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Emily A. Gardner

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# A VICTIM OF ITS OWN SUCCESS: CAN USER FEES BE USED TO SAVE HANAUMA BAY?

*Emily A. Gardner\**

## I. INTRODUCTION

Located on the southeastern tip of Oahu, Hawaii, Hanauma Bay is a geological remnant of a volcanic eruption that took place more than 32,000 years ago.<sup>1</sup> Historically, the Bay was a sacred site in Hawaiian culture<sup>2</sup> and had relatively few visitors. Today, with its myriad of colorful marine life and striking underwater views, Hanauma Bay is one of the most popular sightseeing attractions in Hawaii.<sup>3</sup>

The beach area surrounding Hanauma Bay is part of the larger Koko Head Regional Park and is managed by the City and County of Honolulu.<sup>4</sup> The Bay itself, however, is under the management jurisdiction of the state.<sup>5</sup>

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\* Marine Protected Species Coordinator, Hawaii Department of Land and Natural Resources and University of Hawaii; M.S., Zoology, University of Hawaii (1989); J.D., University of Hawaii (1996).

1. HAROLD T. STEARNS, GEOLOGY OF THE STATE OF HAWAII, 89 (1966). *See also* Mike Markrich, *The Battle of the Bay*, HONOLULU MAG., Nov. 1990, at 86. Later seismic activity, approximately 6,000 years ago, blasted through an existing coral reef and formed the mouth of Hanauma Bay as it exists today. *Id.*

2. Markrich, *supra* note 1. Hanauma Bay served as an important launching site for Native Hawaiian canoe paddlers traveling to the outer islands. It was also used by Native Hawaiians for fishing. *Id.*

3. PLANNING DEPARTMENT, CITY AND COUNTY OF HONOLULU, FIRST BIENNIAL REP.: ON THE CONDITION OF THE CITY AND GENERAL PLAN AND DEVELOPMENT PLANS 91, tbl. 11-A (June 1995) [hereinafter FIRST BIENNIAL REP.]. *See also*, Peter Wagner, *Hanauma Bay: Visitors Threaten the Bay's Fragile Treasure*, HONOLULU STAR-BULL., July 30, 1993, at A1. "[L]ittle Hanauma Bay drew more visitors last year than all 14 of Alaska's national parks combined." *Id.*

4. Athline M. Clark & Craig D. MacDonald, *Hawaii's Experience in Managing the Expanding Use of Scenic Coastal Resources*, 1 PROC. OF THE 1990 CONGRESS ON COASTAL AND MARINE TOURISM, May 1990, at 149-50.

5. *Id.* at 150.

All shore-based access to the Bay is through the city-operated beach park.<sup>6</sup> Designated as Hawaii's first Marine Life Conservation District (MLCD) in 1967,<sup>7</sup> and as an Underwater State Park in 1970,<sup>8</sup> Hanauma Bay is recognized internationally as a unique underwater sanctuary.<sup>9</sup> Recently renamed Hanauma Bay Nature Park,<sup>10</sup> the site is second only to Waikiki Beach as Hawaii's top beach destination.<sup>11</sup> The Bay's tremendous popularity is due largely to its accessibility. Hanauma Bay is within nine miles of the Waikiki resort area, where most visitors to the island stay. In addition, because the Bay's waters are calmed and protected by fringing reefs offshore, it is an excellent location for viewing Hawaii's nearshore reef communities by snorkeling or scuba diving. In 1975, an estimated half-million people, both residents and tourists, visited the Bay.<sup>12</sup> By 1985, park attendance had more than tripled to 1.6 million visitors.<sup>13</sup> By 1990, annual attendance had almost doubled from that of 1985, reaching 2.8 million, or approximately 8,000 persons each day.<sup>14</sup> These figures far exceed the "recommended optimal use level" for Hanauma Bay, which in 1977 had been set at 1,363 persons per day.<sup>15</sup>

The surge in the Bay's popularity has not come without a price. The last three decades of intense recreational use have greatly accelerated environmental events in Hanauma Bay. The recent damage to the Bay is perhaps best summarized in the words of Lisa King, former coordinator of the Hanauma Bay Education Program:

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6. *Id.*

7. ALLEN TOM & ANNE ORCUTT, UNIVERSITY OF HAWAII SEA GRANT COLLEGE PROGRAM, HANAUMA BAY, (Sea Grant Advisory Brochure, UNIHI-SEAGRANT-AB-90-02, June 1990) at 1.

8. ELIZABETH REYNOLDS, HANAUMA BAY BASELINE USERS SURVEY (Univ. of Haw. Sea Grant Extension Serv., Pub. No. UNIHI-SEAGRANT-CP-91-01, Apr. 1991) at 5, tbl. 1.

