Hawaii-Travel/Insights/Big-wave-season-begins-on-Oahu-North-Shore> (explaining Oahu's big wave season begins in late October and runs through mid-March).

points than we are.”⁹⁷ Notably, the Queen of the Bay holding period is not only earlier in the season, it is also about six weeks shorter than the Eddie holding period.⁹⁸

According to Kennelly, “The men get the Da Hui Backdoor Shootout and the Volcom Pipe Pro, and they get a really good contest window. They should give [Depolito] a longer holding period. The boys have so many contests, and the women have no contests.”⁹⁹ Regarding the holding period for Queen of the Bay, Surfer.com said: “the early-autumn waiting period appears to be because whoever holds the permit for the is-it-happening-is-it-not Eddie event has priority later in the winter . . . It is not *unheard of* for Waimea to crank in the fall, so here’s hoping the contest gets the swell it deserves.”¹⁰⁰ The contest did not “get the swell it deserve[d].” In every year since the would-be inaugural year, the event has been “postponed” (but, in reality, cancelled) because there has not been enough swell.¹⁰¹

Depolito gave an example of her comment that other contest organizers would “get more points” in the conflict resolution process.¹⁰² Under the “mitigating impacts” category, Honolulu considers a contest organizer’s contributions to the community. In the past, this has often meant making large donations to the city.¹⁰³ Depolito explained:

I know that the Eddie Aikau was sponsored by the Quiksilver Company and [Quiksilver] did a lot for the community. They bought new lifeguard towers. They bought ATVs and jet skis for the lifeguards . . . [That’s] a million dollars right there that they paid back. I haven’t been able to get that kind of money to give back to the community for my event.¹⁰⁴

Because the Queen of the Bay cannot make these large gifts to Honolulu, they would receive less points on their permit application.¹⁰⁵

97. Betty Depolito Interview, *supra* note 61.

98. *Contest Calendar*, *supra* note 38.

99. Keala Kennelly Interview, *supra* note 24.

100. Housman, *supra* note 38.

101. *See supra* note 36 and accompanying text.

102. Betty Depolito Interview, *supra* note 61.

103. *Id.*

104. *Id.*

105. *Id.*

While the North Shore calendar has been a contentious issue for years in Honolulu,¹⁰⁶ Honolulu officials seem to have drafted at least some of the Shore Water Rules with the public in mind.¹⁰⁷ For instance, the ten-day cooling off period after each holding period allows free surfers time in the water.¹⁰⁸ Additionally, Honolulu's Shore Water Rules are not explicitly discriminatory.¹⁰⁹ However, if Honolulu is giving preferential treatment to the big-money men's events as the calendar suggests,¹¹⁰ it is still violating Hawaii's public trust doctrine.

II. CALIFORNIA REGULATORY AGENCIES FORCE INCLUSION AND PAY EQUITY AT TITANS OF MAVERICKS COMPETITION THROUGH THE CALIFORNIA COASTAL ACT AND CALIFORNIA'S PUBLIC TRUST DOCTRINE

Located in frigid waters off the coast of Northern California, Mavericks is one of the deadliest waves of the world.¹¹¹ "To reach the waves at Mavericks, surfers must paddle for over forty-five minutes over a maze of rocks, rip currents, and frigid open ocean chop until they finally reach the lineup."¹¹² Big-wave surfer Darrick Doerner described his encounter with Mavericks: "I jumped in the water there, and I had the worst ice cream headache, and within thirty seconds I could not feel my hands or feet. How are you supposed to ride 30- to 40- to 50-foot

106. See Rory Parker, *The Battle for Pipeline: The WSL Lobbies for Oahu Rule Changes While Others Fight for the Scraps: The Continuing Fight for the North Shore's Prized Possession*, STAB MAG., <https://stabmag.com/news/the-battle-for-pipeline-the-wsl-lobbies-for-oahu-rule-changes-while-others-fight-for-the-scraps/> (last visited Mar. 31, 2019).

107. See generally Shore Water Rules, *supra* note 55.

108. *Id.* at 5.

109. See *id.* at 21–24.

110. See *Contest Calendar*, *supra* note 38.

111. See Megan Berman, *21 of the Deadliest Surf Spots in the World You've Probably Never Heard Of*, 22 WORDS, <https://twentytwowords.com/deadliest-surf-spots-in-the-world/> (last visited Nov. 15, 2019) ("Located in northern California's 'Red Triangle,'—because of the number of great white sharks that frequent the area—Mavericks is much more likely to kill a surfer with its enormous, 20-foot-plus, ice cold waves than with its creatures.")

112. RIDING GIANTS, *supra* note 2 (the "lineup" is the place beyond where the waves crash where surfers wait to take off on a wave).

faces? I'm outta here."¹¹³ Surfer Peter Mel further described the scene: "You got sharks, you got rocks, you got cold water."¹¹⁴ Evan Slater said Mavericks is filled with "oversized boulders from the Land of the Lost."¹¹⁵

Quiksilver's "Men Who Ride Mountains" big-wave contest debuted at Mavericks in 1999 and contests have sporadically been held there since.¹¹⁶ Until 2016, however, women were never invited.¹¹⁷ In September 2016, a group of female big-wave surfers (including Keala Kennelly), San Mateo Harbor Commissioner and activist Sabrina Brennan, and pro bono attorney Karen Tynan formed the Committee for Equity in Women's Surfing ("CEWS").¹¹⁸ Brennan had met Tynan at a political event earlier in the year and had asked Tynan if she would like to help them after explaining that women were not allowed to surf at Mavericks.¹¹⁹ Tynan agreed to help and started considering the group's legal options.¹²⁰ Tynan knew that litigation "would be cumbersome and expensive," so she thought it best to "drive the Coastal Commission process under the California Coastal Act to include women."¹²¹ Tynan cites three sources of law that could help the women achieve their goal of making the contest more equitable: (1) the California Coastal Act, (2) the public trust doctrine, and (3) the Unruh Act.¹²²

The California Coastal Commission is required to administer a coastal development permit ("CDP") process within its "coastal

113. *Id.* (interview with Darrick Doerner, Waimea Bay surfer, at 45:42).

114. *Id.* (interview with Peter Mel, Mavericks surfer, at 45:56).

115. *Id.* (interview with Evan Slater, Mavericks surfer, at 46:07).

