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

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

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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.”

Buzzy Trent, 1963 article in Surf Guide magazine

Modern big-wave surfing traces its roots to a surf break called Makaha, Hawaiian for “fierce.” Buzzy Trent and a handful of other surfers began riding this legendary wave off Oahu’s west coast in the 1940s. 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. These newcomers were addicted to surfing big waves, but Makaha did not break often. In their pursuit of more big

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

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\(^7\) 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.”).


\(^12\) Id.


\(^16\) 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.\textsuperscript{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.\textsuperscript{18} Keala Kennelly, “the best female big-wave surfer on earth,”\textsuperscript{19} won. She surfed sixty-foot wave faces—a height equal to about one-fifth the height of the Statue of Liberty\textsuperscript{20}—in conditions that blew a male competitor’s eardrums and made him throw up underwater.\textsuperscript{21} She took home $0 in prize money.\textsuperscript{22}

Kennelly, a native Hawaiian,\textsuperscript{23} still works four to five days a week.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{26}

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\textsuperscript{17} Cross, supra note 10.

\textsuperscript{18} Id.


\textsuperscript{22} Cross, supra note 10.


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

\textsuperscript{25} Id.

\textsuperscript{26} Id.
In the past several years, women’s big-wave surfing has taken strides towards equality.\footnote{See generally Duane, supra note 19.} 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.\footnote{Id.} 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.\footnote{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].} During the writing of this paper, the contest organizer, the World Surf League (“WSL”), cancelled the scheduled 2020 contest citing “logistical challenges.”\footnote{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/.} 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.\footnote{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/.}

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.\footnote{See discussion infra Section II.} 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.\footnote{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. This contest, the Queen of the Bay, is a big-wave contest, but it has never run. 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. 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.

This article submits the City and County of Honolulu’s permitting process violates Hawai’i’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 Hawai’i’s public trust doctrine and Hawai’i’s


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.


37. See supra note 36 and accompanying text.

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. A break will be reserved for weeks or even months in what is known as a “holding” or “waiting period.” However, the contest will not go forward if conditions are not right. 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. Meanwhile, the WSL’s Big Wave Tour requires waves to be at least consistently twenty-five feet on their face. To further complicate matters, there are different ways of calculating wave height. 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.  

40. See Contest Calendar, supra note 38.
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. The annual Eddie Aikau contest (“the Eddie”), for instance, had its inaugural event in 1984 but has only run nine times.

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, the Eddie, and the Queen of the Bay. 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. Additionally, a handful of women have been invited to compete in the Eddie. 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.
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.
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 Aliʻi Beach Park, November 13–24 (men only);58

54. Id.
56. See Contest Calendar, supra note 38.
• Vans World Cup, Sunset Beach Park, November 25–December 6 (men only);\textsuperscript{59}
• The Eddie, Waimea Beach Park, December 1–February 29 (invitation-only, only four women invited);\textsuperscript{60}
• Da Hui Backdoor Shootout, ‘Ehukai Beach Park, January 4–16 (invitation-only, men only);\textsuperscript{61}
• Sunset Open, Sunset Beach Park, January 18–28 (men only);\textsuperscript{62}
• Volcom Pipe Pro, ‘Ehukai Beach Park, January 29–February 10 (men only);\textsuperscript{63} and
• Billabong Pipe Masters, ‘Ehukai Beach Park, December 8–20 (men only).\textsuperscript{64}


\textsuperscript{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.

\textsuperscript{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].


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. The other event is the Queen of the Bay, which as described above, has yet to actually run. 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.

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. 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. 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.”

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. The definition of “big wave” as

65. See supra note 64 and accompanying text.
66. See discussion supra Introduction.
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. 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. 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.

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. Additionally, recent changes to the Shore Water Rules completely eliminate an organizer’s ability to appeal Honolulu’s decision on the permit application. 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.”

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

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

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];

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];

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].

79. Id.
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.
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-e73d02f4f3c6/?utm_term=.bf2fdae34dfe.
87. Id.
88. See also Moaniike’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.”).
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.
93. Id.
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’s-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.
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, Honolulu officials seem to have drafted at least some of the Shore Water Rules with the public in mind. For instance, the ten-day cooling off period after each holding period allows free surfers time in the water. Additionally, Honolulu’s Shore Water Rules are not explicitly discriminatory. However, if Honolulu is giving preferential treatment to the big-money men’s events as the calendar suggests, 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. “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.” 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


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.”\textsuperscript{113} Surfer Peter Mel further described the scene: “You got sharks, you got rocks, you got cold water.”\textsuperscript{114} Evan Slater said Mavericks is filled with “oversized boulders from the Land of the Lost.”\textsuperscript{115}

Quiksilver’s “\textit{Men Who Ride Mountains}” big-wave contest debuted at Mavericks in 1999 and contests have sporadically been held there since.\textsuperscript{116} Until 2016, however, women were never invited.\textsuperscript{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”).\textsuperscript{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.\textsuperscript{119} Tynan agreed to help and started considering the group’s legal options.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{122}