9. *Id.* at 1.

10. Peter Wagner, *Hanauma Bay: Visitors Threaten the Bay's Fragile Treasure*, HONOLULU STAR-BULL., July 30, 1993, at A1. In 1992, the park underwent a name change from Hanauma Bay Beach Park to Hanauma Bay Nature Preserve to remind visitors that the area is a marine reserve and not a "playground." *Id.*

11. FIRST BIENNIAL REPORT, *supra* note 3, at 91, tbl. 11-A.

12. James Mak & James E.T. Moncur, *Sustainable Tourism Development: Managing Hawaii's 'Unique' Touristic Resource—Hanauma Bay*, J. TRAVEL RES., Spring 1995, at 51.

13. *Id.*

14. *Id.*

15. Wilson, Okamoto & Assoc., *Hanauma Bay Beach Park Site Development Plan* (City and County of Honolulu, 1977). The "recommended optimal use level" was derived using the Bureau of Outdoor Recreation and the U.S. Corps of Engineering Beach Capacity Standards. *Id.*

The nearshore water became murky from people kicking up and resuspending sediment. Washed-off sunscreen created a noticeably oily film by the end of each day. Litter overflowed onto the beach and into the water. Park toilets overflowed regularly because the septic system was not designed for so much use. Visitors urinated in the water, increasing dissolved nutrients which damaged the reef ecosystem and frequently elevated bacteria levels. Reef fish were fed all sorts of human foods including bread, corn, peas, potato chips and Cheeze Whiz.

But worst of all, thousands of tourists were trampling on the living coral daily with their feet, flippers and booties. They were touching, bumping and holding onto the coral. Tourists accidentally or ignorantly broke off coral fragments. The coral could not withstand the constant abuse. As a result, over 90% of the nearshore reef has been killed.<sup>16</sup>

The overuse of Hanauma Bay threatened not only the natural environment, but also the quality of the visitor experience. During the late 1980s it became evident that an effective management plan was needed to preserve the Bay and prevent further human-induced degradation. In 1990, the Honolulu Department of Parks and Recreation implemented an eight-point general plan that included measures designed to restrict vehicular access to the Bay, improve the facilities and infrastructure, and educate visitors.<sup>17</sup> Although the number of visitors to Hanauma Bay has been reduced significantly since the plan's implementation, the Park's managers felt the need to further limit access to the Bay in order to preserve the fragile ecosystem.<sup>18</sup> Park officials recently called for measures to limit the number of visitors who use the park at any one time to approximately 2,000, down from the estimated 4,000 who currently use the park at a given time.<sup>19</sup> They claim 2,000 to be the maximum number of visitors the park can support without damaging the environment. In response, the Honolulu City Council passed a bill on May 24, 1995 instituting a \$5 admission fee for non-Hawaii residents over the age of thirteen and a \$5 to \$35 dollar

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16. LISA KING, *THE RECENT HISTORY OF HANAUMA BAY* (Hanauma Bay Educ. Program, Univ. of Haw. Sea Grant Extension Serv., 1993) at 1.

17. DORIAN TRAVERS, *HANAUMA BAY TASK FORCE FINAL REPORT* (Univ. of Haw. Sea Grant Extension Serv., Dec. 1993) at 8.

18. *Id.*

19. Darren Pai, *Hanauma Fee vs. Hanauma Free*, *HONOLULU ADVERTISER*, May 13, 1995, at A2.

admission fee for tour busses making brief sightseeing stops.<sup>20</sup> The city began collecting fees under the new ordinance<sup>21</sup> on July 1, 1995. The projected annual income from the collection of fees was more than \$4 million.<sup>22</sup> Because the current annual operating cost for Hanauma Bay Nature Park approximates only \$1 million,<sup>23</sup> and the fees were expected to generate four times that amount, concerns were raised that the fees may be deemed an illegal tax.<sup>24</sup> As a result, on January 8, 1996, the City Council elected to repeal all admission fees at Hanauma Bay until a new fee schedule could be devised.<sup>25</sup> As an interim measure, all visitors were asked to pay a \$5 "suggested donation" prior to gaining entry to the beach portion of the park.<sup>26</sup>

In January of 1996 the Honolulu City Council unveiled its new fee schedule for Hanauma Bay in the form of Bill 1,<sup>27</sup> which was formally adopted on April 10, 1996.<sup>28</sup> Under the newly adopted fee schedule, all vehicles entering the parking lot on the park's upper level will be assessed a \$1 parking fee. Non-Hawaii residents over the age of thirteen will be charged \$3 to enter the beach portion of the park, while native Hawaiians who claim to be visiting the park for cultural or religious purposes, will be exempt from paying parking and beach entry fees. Both the parking fees and non-resident admission fees will be deposited into a special fund

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20. City and County of Honolulu, Bill No. 32, CD2, Bill for an Ordinance to Amend Chapter 10, Revised Ordinances of Honolulu 1990, as amended, relating to fees and charges for the use of Parks and Recreational Facilities, (May 31, 1995), *codified at* HONOLULU, HAW., REV. ORDINANCE, ch. 10, art. 2 (1995).