116. Matt Warshaw, *Mavericks*, ENCYCLOPEDIA OF SURFING, <https://eos.surf/entries/mavericks> (last visited Mar. 31, 2019) (emphasis added).

117. See Julie Jag, *Mavericks Big Wave Contest Adding Female Surfers for the First Time*, SANTA CRUZ SENTINEL (Oct. 24, 2016), <https://www.sanluisobispo.com/sports/outdoors/article110250152.html>.

118. *About*, COMM. FOR EQUITY IN WOMEN'S SURFING, <http://surfequity.org/about-cews> (last visited Mar. 31, 2019).

119. Telephone Interview with Karen Tynan (Feb. 13, 2019) [hereinafter Karen Tynan Interview].

120. *Id.*

121. *Id.*

122. *Id.*

2019]

MAKING WAVES

301

zone.”¹²³ The width of the California Coastal Commission's coastal zone varies, but can extend up to five miles inland from shore and three miles out to sea.¹²⁴ Whether a CDP is required is determined under the State Coastal Act, Coastal Commission regulations, and/or a local government's Local Coastal Program (“LCP”).¹²⁵

It may be surprising that a surf contest could qualify as a “development activity” that requires a CDP. However, activities that change “public access to coastal waters” generally require a permit from the California Coastal Commission and/or the local government.¹²⁶ The Coastal Commission began requiring the Titans of Mavericks contest to obtain a CDP because (1) the contest restricted access to the ocean and the beach in a way that implicated the policies of Chapter 3 of the Coastal Act, and (2) the contest caused damage to the surrounding habitats in the past.¹²⁷ The contest organizers for Titans of Mavericks were required to obtain a CDP from the California Coastal Commission,¹²⁸ but how did the Coastal Commission force the inclusion of a women's heat?

A. The Coastal Act Requires the California Coastal Commission to Maximize Access and Recreational Activities for All People

Section 30604(c) of California's Coastal Act requires every CDP issued for “any development between the nearest public road and the sea . . . include a specific finding that the development is in conformity with the public access and recreation policies of Chapter 3” of the

123. *When Do You Need a Coastal Development Permit?*, CAL. COASTAL COMM'N, https://www.coastal.ca.gov/enforcement/cdp_pamphlet.pdf (last visited Mar. 31, 2019).

124. *Id.*

125. *Id.*

126. *Our Mission*, CAL. COASTAL COMM'N, <https://www.coastal.ca.gov/whoweare.html> (last visited Apr. 6, 2019).

127. 2016 CALIFORNIA COASTAL COMMISSION PERMIT, *supra* note 29, at 2 (pointing to erosion damage to the bluffs caused by the large crowds of people who would gather to watch the contest, and decreased access during contest day, like exclusive use of the surfing area and closure of a public walking trail).

128. *Id.*

Coastal Act.¹²⁹ Since the Mavericks contest was located seaward of the first public road, it fell under this provision.¹³⁰

Sections 30210 through 30223 and 30240(b) in Chapter 3 of the Coastal Act mandate that public access and recreational activities be preserved while still protecting California's natural resources from overuse.¹³¹ When the California Coastal Commission granted a one-year permit to the Titans of Mavericks contest—on the condition that a one-hour women's heat be added¹³²—the Coastal Commission paid special attention to section 30210.¹³³ This section provides “maximum access . . . and recreational opportunities shall be provided for all the people.”¹³⁴ The Coastal Commission also referenced section 30212(a)(1), which ensures public access is provided to the space between the shoreline and the nearest public roadway, “except where it is inconsistent with public safety or the protection of fragile coastal resources.”¹³⁵

In its report, the California Coastal Commission emphasized that the Coastal Act required them to *maximize* public access: not merely provide or protect it.¹³⁶ The Commission found the existing contest, by failing to include female competitors, did not maximize public access and thus violated the public access policies of the Coastal Act.¹³⁷ The Commission used its authority under the Coastal Act to require Titans of Mavericks to bring the contest into conformity by adding a women's heat and making a plan for future inclusion of female competitors.¹³⁸ Then-contest organizer, Cartel Management (“Cartel”), submitted a

129. CAL. COASTAL ACT OF 1976 § 30604(c) (Deering 2019).

130. 2016 CALIFORNIA COASTAL COMMISSION PERMIT, *supra* note 29, at 12.

131. CAL. COASTAL ACT OF 1976 §§ 30210–30223, 30240 (Deering 2019).

132. 2016 CALIFORNIA COASTAL COMMISSION PERMIT, *supra* note 29, at 15; *see also* Dan Weikel, *Let Women Compete, Coastal Commission Orders Famous Surf Contest at Mavericks*, L.A. TIMES (Nov. 5, 2016), <https://www.latimes.com/local/lanow/la-me-ln-mavericks-women-20161103-story.html>.

133. 2016 CALIFORNIA COASTAL COMMISSION PERMIT, *supra* note 29, at 13.

134. CAL. COASTAL ACT OF 1976 § 30210 (Deering 2019).

135. 2016 CALIFORNIA COASTAL COMMISSION PERMIT, *supra* note 29, at 13; *see also* CAL. COASTAL ACT OF 1976 § 30212(a) (Deering 2019).

136. 2016 CALIFORNIA COASTAL COMMISSION PERMIT, *supra* note 29, at 13.

137. *Id.* at 15.

138. *Id.*

revised proposal, including a heat for six women to commence in the 2016–2017 contest and a statement they would include a women's competition in all future years authorized by the permit.¹³⁹ The Coastal Commission noted that because the permit allowed Cartel to temporarily close public access areas, in order to offset those impacts, it was reasonable to require the organizers “to increase the participation of women in this male-dominated event.”¹⁴⁰

B. “The Waves Do Not Discriminate:” The California State Lands Commission Invokes the Public Trust Doctrine

The public trust doctrine traces its roots to ancient Roman law.¹⁴¹ The Romans believed that certain interests, like fishing and navigation, should be preserved for the general public.¹⁴² Accordingly, the properties used for those endeavors, such as navigable waterways and the lands underneath them, were held in trust for the general public use and could not be granted away to private owners.¹⁴³

The United States adopted a system which reflects this notion that the states' navigable waters and the lands underneath them are held in trust for the public and should be protected.¹⁴⁴ For instance, the general rule is “that the seashore between high and low tide may not be routinely granted to private owners.”¹⁴⁵ Rather, title to the land and navigable waters from the high tide mark seaward belongs to the states.¹⁴⁶ When each state was admitted to the U.S., they agreed to take this property in trusteeship for the public.¹⁴⁷ In the seminal public trust doctrine case, *Illinois Central Railroad Co. v. Illinois*, the U.S. Supreme Court recognized the states hold title to their submerged lands, and emphasized:

139. *Id.* at 16.