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

\textsuperscript{113} Id. (interview with Darrick Doerner, Waimea Bay surfer, at 45:42).
\textsuperscript{114} Id. (interview with Peter Mel, Mavericks surfer, at 45:56).
\textsuperscript{115} Id. (interview with Evan Slater, Mavericks surfer, at 46:07).
\textsuperscript{118} \textit{About, COMM. FOR EQUITY IN WOMEN’S SURFING}, http://surfequity.org/about-cews (last visited Mar. 31, 2019).
\textsuperscript{119} Telephone Interview with Karen Tynan (Feb. 13, 2019) [hereinafter Karen Tynan Interview].
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
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. 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”).

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. 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. The contest organizers for Titans of Mavericks were required to obtain a CDP from the California Coastal Commission, 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 Coastal Commission’s Local Coastal Program.

124. Id.
125. Id.
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. Since the Mavericks contest was located seaward of the first public road, it fell under this provision.

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. 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 added—the Coastal Commission paid special attention to section 30210. This section provides “maximum access . . . and recreational opportunities shall be provided for all the people.” 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.”

In its report, the California Coastal Commission emphasized that the Coastal Act required them to maximize public access: not merely provide or protect it. 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. 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. 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.
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).
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. 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.”

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. The Romans believed that certain interests, like fishing and navigation, should be preserved for the general public. 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.

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. For instance, the general rule is “that the seashore between high and low tide may not be routinely granted to private owners.” Rather, title to the land and navigable waters from the high tide mark seaward belongs to the states. When each state was admitted to the U.S., they agreed to take this property in trusteeship for the public. 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{150} For instance, the public trust doctrine has become a tool for preserving environmental resources and public recreational uses.\textsuperscript{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.\textsuperscript{152} As a result, public trust law is “very much a species of state common law.”\textsuperscript{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.\textsuperscript{154} In early 2017, Cartel filed for bankruptcy,\textsuperscript{155} and the WSL purchased Cartel’s permit and

\textsuperscript{148} Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (emphasis added).
\textsuperscript{149} Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 480 (1988).
\textsuperscript{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.”).
\textsuperscript{151} Id.
\textsuperscript{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.”).
\textsuperscript{153} Id.
\textsuperscript{154} Duane, supra note 19.
\textsuperscript{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.surfline.com/surf-
took over the contest. Soon after, CEWS approached the WSL to request the same prize money as the amount offered to the men. The WSL said this was “out of the question.” Sabrina Brennan from CEWS then contacted a local reporter. The reporter published an article about the battle between the CEWS and the WSL, which caught the attention of a State Lands Commissioner. 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. 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.

The WSL’s proposed lease was for approximately one thousand acres of sovereign submerged land managed by the State Lands Commission. The State Lands Commission had broad discretion to issue leases for these public trust lands, so the State Lands Commission essentially told the WSL that they needed to give the women equal pay in order to obtain the lease. 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.”

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156. Duane, supra note 19.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id.
162. Id.
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.”).
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.
Initially, all of Hawaii’s land and waters belonged to the King.\textsuperscript{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.\textsuperscript{175} Under this system, there was no private ownership of water.\textsuperscript{176} Rather, privileges to water were earned through participating in the construction of irrigation systems.\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{179} These divisions of land were known as “ahupuaas.”\textsuperscript{180} Water running through a particular ahupuaa was considered to belong to the owner of that land.\textsuperscript{181}

For a time, court decisions upheld this private ownership of Hawaii’s freshwater resources.\textsuperscript{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.\textsuperscript{183} In this case, \textit{McBryde Sugar Co. v. Robinson}, the Hawaii Supreme Court

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\textsuperscript{175} Id.; see also \textit{Kingdom of Hawai’i Constitution of 1840}, HAWAIINATION.ORG, http://www.hawaii-nation.org/constitution-1840.html (last visited Nov. 27, 2019).
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\textsuperscript{176} Kyle, \textit{supra} note 174, at 24.
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\textsuperscript{177} Id.
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\textsuperscript{180} Kyle, \textit{supra} note 174, at 24–25.
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\textsuperscript{181} Id. at 25; see also \textit{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/.
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\textsuperscript{182} Kyle, \textit{supra} note 174, at 25.
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\textsuperscript{183} Id.; see also McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1339 (Haw. 1973).
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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.”  

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.” 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.

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. 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. 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. When Hawaii recovered these lands, it agreed to hold them in public trust pursuant to section 5(b) of the Admission Act.

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

The Waiahole Ditch case arose when an Oahu sugar plantation closed down in the 1990s. 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. It became clear that by diverting the freshwater away from the nearby streams, the irrigation system had been negatively affecting local ecosystems. Still, when the plantation announced it was closing, thereby making its ditch water permit available, parties began fighting over the highly sought-after water. 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.
available, and held hearings to determine who would get the water. 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. The Commission’s decision, which granted some permit requests but denied others, was appealed.