21. See HONOLULU, HAW., REV. ORDINANCE § 10-2.11 (1995).

22. Jon Yoshishige, *Hanauma Bill: Residents in Free*, HONOLULU ADVERTISER, Sept. 28, 1995, at A1.

23. *Id.*

24. Memorandum from Darolyn Hatsuko Lendio, City and County of Honolulu Corporation Counsel, to the Honorable Duke Bainum, Chair, Honolulu City Council Budget and Finance Committee, regarding Hanauma Bay Fees (May 16, 1995) (on file with the *Ocean and Coastal Law Journal*). See also Memorandum from Sonia Faust, Deputy Attorney General for the State of Hawaii to the Honorable Duke Bainum, Chair, Honolulu City Council Budget and Finance Committee, regarding Fees for Admission to Hanauma Bay Nature Park, (June 22, 1995) (on file with the *Ocean and Coastal Law Journal*).

25. Jon Yoshishige, *New Hanauma Fee Structure to be Offered: Council's Veto Override Ends Charges at Bay*, HONOLULU ADVERTISER, Jan. 9, 1996, at A1. Honolulu Mayor Jeremy Harris attempted to veto the bill repealing all fees at Hanauma Bay, claiming that the city needed the money. *Id.*

26. Greg Barrett, *Hanauma Bay Still Taps Visitors*, HONOLULU ADVERTISER, Jan. 14, 1996, at A1.

27. City and County of Honolulu, Bill No. 1, CD1, Bill for an Ordinance Relating to Fees for Hanauma Bay (Jan. 9, 1996).

28. City Council of the City and County of Honolulu, Journal, Twenty-Fourth Session, at 11 (Apr. 10, 1996).

created for the maintenance and improvement of the park.<sup>29</sup> The new fee schedule also provides that excess funds may be put toward the operation and maintenance of other facilities within the Koko Head Regional Park.<sup>30</sup>

The collection of admission fees as a way to discourage visitors has raised quite a bit of controversy, not only because the amounts initially collected greatly exceeded those needed to maintain the park, but also because thus far, the collection of fees has not served its intended purpose of reducing the number of visitors to the park. Results of a recent survey indicate that it would take fees between \$30 and \$40 to discourage people from visiting the Bay.<sup>31</sup> What is perhaps most controversial, however, is the discriminatory nature of the fees—the fact that only non-residents will be required to pay a fee to enter the beach portion of the park, while Hawaii residents will be exempt from paying to enter the beach, and native Hawaiians will be exempt from all fees if visiting the park for cultural purposes.

This Comment examines the legality of the management strategy most recently proposed for Hanauma Bay Nature Park. Part II of the Comment chronicles the management history of the park up through the adoption of the new fee schedule. Part III evaluates the constitutionality of the discriminatory admission fee under the Privileges and Immunities Clause and the Fourteenth Amendment of the U.S. Constitution. Part IV considers the legality of a non-resident admission fee under Hawaii's Public Trust Doctrine and coastal access laws. Part V provides analysis regarding whether the collection of parking and non-resident admission fees could be deemed a tax under Hawaii law. Lastly, Part VI concludes that while the use of a discriminatory fee structure may survive challenges under both the U.S. Constitution and Hawaii's Public Trust Doctrine, alternative management strategies may prove easier to administer and less susceptible to litigation.

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29. City and County of Honolulu, Bill No. 1, CD 1, Bill for an Ordinance Relating to Fees for Hanauma Bay, §§ 6.1, 6.2, 10.2 (Jan. 9, 1996).

30. *Id.* at § 3. These facilities include: Koko Head district park, Maunalua Bay beach park, Koko Head rifle range, and the Koko Crater botanical garden.