140. *Id.*

141. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 475 (1970).

142. *Id.* at 475.

143. *Id.*

144. *Id.* at 476.

145. *Id.*

146. *Id.*

147. *Id.*

[I]t is a title different in character than that which the State holds in lands intended for sale . . . It is a title held in trust *for the people of the state*, that they may enjoy the navigation of the waters, carry commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.¹⁴⁸

Expanding the traditional rule, the U.S. Supreme Court has stated the states own the lands underneath all tidal waters, regardless of whether they are actually navigable.¹⁴⁹ Additionally, while the public trust doctrine originally focused on protecting fishing, navigation, and commerce, courts have since broadly expanded the scope of the public trust doctrine.¹⁵⁰ For instance, the public trust doctrine has become a tool for preserving environmental resources and public recreational uses.¹⁵¹ While the broad outlines of the public trust doctrine are based in federal law, each state's public trust doctrine has evolved differently based on its history and needs.¹⁵² As a result, public trust law is "very much a species of state common law."¹⁵³

Let us return to how the public trust doctrine was applied in the Titans of Mavericks competition. Though women were invited to participate in the Mavericks contest for the first time in 2017, they were not offered the same prize purse as the men.¹⁵⁴ In early 2017, Cartel filed for bankruptcy,¹⁵⁵ and the WSL purchased Cartel's permit and

148. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (emphasis added).

149. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 480 (1988).

150. See generally Haochen Sun, *Toward a New Social-Political Theory of the Public Trust Doctrine*, 35 VT. L. REV. 563, 566 (2011) (noting "[t]he past few decades . . . witnessed an increasingly broad expansion of the [public trust] doctrine by courts.").

151. *Id.*

152. See generally Robin Kundis Craig, *A Comparative Guide to Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q., 53, 58 (2010) ("[W]hile the broad contours of the public trust doctrine have a federal law basis, especially regarding state ownership of the beds and banks of navigable waters, the details of how public trust principles apply vary considerably from state to state.").

153. *Id.*

154. Duane, *supra* note 19.

155. Marcus Sanders, *Cartel Management/Titans of Mavericks Files for Bankruptcy: Event Status in Question as More Legal and Financial Troubles Beset Event Organizers*, SURFLINE (Feb. 1, 2017), <https://www.surflines.com/surf->

2019]

MAKING WAVES

305

took over the contest.¹⁵⁶ Soon after, CEWS approached the WSL to request the same prize money as the amount offered to the men.¹⁵⁷ The WSL said this was “out of the question.”¹⁵⁸ Sabrina Brennan from CEWS then contacted a local reporter.¹⁵⁹ The reporter published an article about the battle between the CEWS and the WSL, which caught the attention of a State Lands Commissioner.¹⁶⁰ In addition to obtaining a CDP from the California Coastal Commission, an organizer seeking to hold a contest at Mavericks needs to obtain a lease from the State Lands Commission for the tidelands on which the contest is held.¹⁶¹ Luckily for CEWS, the State Lands Commission was processing the WSL’s lease application for Mavericks at that time, and asked CEWS to suggest terms.¹⁶²

The WSL’s proposed lease was for approximately one thousand acres of sovereign submerged land managed by the State Lands Commission.¹⁶³ The State Lands Commission had broad discretion to issue leases for these public trust lands,¹⁶⁴ so the State Lands Commission essentially told the WSL that they needed to give the women equal pay in order to obtain the lease.¹⁶⁵ Tynan summarized CEWS’s argument under the public trust doctrine: “You have all these lands that you are holding for the benefit and use of all Californians . . . not just men who surf. That was the hook, and that was how the State Lands Commission staff interpreted it.”¹⁶⁶

news/event-status-in-question-as-more-legal-and-financial-troubles-beset-event-organizers-cartel-management-titans-_145066/.

156. Duane, *supra* note 19.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. CAL. STATE LANDS COMM’N, STAFF REPORT C36 - GENERAL LEASE 1 (Aug. 23, 2018), https://calmatters.org/wp-content/uploads/sites/2/2018/09/StateLands_Mavericks.pdf [hereinafter STATE LANDS COMMISSION REPORT].

164. *Id.* at 4.

165. *See id.* at 4–5. (“[T]he core element and major draw of the Mavericks Challenge are the waves, a public resource on public lands. The waves to not discriminate.”).

166. Karen Tynan Interview, *supra* note 119.

Indeed, the State Lands Commission stated the public trust doctrine required them to “protect and manage its tide and submerged lands for the benefit of *all* the people of California.”¹⁶⁷ Interestingly, the State Lands Commission also stated the waves themselves were a public trust resource.¹⁶⁸ Using its authority under the public trust doctrine, the State Lands Commission added language to the WSL’s lease requiring pay equity to ensure that the “temporary but exclusive use of [the] public lands [was] equitable for all participants regardless of gender.”¹⁶⁹

III. THE NORTH SHORE’S PERMITTING PROCESS EVALUATED THROUGH THE LENS OF THE PUBLIC TRUST DOCTRINE

A. *Background of Hawaii’s Public Trust Doctrine: History, Constitutional Provisions, and Statutes*

Hawaii has one of the most expansive public trust doctrines in the country.¹⁷⁰ In addition to the federal navigable waters trust, Hawaii recognizes a distinct water resources trust which applies to “all [of Hawaii’s] water resources without exception or distinction,” including ocean waters.¹⁷¹ Hawaii has incorporated this state water resources trust into its constitution.¹⁷² Hawaii’s public trust doctrine, therefore, is a public-rights-focused combination of history, state and federal case law, state water code, and state constitutional provisions.¹⁷³ In light of the complexity of Hawaii’s public trust doctrine, it is useful to start from the beginning.

167. STATE LANDS COMMISSION REPORT, *supra* note 163, at 4 (emphasis added).

168. *Id.* at 5.