On appeal, the Hawaii Supreme Court began with an exhaustive description of Hawaii’s public trust doctrine. 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.” 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.” This includes ocean water.

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). 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.

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.
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).
applicant’s water use is consistent with, or “justified,” in light of its state water resources trust. 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. 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.

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. 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].”

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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. Envtl. 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.
III. 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*. 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.”

In addition to protections provided by federal law, Hawaii’s public trust doctrine is one of the broadest and most protective in the country. 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. Equally important, Hawaii is one of only a few states to elevate its public trust doctrine to the level of a “constitutional mandate.” This is binding on Hawaii’s counties.

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 conservative or

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237. *Id.; see also* *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).
240. *See* discussion *supra* Section III.C.
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”).
consumptive\textsuperscript{244} 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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{247} Similarly, the court stated water resources had to be used in the most “equitable, reasonable, and beneficial” way.\textsuperscript{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.”\textsuperscript{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).\textsuperscript{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.”\textsuperscript{251} It is the Hawaiian courts’ job to

\footnotesize{\textsuperscript{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).

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

\textsuperscript{246} Id. at 448.

\textsuperscript{247} Id. at 450 (emphasis added).

\textsuperscript{248} Id. at 452.

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

\textsuperscript{250} See supra notes 51–56 and accompanying text. See generally Contest Calendar, supra note 38.

\textsuperscript{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 1 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. 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.” These “public rights” require that Hawaii’s state waters be used in the “most equitable . . . and beneficial” way. 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.

Yet, it seems like the WSL is running the show. The WSL, a California corporation, controls the majority of Hawaii’s North Shore contests, and almost all are men-only. The WSL is not meant to be the “beneficiary” of Hawaii’s public trust resources; Hawaiians are. 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.
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 . . .”.

https://scholarlycommons.law.cwsl.edu/cwlr/vol56/iss1/18
alotted days for contests at Pipeline,\textsuperscript{259} with only one local contest, the Backdoor Shootout, taking the remaining four.\textsuperscript{260} The WSL acts entitled to their historically-held contest windows, as if these contest windows are their personal property.\textsuperscript{261} For instance, in 2018, the WSL was late in filing their permit applications.\textsuperscript{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.\textsuperscript{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.\textsuperscript{264} Since Honolulu is granting contest organizers exclusive access to the beach and ocean waters for days, and often weeks, at a time,\textsuperscript{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.

\textbf{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.\textsuperscript{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.\textsuperscript{267} However, the “mitigating impacts” section of the

\begin{thebibliography}{99}
  \bibitem{259} These eleven contest days were spread out over three events. \textit{See generally} Parker, \textit{supra} note 106.
  \bibitem{260} Parker, \textit{supra} note 106.
  \bibitem{262} \textit{Id.}
  \bibitem{263} \textit{Id.}
  \bibitem{264} \textit{See generally} Shore Water Rules \textit{supra} note 55, at 15.
  \bibitem{265} \textit{See generally} Contest Calendar, \textit{supra} note 38.
  \bibitem{266} \textit{See generally} Robinson v. Ariyoshi, 658 P.2d 287 (Haw. 1982).
  \bibitem{267} \textit{Cf.} Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 998 (Haw. 2006).
\end{thebibliography}
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.


274. See STATE LANDS COMMISSION REPORT, supra note 163, 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. 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.” Like the Coastal Act requires the California Coastal Commission to maximize coastal access, 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. What is clear is that most professional surfers earn a living through a combination of sponsorships and prize money from contests. What is also clear is that for women, talent is often not the most important factor in terms of getting a sponsorship. For example, a friend of big-wave surfer Bianca Valenti was told she had to lose 20 pounds or she would lose her sponsorship. Unfortunately, this is not surprising in the surfing industry. From Gidget to Roxy, women’s surfing has been

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).
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.\textsuperscript{286} Adding insult to injury, historically, sponsorships for female surfers have been fewer, the prize money substantially less, and the opportunities to compete minimal.\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{289} While this is a great step forward, Hawaii is arguably the heart of the big-wave surfing world.\textsuperscript{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,\textsuperscript{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.”). \textit{But see} AnnaMarie Houlis, \textit{These Activewear and Gear Brands Are Helping Women Stem the Tides in Male-Dominated Sports}, \textit{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)).

\textsuperscript{286} Cori Schumacher, \textit{My Mother is a Fish: From Stealth Feminism to Surfebignism}, in \textit{THE CRITICAL SURF STUDIES READER}, \textit{supra} note 280, at 286.

\textsuperscript{287} \textit{Id}.

\textsuperscript{288} \textit{Id.} at 289.

\textsuperscript{289} \textit{Cf. Contest Calendar, supra} note 38.

\textsuperscript{290} \textit{Cf. Contest Calendar, supra} note 38.

\textsuperscript{291} \textit{See Shore Water Rules supra} note 55, at 11.
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.

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293. See id.

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