31. Jon Yoshishige, *Hanauma Bay Fee Real Moneymaker; Visitors Not Put off*, HONOLULU ADVERTISER, Sept. 28, 1995, at A2.

## II. MANAGEMENT HISTORY OF HANAUMA BAY

Under the Hawaiian land tenure system, Hanauma Bay was originally located in the *ahupua'a* of Waimanalo, in the *ili* of Maunaloa.<sup>32</sup> On December 18, 1924, the owners of the Waimanalo *ahupua'a*, the Bernice Pauahi Bishop Estate, leased certain parcels of land in Maunaloa, including Koko Head Regional Park and Hanauma Bay, to the City and County of Honolulu, Territory of Hawaii for a three-year period.<sup>33</sup> On December 29, 1928, after the City and County had complied with all terms specified in the lease and a subsequent agreement, the lands were deeded to them for \$1 with the condition that they be used exclusively as a public park.<sup>34</sup> During the 1930s a new road was built connecting what is now Hawaii Kai with Makapu'u, on Oahu's eastern most shores.<sup>35</sup> The new road made Hanauma Bay accessible to people from Honolulu. The Bay soon became a popular site for camping, picnicking, swimming and fishing.

During the 1950s, several improvements were made to the beach park. These included dredging three large swimming holes in the coral, constructing a road from the cliff overlooking the Bay down to the beach, building a 20,000 gallon water tank, and improving the parking facilities.<sup>36</sup> In addition, the public bus system began servicing the Bay on weekends and holidays.<sup>37</sup> As early as 1952, Hanauma Bay was declared the most popular of Oahu's public parks.<sup>38</sup>

The ten-acre park consists of two levels. The upper level includes a parking lot, a scenic overlook, and a grassy area for picnics. The lower

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32. In ancient Hawaii, an *ahupua'a* was a division of land running from the sea to the mountains. An *ili* was the next smaller subdivision within the *ahupua'a*. See *Palama v. Sheehan*, 440 P.2d 95, 97 (Haw. 1968).

33. Register of Conveyances, Lease of Trustees of the Estate of Bernice P. Bishop to City and County of Honolulu, Honolulu, Haw. (Dec. 22, 1924), at 316-325.

34. Register of Conveyances, Deed of Trustees of the Estate of Bernice P. Bishop to City and County of Honolulu, Honolulu, Haw. (Jan. 12, 1929), at 257-265. Registrar of Conveyances, Deed of Trustees of the Estate of Bernice P. Bishop to City and County of Honolulu, Honolulu, Haw. (Jan. 12, 1929), at 213-215. According to the deed, the City and County of Honolulu covenanted with the Bishop Estate to perpetually maintain a water system installed as a condition of the lease; to use the lands solely for the purposes of public parks and/or rights of way; and, to refrain from using the lands in connection with a wireless telephone or telegraph business until after the expiration of the grantor's lease on a nearby parcel, on April 31, 1963. *Id.*

35. Markrich, *supra* note 1, at 87.

36. DORIAN TRAVERS, *supra* note 17, at 5.

37. *The Old Swimm'n' Hole*, HONOLULU ADVERTISER, July 12, 1952, at B1.

38. *Id.*

level includes the beach, a grassy area, concession stands, public restroom facilities, showers, and Bay rim trails.<sup>39</sup>

In 1967, in recognition of the Bay's unique natural features and declining fish populations, the Hawaii Department of Land and Natural Resources (DLNR) established Hanauma Bay as the state's first MLC. <sup>40</sup> Three years later, the Bay was also designated a State Underwater Park. <sup>41</sup> The MLC and underwater park encompass the area from the highest wash of the waves <sup>42</sup> out to the mouth of the Bay. <sup>43</sup> Within this area, the harming or collection of fishes, invertebrates (including coral and shells), seaweeds, rocks or sand became prohibited by state law. <sup>44</sup> Thus, the establishment of Hanauma Bay as a conservation district and underwater park brought it within the regulatory jurisdiction of the state. Today, more than ten different city, state, and federal agencies share jurisdiction over Hanauma Bay, making it sometimes difficult to determine who is responsible for managing the use of the Bay. <sup>45</sup> Generally speaking, the Honolulu Department of Parks and Recreation (HDPR) has jurisdiction over the dry sand beach, picnic and parking areas, and the DLNR and Department of Transportation (DOT) have jurisdiction over the water areas and entrances to the park. <sup>46</sup> The U.S. Army Corps of Engineers also has regulatory

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39. Mak & Moncur, *supra* note 12, at 51.

40. Charmaine Marie Gallagher & Donna J. Lee, *An Economic Contribution to Marine Park Management for Hanauma Bay 3* (1993) (unpublished, on file with the *Ocean and Coastal Law Journal*).

41. Clark & MacDonald, *supra* note 4.

42. The Hawaii Supreme Court determined that the boundary between private land and public beaches was located at the highest wash of the waves, at the vegetation line. *See County of Hawaii v. Sotomura*, 55 Haw. 176, 182 (1973).