169. *Id.*

170. Jesse Reiblich & Dan Reineman, *Rhino Chasers and Rifles: Surfing Under the Public Trust Doctrine*, 34 J. LAND USE & ENVTL. LAW, 36, 63 (2018) (suggesting that “because [Hawaii] has a broad public trust doctrine and because surfing is so closely tied to the state’s cultural identity, a very strong argument could be made that the doctrine should protect the sport if it does not already.”).

171. *In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000); *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1002 (Haw. 2006).

172. *In re Water Use Permit Applications*, 9 P.3d at 443; *see also* Craig, *supra* note 152, at 88.

173. *See* Craig, *supra* note 152, at 88.

2019]

MAKING WAVES

307

Initially, all of Hawaii's land and waters belonged to the King.¹⁷⁴ The King set aside some land for himself and divided Hawaii's remaining land between his chiefs, who in turn distributed it to lesser chiefs and commoners.¹⁷⁵ Under this system, there was no private ownership of water.¹⁷⁶ Rather, privileges to water were earned through participating in the construction of irrigation systems.¹⁷⁷ Then, in 1840, the Kingdom of Hawaii's first constitution proclaimed that despite belonging to the King, the lands were not his private property, but rather "belonged to the Chiefs and the people in common"¹⁷⁸ In 1848, however, in what is known as the "Great Mahele," King Kamehameha III divided up the Hawaiian land and doled it out to his chiefs, their agents, and the people themselves.¹⁷⁹ These divisions of land were known as "ahupuaas."¹⁸⁰ Water running through a particular ahupuaa was considered to belong to the owner of that land.¹⁸¹

For a time, court decisions upheld this private ownership of Hawaii's freshwater resources.¹⁸² In 1973, however, the Hawaii Supreme Court reversed its position, holding that all freshwater in Hawaii was held in trust for the "common good" of its citizens.¹⁸³ In this case, *McBryde Sugar Co. v. Robinson*, the Hawaii Supreme Court

174. Marie Kyle, *The "Four Great Waters" Case: An Important Expansion of the Wai'ahole Ditch and the Public Trust Doctrine*, 17 U. DENV. WATER L. REV. 21, 24 (2013).

175. *Id.*; see also *Kingdom of Hawai'i Constitution of 1840*, HAWAII-NATION.ORG, <http://www.hawaii-nation.org/constitution-1840.html> (last visited Nov. 27, 2019).

176. Kyle, *supra* note 174, at 24.

177. *Id.*

178. *Kingdom of Hawai'i Constitution of 1840*, HAWAII-NATION, <http://www.hawaii-nation.org/constitution-1840.html> (last visited Nov. 27, 2019).

179. Kyle, *supra* note 174, at 24–25; *The Mahele*, HAWAIIHISTORY.ORG, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=288> (last visited Nov. 22, 2019).

180. Kyle, *supra* note 174, at 24–25.

181. *Id.* at 25; see also *What Are the Ceded Lands of Hawaii?: UH Law Professor Jon Van Dkyke Explains Key Issue for Future of State, Both for Native Hawaiians and General Population*, HONOLULU CIVIL BEAT (Oct. 25, 2010), <https://www.civilbeat.org/2010/10/5914-what-are-the-ceded-lands-of-hawaii/>.

182. Kyle, *supra* note 174, at 25.

183. *Id.*; see also *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330, 1339 (Haw. 1973).

held the water in the lands given during the Mahele could not be transferred to private owners because “ownership of water in natural watercourses, streams, and rivers remained with the people of Hawaii for their common good.”¹⁸⁴ Later, the court pointed out that the *McBryde* decision rectified a misconception about water rights in Hawaii and “reasserted the dormant public interest in the equitable and *maximum* beneficial allocation of water resources.”¹⁸⁵ This change from viewing water as a private property right to a public trust resource continues to fuel legal clashes between private property owners or would-be owners and the public.¹⁸⁶

*B. Hawaii Embraces Illinois Central and Federal
Navigable Waters Trust*

Hawaii’s water resources trust, rooted in tradition and Hawaiian history, has embraced—but is distinct from—the federal navigable waters trust.¹⁸⁷ When the United States annexed the Republic of Hawaii in 1898, approximately 1,800,000 acres of Hawaiian lands were ceded to the federal government without compensation.¹⁸⁸ In 1959, about 1,400,000 acres were returned to Hawaii under sections 5(b) and 5(e) of the Hawaii Admission Act, when Hawaii was admitted to the United States.¹⁸⁹ When Hawaii recovered these lands, it agreed to hold them in public trust pursuant to section 5(b) of the Admission Act.¹⁹⁰

Hawaii’s admission to the U.S., however, was not the first time Hawaii recognized its navigable waters were to be held in trust for its people.¹⁹¹ In 1899, relying on *Illinois Central*, Hawaii’s Supreme Court declared: “the people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their common use. The

184. *McBryde Sugar Co.*, 504 P.2d at 1339.

185. *In re Water Use Permit Applications*, 89 P.3d 409, 451 (Haw. 2000) (emphasis added).

186. Kyle, *supra* note 174, at 27–28; *see also In re Water Use Permit Applications*, 9 P.3d at 445.

187. *See* Haw. Admission Act, PUB. L. NO. 86-3, § 5, 73 Stat. 4 (1959).

188. *Overthrow of Hawaii*, S.J. Res. 103-150, 103d Cong., 1st Sess. (Haw. 1993).

189. Haw. Admission Act § 5.

190. *Id.*

191. *See, e.g., King v. Oahu R. & L. Co.*, 11 Haw. 717, 725 (1899).

lands under the navigable waters in and around [Hawaii] are held in trust for the public uses of navigation.”¹⁹² Hawaii has embraced the rule that these waters and submerged lands are subject to the trust whether the waters are navigable or not.¹⁹³ Further, Hawaii constitutionalized its water resources public trust by amending its constitution in 1979.¹⁹⁴ Hawaii is thus subject to both the federal public trust doctrine and broader unique mandates under its own constitution.¹⁹⁵

Article XI, section 1 of Hawaii's constitution declares, “the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources . . . [a]ll public natural resources are held in trust by the State for the benefit of the people.”¹⁹⁶ The Hawaii Supreme Court has clarified that article XI, section 1's reference to public trust resources “applies to all water resources without exception or distinction,”¹⁹⁷ and that “water resources” includes ocean waters.¹⁹⁸ Additionally, the trust duties of the State's “political subdivisions” in article XI, section 1 extend to Hawaii's counties.¹⁹⁹

C. Hawaii Recognizes a Range of Public Trust-Protected Uses

Hawaii's public trust doctrine protects traditional public trust uses, such as navigation, fishing, and commerce, in addition to a wide range of others.²⁰⁰ Hawaii has also recognized more novel public trust uses, including recreation,²⁰¹ resource protection,²⁰² and native traditional

192. *Id.*

193. *See In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) (citing *Philips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476–81 (1988)).