43. Clark & MacDonald, *supra* note 4, at 150.

44. HAW. ADMIN. RULES, § 13-28-2 (1994).

45. REYNOLDS, *supra* note 8, at 1-5.

46. *Id.* State regulation of the Bay includes the following: The DLNR is responsible for establishing MLCs under the Marine Life Conservation Program. *Id.* Five divisions of the DLNR directly manage the Bay. They are: the Division of Aquatic Resources (DAR) which regulates activities at Hanauma Bay; the Division of State Parks (DSP) which manages the submerged portions of the Bay; the Division of Conservation and Resources Enforcement (DOCARE) which enforces all DLNR regulations; the Conservation and Environmental Affairs Division (CEAD) which regulates commercial activities at the Bay and, the Division of Boating and Ocean Recreation (DBOR) which regulates vessel use within the Bay. *Id.* The DOT regulates the highway access into the park as well as the operation of all vessels in the Bay under Hawaii boating laws. *Id.* The State Department of Health (DOH) monitors water quality at the Bay and is authorized to close the park if levels of contaminants exceed prescribed limits. *Id.* Under the auspices of four divisions of the HDPR, the city has jurisdiction over the park and beach areas of Hanauma Bay. The Facilities Development Division develops plans for facility and infrastructure development; the Water Safety Division provides lifeguards; District I Maintenance and Support Services



jurisdiction of the water area of the Bay under section 10 of the Rivers and Harbors Act for work in navigable waters,<sup>47</sup> and section 404 of the Clean Water Act for "the discharge of dredged or fill material into the navigable waters [of the United States]."<sup>48</sup>

During the late 1980s, a swarm of media attention focused on the deterioration of the Bay's environment.<sup>49</sup> Reports of mounting water quality problems attributed to fresh water and sewage leakage into the Bay from restroom facilities, increased levels of trash in the water and on the beach, and undesirable changes in the Bay's fish populations due to overfeeding appeared in the local press.<sup>50</sup> The reports stimulated public demand for improved management at Hanauma Bay.<sup>51</sup> As a result, in 1989, HDPR presented the Honolulu City Council with an eight-point management plan for Hanauma Bay Beach Park. The plan included: 1) establishing hours for vehicular traffic between 7:00 A.M. and 7:00 P.M.; 2) closing the park on Wednesdays to allow the Bay's ecosystem to recover and maintenance crews to complete projects; 3) instituting traffic controls and hiring a traffic attendant; 4) restricting commercial vehicles from dropping off visitors at the park, except for brief sightseeing stops in the upper level; 5) building a visitor information center in the upper level; 6) improving the park's infrastructure, paying special attention to controlling sewer leakage and erosion; 7) limiting the type of food used to feed the fishes to an approved variety; and, 8) implementing additional control measures such as hiring a park manager, trapping and removing pigeons and regularly monitoring the water quality.<sup>52</sup>

The plan met resistance from tour operators who ardently opposed the proposed restrictions on commercial vehicle drop offs.<sup>53</sup> As more than half of all tourists visiting Hanauma Bay came by tour bus or van,<sup>54</sup> the plan would dramatically effect their businesses. In an effort to avoid implementation of the plan, a number of tour operators formed the Commercial Hanauma Bay Users Committee and sought to impose self-regulatory

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Division maintains grounds and facilities; and, the Permits Section handles all concession contracts and commercial permits. *Id.* The Honolulu City Council promulgates ordinances regarding management of the park. *Id.* See also HAW. ADMIN. RULES, § 13-256 (1994).

47. Rivers and Harbors Act of 1899, ch. 425, § 10, 33 U.S.C. § 403 (1986).

48. Clean Water Act of 1977, 33 U.S.C. § 1344(a) (1986).

49. TRAVERS, *supra* note 17, at 6-7.

50. *Id.*

51. *Id.*

52. *Id.* at 8.

53. Mak & Moncur, *supra* note 12, at 52.

54. *Id.*

measures.<sup>55</sup> Tour operators voluntarily agreed to refrain from using the park on Sundays and major holidays for a six-month period beginning February 18, 1990.<sup>56</sup> Although there was a noticeable decline in the number of visitors when the voluntary ban initially went into effect, by summer, the self-imposed measures proved insufficient to avert further deterioration of the Bay.<sup>57</sup> On June 12, 1990, the city enacted its management plan.<sup>58</sup>