194. HAW. CONST. art. XI, §§ 1, 7 (1978).

195. *Id.*

196. HAW. CONST. art. XI, § 1 (1978).

197. *In re Water Use Permit Applications*, 9 P.3d at 445.

198. *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1002 (Haw. 2006).

199. *Id.* at 1006.

200. *In re Water Use Permit Applications*, 9 P.3d at 449.

201. *Kuramoto v. Hamada*, 30 Haw. 841, 845 (1929); *see also Pub. Access Shoreline v. Hawaii Cty. Planning Comm'n*, 900 P.2d 1313, 1318–20 (Haw. Ct. App. 1993) (recognizing rights of access and native Hawaiian rights).

202. *In re Water Use Permit Applications*, 9 P.3d at 448.

and customary rights.²⁰³ Under this last category, the Hawaii Supreme Court has held access to Hawaii's beaches is a customary right.²⁰⁴ Similarly, Hawaii has embraced the idea of a malleable public trust, stating, "the public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."²⁰⁵

D. Hawaii Supreme Court Adopts a Public-Focused View of Public Trust Doctrine in Freshwater Permit Case, In Re Water Use Permit Applications

Surf breaks are not the only Hawaiian water resource people have fought over. Through battles over permits relating to Hawaii's freshwater resources, the Hawaii Supreme Court has colored in the edges of its public trust doctrine.²⁰⁶

The Waiahole Ditch case arose when an Oahu sugar plantation closed down in the 1990s.²⁰⁷ With the plantation's closure, the ditch water used to irrigate the plantation fields was redirected to the nearby streams from which the water had been taken, and life in the streams began to thrive.²⁰⁸ It became clear that by diverting the freshwater away from the nearby streams, the irrigation system had been negatively affecting local ecosystems.²⁰⁹ Still, when the plantation announced it was closing, thereby making its ditch water permit available, parties began fighting over the highly sought-after water.²¹⁰ The state agency in charge of issuing the permits, the Commission on Water Resources Management, received more applications than there was water

203. *Id.* at 449.

204. *City of Hawaii v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973) (noting the "long-standing public use of Hawaii's beaches . . . has ripened into a customary right") (citing *Oregon ex rel. Thorton v. Hay*, 462 P.2d 671 (Or. 1969)).

205. *In re Water Use Permit Applications*, 9 P.3d at 447.

206. *See id.* at 428; *see also* *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (Four Great Waters)*, 287 P.3d 129, 132 (Haw. 2012).

207. *In re Water Use Permit Applications*, 9 P.3d at 423.

208. *Id.* at 424 (noting the "interim restoration of windward stream flows had an immediate apparent positive effect on the stream ecology" and that the water "flushed out exotic fish species that were harming native fish species . . .").

209. *Id.*

210. *Id.* at 423–424.

2019]

MAKING WAVES

311

available,²¹¹ and held hearings to determine who would get the water.²¹² In making its decision, the Commission considered Hawaii's water laws as established in Hawaii's constitution, state water code, and the common law, with particular regard to the public trust doctrine.²¹³ The Commission's decision, which granted some permit requests but denied others, was appealed.²¹⁴

On appeal, the Hawaii Supreme Court began with an exhaustive description of Hawaii's public trust doctrine.²¹⁵ Citing article XI, sections 1 and 7 of Hawaii's constitution, the court reaffirmed there is a distinct water resources public trust that applies to all of Hawaii's water resources "without exception or distinction."²¹⁶ In support of this reading that the trust includes all of Hawaii's waters, the Hawaii Supreme Court pointed to the legislative history of the amendments under sections 1 and 7, which indicated the framers intended "water resources" to include "ground water, surface water, and all other water."²¹⁷ This includes ocean water.²¹⁸

The Waiahole court continued on to acknowledge Hawaii state officials' obligations with respect to navigable waters would not be "identical" to those at issue in the Waiahole case (which involved freshwater valued for consumption).²¹⁹ Critically, however, the court acknowledged the possible dissonance between the types of water, and went on to define the scope of the trust as it applies to both freshwater and navigable water.²²⁰

Importantly, the Waiahole court held that the state water resources trust imposes a duty on Hawaiian state officials "to promote the reasonable and beneficial use of water resources in order to maximize

211. *Id.*

212. *Id.* at 425.

213. *Id.*

214. *Id.* at 430.

215. *Id.* at 439–50.

216. *Id.* at 445.

217. *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1002 (Haw. 2006) (citing *Debates in Committee of the Whole on Conservation, Control and Development of Resources, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978*, 861 (1980) (statement by Del. Fukunaga)).

218. *Id.*

219. *In re Water Use Permit Applications*, 9 P.3d at 448.

220. *Id.*

their social and economic benefits to [Hawaiians].”²²¹ Similarly, the court stated Hawaiians possess a right “in the equitable and maximum beneficial allocation of water resources.”²²²

Thus, the Waiahole court made it clear that state officials have a duty to make sure Hawaii’s waters are used in the most equitable and beneficial way under article VI, section 1 of Hawaii’s constitution.²²³ Specifically, that section defines “conservation” as “the protection, improvement and use of natural resources according to principles that will assure *their highest economic or social benefits*.”²²⁴ The court continued, “[T]he object is . . . the most equitable, reasonable, and beneficial allocation of state water resources”²²⁵

The court acknowledged the state and its administrative agencies would often be faced with competing interests.²²⁶ For instance, here, the public’s interest in the preservation of Hawaiian ecosystems had to be balanced against the commercial interests of private parties.²²⁷ While the parties’ respective rights must be balanced, it has to “begin with a presumption in favor of public use, access, and enjoyment.”²²⁸

Similarly, in rejecting an argument that commercial use was a protected public trust purpose, the court stated, “[T]he public trust has never been understood to safeguard rights of exclusive use for private commercial gain.”²²⁹ In support of its position, the court cited both a Hawaii freshwater case and the seminal navigable waters case, *Illinois Central*.²³⁰ The court continued, “Such an interpretation, indeed, eviscerates the trust’s basic purpose of reserving the resource for use *and* access by the general public *without preference* or restriction.”²³¹

Further, under Waiahole, permit applications require both the requesting party and the approving agency make a showing that the

221. *Id.* at 451.