As part of the city's plan, HDPR worked cooperatively with the University of Hawaii Sea Grant Extension Service to establish the Hanauma Bay Education Program (HBEP) in August of 1990.<sup>59</sup> HBEP staff and volunteers distribute information, pick up trash, lead interpretive tours, and interact with visitors at Hanauma Bay.<sup>60</sup> The central theme of all HBEP presentations has been showing visitors how they can minimize negative environmental impacts while visiting Hanauma Bay and other reef ecosystems in Hawaii.<sup>61</sup> Although the Sea Grant Extension Service provided start-up and operating money for the program's first two years, HBEP lacks a permanent funding source.<sup>62</sup> As such, it was forced to drastically cut back its staff, despite national recognition as a leading conservation program.<sup>63</sup> This downsizing of HBEP is particularly unfortunate in light of recent studies which indicate that Hanauma Bay could accommodate more visitors if all visitors were educated on how to properly use the park.<sup>64</sup>

Along with the difficulty of acquiring necessary funds to meet the plan's educational objectives, the city has encountered additional problems associated with the implementation of the 1990 management plan. Tour companies discovered ways to circumvent the commercial drop off restrictions. Several began bussing their customers to nearby neighbor-

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. TRAVERS, *supra* note 17, at 8.

60. *Id.* at 9-10.

61. *Id.*

62. Mak & Moncur, *supra* note 12, at 52.

63. TRAVERS, *supra* note 17, at 11-12. The Hanauma Bay Education Program has won numerous awards including the Hawaii State's Fifteenth Annual First Lady's Outstanding Volunteer Award for outstanding voluntary service in 1991; the Chevron Conservation Award, a national award honoring outstanding contributions to the conservation of our nation's natural resources in 1992; and, the U.S. Department of the Interior's Volunteer Service Award for outstanding commitment to stewardship of America's public lands and natural and cultural resources in 1993. *Id.*

64. Mak & Moncur, *supra* note 12, at 53.

hoods and contracted with taxi companies to transport passengers the rest of the way to the park.<sup>65</sup> Similarly, visitors who were not on commercial tours also began taking advantage of loopholes in the regulations. Many opted to drive themselves to Hanauma Bay, where they parked in neighboring residential areas or at scenic lookouts on the side of the highway after the park's 300 allotted parking stalls had been filled and the lot had been closed.<sup>66</sup> Others took the city bus that continues to service the park or arrived by moped. It is estimated that approximately 500 visitors walk into the park or enter by moped each day.<sup>67</sup> Thus, while the city's plan was designed to limit access to the Bay by limiting vehicular entry, its methods were not foolproof.

To its credit, however, the 1990 management plan has been successful in substantially reducing the number of daily visitors to the park to about 4,000, although this still exceeds the recommended optimum number.<sup>68</sup> In addition, anecdotal evidence suggests that the Bay has experienced a partial recovery, with clearer water and a rejuvenation of coral communities inside the reef.<sup>69</sup>

Nonetheless, many believe that further efforts are needed to preserve Hanauma Bay. Vaclav Smil, a noted ecologist, recently recommended that the park be closed for one to two years to allow the Bay to fully recover.<sup>70</sup> While city officials view Smil's proposed solution as "provocative," they do not see closing the park as a realistic alternative at a time when the number of tourists visiting Hawaii is continuing to increase.<sup>71</sup> Instead, officials have elected to levy an admission fee as a means of "rationing" the use of the Bay and generating revenues to fund park services.

A bill proposing to impose both a parking fee and a \$5 general admission fee to enter the lower level of the park was first introduced in the city council in 1993.<sup>72</sup> The bill failed to pass, however, as city officials argued that it would not be fair to Hawaii residents who already pay for the

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65. Melissa Vickers, *Only One Cab Drop-off Per Day to Hanauma*, HONOLULU STAR-BULL., Jan. 5, 1994, at A3. This particular loophole was closed in January 1995 when the city imposed a new regulation limiting cabs to one visitor drop-off per day and permitting them to wait fifteen minutes to wait for a fare out of the park. *Id.*

66. Mak & Moncur, *supra* note 12, at 54.

67. *Id.*

68. *Id.*

69. *Id.*

70. Jan TenBruggencate, *Rx for Bay: Ecologist Urges Two-Year Closure to Let Park Recover*, HONOLULU ADVERTISER, Aug. 19, 1994, at A3.