222. *Id.*

223. *Id.*

224. *Id.* (emphasis added).

225. *Id.* at 452.

226. *Id.* at 454.

227. *Id.* at 454–55.

228. *Id.* at 454.

229. *Id.* at 450.

230. *Id.* (citing *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)).

231. *In re Water Use Permit Applications*, 9 P.3d at 450 (emphasis added).

2019]

MAKING WAVES

313

applicant's water use is consistent with, or "justified," in light of its state water resources trust.²³² Here, the court stated, and the *Kelly* court later confirmed, that when determining whether to approve or deny water permit applications, Hawaiian administrative agencies must take an active role in protecting public rights at all stages of the application process.²³³ The court said:

[T]he Commission must not relegate itself to the role of a mere "umpire passively calling balls and strikes for adversaries appearing before it," but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision[-]making process . . . Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including using alternative sources.²³⁴

Subsequent cases expanded this approach and began requiring water permit applicants to demonstrate that the proposed use would not affect another water user's protected use.²³⁵ Relatedly, the court said the trust requires decision-making and planning from a "global, long-term perspective," and that any state agency decision has to possess a level of "openness, diligence, and foresight commensurate with the high priority these rights command under the laws of [Hawaii]."²³⁶

232. *Id.* at 454.

233. *Id.* at 455; *see also* *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1002 (Haw. 2006).

234. *In re Water Use Permit Applications*, 9 P.3d at 455 (quoting *Save Ourselves, Inc. v. La. Env'tl. Control Com.*, 452 So. 2d 1152, 1157 (La. 1984)).

235. *In re Wai'ola O Molokai, Inc.*, 83 P.3d 664, 705 (Haw. 2004) (noting applicants have "the burden of proving, *inter alia*, that the proposed water use would not abridge or deny traditional and customary native Hawaiian rights").

236. *In re Water Use Permit Applications*, 9 P.3d at 455.

IV. THE NORTH SHORE'S SURF CONTEST CALENDAR'S PREFERENTIAL
TREATMENT OF MEN-ONLY COMPETITIONS VIOLATES HAWAII'S
PUBLIC TRUST DOCTRINE

*A. Honolulu Has a Duty to Promote the Most Equitable and Beneficial
Use of the North Shore Waters Under In Re Water
Use Permit Applications*

Both Hawaii and California are required to hold their ocean waters in trust for their people “without preference” under the principles laid down in *Illinois Central*.²³⁷ The systematic exclusion of women from big-wave surfing competitions on the North Shore violates the public trust principle that the ocean is held in trust for all people, not just, as Karen Tynan put it, for “men who surf.”²³⁸

In addition to protections provided by federal law, Hawaii's public trust doctrine is one of the broadest and most protective in the country.²³⁹ While recognizing traditional public trust uses like commerce and fishing, the doctrine also recognizes the more novel public trust purposes of traditional and customary Hawaiian rights and conservation.²⁴⁰ Equally important, Hawaii is one of only a few states to elevate its public trust doctrine to the level of a “constitutional mandate.”²⁴¹ This is binding on Hawaii's counties.²⁴²

Hawaii's recent case law interpreting its obligations under the public trust doctrine has been use-focused. The Waiahole case and the string of factually similar freshwater permit cases that followed contemplated using Hawaii's freshwater for conservative²⁴³ or

237. *Id.*; see also *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

238. See Karen Tynan Interview, *supra* note 119.

239. See Reiblich & Reineman, *supra* note 170, at 63. See generally Craig, *supra* note 152.

240. See discussion *supra* Section III.C.

241. See Kacy Manahan, Comment, *The Constitutional Public Trust Doctrine*, 49 ENVTL. L. 263, 270, 293 (2019).

242. See *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1006 (Haw. 2006) (rejecting the County of Hawaii's argument that “public trust responsibilities arise out of state ownership only”).

243. See *Kauai Springs, Inc. v. Planning Comm'n of Kauai*, 324 P.3d 951, 956 (Haw. 2014).

consumptive²⁴⁴ purposes. While the Waiahole court noted the issues that would arise with freshwater would not be “identical” to those with ocean waters, they defined the scope of their very broad state water resources trust as it applied to both types of water.²⁴⁵ The court’s rationale for believing the issues that arose with respect to freshwater would be different than those with respect to ocean water was that with freshwater, “competing uses are more often mutually exclusive.”²⁴⁶ With the surf contest permits, there are “competing uses” and they *are* “mutually exclusive.”

In Waiahole, the Hawaii Supreme Court reaffirmed that it “reserve[s] [water resources] for use *and* access by the general public without preference or restriction.”²⁴⁷ Similarly, the court stated water resources had to be used in the most “equitable, reasonable, and beneficial” way.²⁴⁸ It is clear from the North Shore contest calendar that the North Shore waters are not being used in the most “equitable, reasonable, and beneficial way.”²⁴⁹ Out of the nine professional or pro-am surfing events slotted for the 2019–2021 seasons, women are currently only allowed to compete in two of them, and as described above, opportunity to compete in those contests is limited (e.g. only four women are invited or the contest has little chance of running).²⁵⁰

While recreation is a protected public trust use that has been recognized by the Hawaii Supreme Court, professional surfing is more than recreation. Commerce and fishing were among the first public trust uses protected, and professional surfing is like those: it is a job. The Hawaii Supreme Court has said, “the public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances.”²⁵¹ It is the Hawaiian courts’ job to

244. See *In re ‘Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (Four Great Waters)*, 287 P.3d 129, 132 (Haw. 2012).

245. *In re Water Use Permit Applications*, 9 P.3d 409, 447–448 (Haw. 2000).

246. *Id.* at 448.

247. *Id.* at 450 (emphasis added).

248. *Id.* at 452.

249. See generally *Contest Calendar*, *supra* note 38; *In re Water Use Permit Applications*, 9 P.3d at 452.

250. See *supra* notes 51–56 and accompanying text. See generally *Contest Calendar*, *supra* note 38.

251. *In re Water Use Permit Applications*, 9 P.3d at 447.

determine the scope of Hawaii's public trust doctrine, and they ought to recognize professional surfing as a public trust protected use.

B. Honolulu Has a Duty to Actively Promote the Public Trust Doctrine in Its Decision-making Process and Favor Public over Private Interests

The Waiahole court held that, under article VI, section I of Hawaii's constitution, the Commission on Water Resources Management could not "merely sit back and play umpire" while the would-be freshwater permit users battled it out for use of the plantation ditch water.²⁵² Instead, the court held state officials were required to take an active role in the permit application process by "considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process."²⁵³ These "public rights" require that Hawaii's state waters be used in the "most equitable . . . and beneficial" way.²⁵⁴ Thus, Honolulu cannot "merely sit back and play umpire" while the WSL and local contest organizers battle it out for contest permits. Applying the Waiahole decision to the big-wave surfing context, Honolulu officials are constitutionally required to advance public rights throughout the application process and consider the cumulative impact that giving these timeslots to the men, year after year, has on other public trust beneficiaries.²⁵⁵

Yet, it seems like the WSL is running the show. The WSL, a California corporation,²⁵⁶ controls the majority of Hawaii's North Shore contests, and almost all are men-only.²⁵⁷ The WSL is not meant to be the "beneficiary" of Hawaii's public trust resources; *Hawaiians* are.²⁵⁸ However, in the 2017–2018 season, the WSL had eleven of the

252. *Id.*

253. *Id.* at 455.

254. *Id.* at 452 (emphasis added).

255. *See id.* at 455.

256. *About*, WORLD SURF LEAGUE, <http://www.worldsurfleague.com/pages/about> (last visited Apr. 8, 2019).

257. *See Contest Calendar*, *supra* note 38.

258. *See In re Water Use Permit Applications*, 9 P.3d at 441 ("The right to water' we explained . . . was specifically and definitely reserved for the people of Hawaii for their common good . . .").

allotted days for contests at Pipeline,²⁵⁹ with only one local contest, the Backdoor Shootout, taking the remaining four.²⁶⁰ The WSL acts entitled to their historically-held contest windows, as if these contest windows are their personal property.²⁶¹ For instance, in 2018, the WSL was late in filing their permit applications.²⁶² When Honolulu said it would not give them their traditionally-held time slots as a result, the WSL threatened to pull all of its contests from Hawaii altogether.²⁶³

Moreover, the Shore Water Rules do not mention the public trust at all, except for a provision that allows city officials to call off a contest if there is risk of erosion.²⁶⁴ Since Honolulu is granting contest organizers exclusive access to the beach and ocean waters for days, and often weeks, at a time,²⁶⁵ public trust considerations should be at the forefront of the officials' minds. As the rules stand now, this does not seem to be the case.

C. "Mitigating Impacts" to the Community Should Mean Finding Ways to Increase Access: Not Planning for Trash Removal and Traffic Control

Additionally, under Hawaii's water resources public trust law, if Honolulu officials are going to grant exclusive control to a state water resource, they need to consider the surrounding circumstances and implement reasonable measures to mitigate any negative impacts.²⁶⁶ Accordingly, Honolulu must consider how the closing down of the beach and waters for each of its surf events affects the public trust rights of its citizens.²⁶⁷ However, the "mitigating impacts" section of the

259. These eleven contest days were spread out over three events. *See generally* Parker, *supra* note 106.

260. Parker, *supra* note 106.

261. *See generally* Mileka Lincoln & Ashley Nagaoka, *Dispute over Permitting May Jeopardize WSL Tour in Hawaii*, HAW. NEWS NOW (Feb. 5, 2018), <http://www.hawaiinewsnow.com/story/37428338/dispute-over-permitting-may-jeopardize-world-surf-league-tour-in-hawaii/>.

262. *Id.*

263. *Id.*

264. *See generally* Shore Water Rules *supra* note 55, at 15.

265. *See generally* Contest Calendar, *supra* note 38.

266. *See generally* Robinson v. Ariyoshi, 658 P.2d 287 (Haw. 1982).

267. *Cf.* Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 998 (Haw. 2006).

Shore Water Rules focuses on traffic management, noise control, and apparently, contributions to the community, like lifeguard towers.²⁶⁸

Conversely, the California Coastal Commission's report about Titans of Mavericks formulated a different definition of "mitigating impacts."²⁶⁹ The Coastal Commission found it reasonable to require contest organizers to include women in the competition to offset the impacts of shutting down the beach and waters to the public for a day.²⁷⁰ Honolulu's permitting rules will not allow big-wave contest holding periods to overlap.²⁷¹ The Queen of the Bay, however, is looking for about twenty-foot waves while the big-wave contest in the timeslot following it, the Eddie, needs forty-foot waves (Hawaiian style).²⁷² Technically, therefore, Honolulu could allow the Queen of the Bay to run its contest during the Eddie's three-month-long holding period when the waves do not reach heights of forty feet.²⁷³ However, Honolulu has thus far failed to consider this option.

D. Both the California Regulatory Agencies and Honolulu Have Authority Under the Public Trust Doctrine and Are Expected to Use it to Maximize Access to Their Ocean Waters

The argument made by the California State Lands Commission is a simple but persuasive one: California's ocean lands are held in trust for *all* people—not just men who surf.²⁷⁴ This is arguably even more true in Hawaii, which has "elevated [its] public trust doctrine to the level of a constitutional mandate."²⁷⁵ One purpose of Honolulu's Shore Water Rules is "to ensure maximum permissible use of park areas and facilities by appropriate distribution of users"²⁷⁶ In this way, the purported goal of Honolulu's Parks and Recreation Department is

268. Shore Water Rules, *supra* note 55, at 22–23; *see also* Betty Depolito Interview, *supra* note 61.

269. *See* 2016 CALIFORNIA COASTAL COMMISSION PERMIT, *supra* note 29, at 16.

270. *Id.*

271. Shore Water Rules, *supra* note 55, at 19.

272. Keala Kennelly Interview, *supra* note 24.

273. *See* Shore Water Rules, *supra* note 55, at 4–5.

274. *See* STATE LANDS COMMISSION REPORT, *supra* note 163, at 4.

275. *See* In re Water Use Permit Applications, 9 P.3d 409, 443 (Haw. 2000).