71. Jan TenBruggencate, *City, State Cite Attempts to Deal With Ecology*, HONOLULU ADVERTISER, Aug. 19, 1994, at A3.

72. City and County of Honolulu, Bill No. 152, Bill for an Ordinance Relating to Hanauma Bay Nature Park, (1993).

Bay's preservation and subsidize the cost for tourists through their payment of taxes.<sup>73</sup> Results of a 1994 visitor survey designed to ascertain the willingness of visitors to pay the proposed admission fee support this view.<sup>74</sup> While the majority of out-of-state residents were willing to pay the proposed admission fee, the majority of Hawaii residents were not.<sup>75</sup> Currently, more than eighty percent of the park's visitors are non-Hawaii residents.<sup>76</sup>

The Honolulu City Council apparently took the survey results to heart. On May 24, 1995, perhaps in an attempt to appease their constituents, city council members passed the bill imposing a \$5 admission fee for non-Hawaii residents over the age of thirteen, and a fee of between \$5-\$35 for tour busses entering the park for sightseeing, dependent upon vehicle capacity.<sup>77</sup>

The bill entered into effect on July 1, 1995.<sup>78</sup> Following the imposition of fees, in order to enter the park, visitors were required to pass through one of two newly installed entrance ways,<sup>79</sup> present identification, and pay a \$5 entry fee if they were a non-Hawaii resident over the age of thirteen. After six months of collecting the fees, \$2.5 million was generated,<sup>80</sup> and city officials estimated that more than \$4 million would be collected annually.<sup>81</sup> As previously stated, this amount far exceeds the annual operating budget of the park, which approximates \$1 million.<sup>82</sup>

On January 8, 1996, amid serious concerns about the legality of the newly imposed fee schedule, the city council elected to repeal all fees at

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73. Walker M. Ozawa, Editorial, *City Does Not Support Bill to Charge Bay Fees*, HAW. KAI SUN PRESS, Dec. 30, 1993, at A4.

74. Mak & Moncur, *supra* note 12, at 55.

75. *Id.* The survey was conducted by students from the University of Hawaii during the 1994 Veterans Day Holiday Weekend. *Id.* Visitors were posed with the following question: "A 1993 city council bill proposed to charge \$5 per person admission fee to Hanauma Bay. If this charge were levied, would you still have come today?" *Id.* The percentage of Hawaii residents who responded "yes" ranged from between 30% and 36%, while the percentage of nonresidents who indicated a willingness to pay a fee was between 65% and 93%. *Id.*

76. Yoshishige, *supra* note 23, at A1.

77. City and County of Honolulu, Bill No. 32 CD 2 (1995).

78. Yoshishige, *supra* note 23.

79. Gordon Y.K. Pang, *Bill to End Hanauma Fees Passes First Council Test*, HONOLULU STAR-BULL., Oct. 12, 1995, at A1. Concerns have recently been raised that the city failed to obtain a special area management permit for the ticket booths. *Id.*

80. Barrett, *supra* note 26.

81. Pai, *supra* note 19.

82. Yoshishige, *supra* note 22. It should be noted that this amount does not include moneys needed for capital improvements to the facilities and infrastructure of the park such as the \$2 million allotted for replacement of the sewer lines in 1992.

Hanauma Bay.<sup>83</sup> Among the concerns expressed were those that the city-imposed fees could be considered an illegal tax as they were expected to generate substantially more revenue than was needed to operate the park. Under Hawaii's constitution, only the State is authorized to impose a tax.<sup>84</sup> In a related matter, the grantors of the land, the Bishop Estate, had threatened the city with legal action, claiming the collection of fees in excess of that needed to maintain the park was a breach of the provision in the 1928 deed requiring that the land be used solely for public park purposes.<sup>85</sup> Lastly, the two booths erected to collect the fees were found to be lacking Special Management Area (SMA) permits required of all projects within Hawaii's coastal zone that have a significant effect on the environment.<sup>86</sup>

Upon repealing the fees, the city began soliciting a "suggested donation" of \$5 from all visitors seeking entry to the lower portion of the park as a means of continuing to generate income until a new fee schedule could be implemented.<sup>87</sup> To date, the amount of fees collected under the donation scheme has fallen far short of that collected under the flat \$5 non-resident admission fee.<sup>88</sup> Under the newly adopted fee schedule, the city expects to collect \$2.6 million annually.<sup>89</sup> This amount is in addition to the approximate \$1 million the city already receives in fees from park concessions.<sup>90</sup>

Controversy continues to surround the \$3 entry fee for non-residents, as several tourism industry officials claim the practice to be discriminatory and unnecessary because the annual income resulting from the collection of parking and concession fees would approximate \$1.5 million.<sup>91</sup> Others

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83. Yoshishige, *supra* note 25.

84. HAW. CONST., art. VIII, § 3.

85. Mufi Hannemann, *Hanauma Bay User Fees Violate Honolulu Ordinance*, HONOLULU STAR-BULL., Jan. 6, 1996, at A8. "According to the estate, the imposition of the present fee structure has 'placed the City and County of Honolulu in breach of the provisions of the deed.'" *Id.*

86. *Id.* See also HAW. REV. STAT. § 205A (Supp. 1995).