276. Shore Water Rules, *supra* note 55, at 4.

similar to that described by the California Coastal Commission when they added the women's heat at Mavericks: maximizing access to California's shores.²⁷⁷ This described purpose of the Shore Water Rules is also consistent with federal law, which requires that access to Hawaii's navigable waters be provided "without preference or restriction."²⁷⁸ Like the Coastal Act requires the California Coastal Commission to maximize coastal access,²⁷⁹ this policy of the Shore Water Rules is not just a goal—it is a requirement.

CONCLUSION

Surfing is a notoriously male-dominated sport with a lot of problems, but when you ask why—what made it that way—and relatedly, what made it so difficult for women to become professional surfers, the answer is complicated.²⁸⁰ What is clear is that most professional surfers earn a living through a combination of sponsorships and prize money from contests.²⁸¹ What is also clear is that for women, talent is often not the most important factor in terms of getting a sponsorship.²⁸² For example, a friend of big-wave surfer Bianca Valenti was told she had to lose 20 pounds or she would lose her sponsorship.²⁸³ Unfortunately, this is not surprising in the surfing industry. From *Gidget*²⁸⁴ to Roxy,²⁸⁵ women's surfing has been

277. 2016 CALIFORNIA COASTAL COMMISSION PERMIT, *supra* note 29, at 13.

278. *In re Water Use Permit Applications*, 9 P.3d at 450.

279. CAL. COASTAL ACT OF 1976 § 30210 (Deering 2019).

280. See generally Cori Schumacher, *My Mother is a Fish: From Stealth Feminism to Surfeminism*, in THE CRITICAL SURF STUDIES READER 284–97 (Dexter Zavalza Hough-Snee & Alexander Sotelo Eastman eds., 2017) (providing a historical overview of inequality, hypersexuality, and the emergence of "surfeminism" within the surfing industry).

281. Kelly O'Mara, *Bianca Valenti Leads the Fight for Equality in Surfing*, ESPNW (Nov. 9, 2018), <http://www.espn.com/espnw/lifestyle/article/25217669/bianca-valenti-leads-fight-equality-surfing>.

282. *Bianca Valenti Is on a Big-Wave Mission*, OUTSIDE ONLINE (Feb. 5, 2019), <https://www.outsideonline.com/2389081/bianca-valentis-big-wave-mission>.

283. *Id.*

284. See *supra* text accompanying note 8.

285. See Cori Schumacher, *My Mother is a Fish: From Stealth Feminism to Surfeminism*, in THE CRITICAL SURF STUDIES READER, *supra* note 280, at 299 n.18 ("From the late 1990s to the early 2000s, the 'slim' ideal drove so many Roxy-

typecast and sexualized in the media.²⁸⁶ Adding insult to injury, historically, sponsorships for female surfers have been fewer, the prize money substantially less, and the opportunities to compete minimal.²⁸⁷ These limitations require women to “surf more like men to gain respect and equal prize money, and to enjoy access in the lineup, yet disparages and excludes those deemed ‘too manly.’”²⁸⁸ Since the Mavericks decision, the State of California enacted Assembly Bill No. 467, which requires equal pay for male and female athletes in all recreational events held on public California land.²⁸⁹ While this is a great step forward, Hawaii is arguably the heart of the big-wave surfing world.²⁹⁰ Without increased access to the North Shore’s competitions and a change to the Shore Water Rules that locks in these water event permits for three years at a time,²⁹¹ professional female surfers—and big-wave surfers especially—will be detrimentally affected.

Hawaii holds the ocean waters off Oahu’s coast in trust for *all* people, not just professional male surfers. Hawaii’s case law and public trust constitutional provisions make it clear that Honolulu officials have an affirmative duty to protect public rights to trust resources; ensure the most equitable and reasonable use of waters; issue decisions that indicate how and why they came to their decision; and mitigate the negative effects of restricted use.

Not only is Honolulu failing to make sure the ocean waters are used in the most equitable way, it does not seem to be thinking about the public trust doctrine at all. To make the contest calendar equitable,

sponsored surfers to eating disorders that the neologism ‘Roxy-rexia’ was frequently used to describe the extreme weight loss exhibited by Roxy-sponsored riders.”). *But see* AnnaMarie Houlis, *These Activewear and Gear Brands Are Helping Women Stem the Tides in Male-Dominated Sports*, DAILY BEAST (Oct. 17, 2019) <https://www.thedailybeast.com/these-brands-are-working-to-close-the-gender-pay-gap-in-sports-for-female-athletes> (“In 2018, Roxy launched the global campaign, ‘Make waves, Move Mountains.’ The campaign ‘celebrates the empowerment of women in action sports and beyond . . . [and] helps promote a message of strength and support to young women of any age, sport, or dream.’” (alteration in original)).

286. Cori Schumacher, *My Mother is a Fish: From Stealth Feminism to Surfeminism*, in THE CRITICAL SURF STUDIES READER, *supra* note 280, at 286.

287. *Id.*

288. *Id.* at 289.

289. *Cf. Contest Calendar*, *supra* note 38.

290. *Cf. Contest Calendar*, *supra* note 38.

291. *See Shore Water Rules* *supra* note 55, at 11.

2019]

MAKING WAVES

321

Honolulu should require the addition of women's heats in all of the men-only events, or in the alternative, create companion contests for women.²⁹² Honolulu should also decrease the Queen of the Bay's wave height requirement to thirty feet.²⁹³ Lastly, Honolulu should create new Shore Water Rules that reflect the public trust principles laid down in Waiahole and its progeny cases. Honolulu is a trustee: it's holding the ocean in trust for the public and has a duty to make sure those waters are used in the most equitable way. Honolulu is currently neglecting that duty.

*Natalie Holtz**

292. *See About*, COMM. FOR EQUITY IN WOMEN'S SURFING, <http://surfequity.org/about-cews> (last visited Sept. 15, 2019).

293. *See id.*

* J.D. Candidate, California Western School of Law, 2020; Executive Editor, California Western Law Review, 2019–2020; B.A., University of Colorado at Boulder, 2010. I would like to thank Katie Norton and her editing team for their tireless efforts throughout the publication process. I would also like to thank Professor Roberta Thyfault for her invaluable feedback and encouragement. Additionally, I would like to thank all of the inspiring people I interviewed during the course of this paper including Sabrina Brennan, Keala Kennelly, Karen Tynan, and Betty Depolito. Thank you for fielding all of my questions and providing me with invaluable insights about the surfing industry. Lastly, I would like to thank my family, friends, and boyfriend, Chase Fite, for their support throughout this process.