87. Barrett, *supra* note 26.

88. Barrett, *supra* note 26. During the first week of collecting donations, many visitors gave more than their share. Soon after, however, the amounts collected fell to between 48% and 20% of those collected under the fee. Interview with Alan Hong, Manager, Hanauma Bay Nature Park (Apr. 10, 1995).

89. See Memorandum from Dona L. Hanaïke, City and County of Honolulu Department of Parks and Recreation, to Emily Gardner, regarding the new fee schedule for Hanauma Bay (Dec. 17, 1996) (on file with the *Ocean and Coastal Law Journal*).

90. *Id.*

91. Pai, *supra* note 19. See also City Council of the City and County of Honolulu, Journal, Twenty-Third Session 38-39 (Mar. 13, 1996). Of the ten speakers who registered to testify, seven testified in strong opposition to the bill. In addition, Honolulu Mayor

are supportive of the fees as a way to raise funds needed to improve management practices and enhance services at the Bay, including restoration of the Hanauma Bay Education Program, which has been shown to reduce individual visitor impact.<sup>92</sup>

Given the heated nature of the controversy and the revenue generating potential of the fees, it seems doubtful that the issue has been finally resolved. The following sections of this paper attempt to answer some of the legal questions surrounding the user fee structure recently adopted for use at Hanauma Bay Nature Park with the hope of providing clarity to the issue should the fees become subject to future legal challenges.

### III. THE VALIDITY OF THE FEE SCHEDULE UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION

The Privileges and Immunities Clause in Article IV, Section 2 of the U.S. Constitution provides that “[t]he Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>93</sup> Originally the clause was designed to transform a collection of independent, sovereign states into a cohesive nation, and to assure that citizens of one state who travel into another state have the same rights and privileges which citizens of the latter state enjoy.<sup>94</sup> The U.S. Supreme Court has ruled, however, that the clause is not all inclusive, but applies only to those rights which are “fundamental” to the promotion of interstate harmony.<sup>95</sup> In *Baldwin v. Fish and Game Commission of Montana*,<sup>96</sup> the Court held that the right of access to recreational activities was not “fundamental” in nature.<sup>97</sup> Thus, under the Privileges and Immunities Clause, states are not barred from discriminating against non-residents with regard to recreational activities.

In *Baldwin*, the Court upheld Montana’s statutory elk-hunting license scheme which imposed fees that were at least 7½ half times higher for non-

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Jeremy Harris has stated that he is supportive of a “\$3 visitor-only admission fee to the Park, provided that no admission charge be imposed on local residents.” He has also stated that he would agree to a reasonable parking charge. *Id.*

92. *Id.*

93. U.S. CONST. art. IV, § 2, cl. 1.

94. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

95. *Baldwin v. Fish and Game Comm’n of Mont.*, 436 U.S. 371, 383 (1978). (“Only with respect to those ‘privileges’ and ‘immunities’ bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.”)

96. *Id.* at 371.

97. *Id.* at 388.

residents than for residents, and which required only non-residents to purchase a special "combination" license.<sup>98</sup> The Court supported its decision largely by finding that the preservation of Montana's elk populations was a valid legislative goal to which the payment of fees through taxes or licensing was rationally related.<sup>99</sup>

In Hawaii, the U.S. Court of Appeals for the Ninth Circuit reached a similar result in *Hawaii Boating Association v. Hawaii*.<sup>100</sup> In this case, the court upheld a state statute imposing preferential rates for Hawaii residents desiring to moor and live aboard their boats in the state's small boat harbors. The rate differentials were fairly substantial. Non-Hawaii residents were required to pay a \$100 application fee, as opposed to a \$15 application fee for Hawaii residents, and live-aboard fees that were one-third greater than those paid by state residents.<sup>101</sup> Relying heavily on the legislative history of the statute, which described the purpose of Hawaii's small boat harbors as primarily for the promotion of "recreational boating activities" and the landing of fish,<sup>102</sup> the court found the statute to be outside the purview of the Privileges and Immunities Clause because it did not implicate a "fundamental" right, only a right of recreational access.<sup>103</sup> It is the Privileges and Immunities Clause that presumably permits the imposition of a discriminatory user fee at other HDPR facilities such as the Ala Wai Golf Course, which currently charges non-Hawaii residents four times more for green fees than it does Hawaii residents.<sup>104</sup>

Like visits to a golf course, visits to Hanauma Bay would most likely be characterized as recreational in nature. This is particularly true given the fact that state regulations currently prohibit vessel traffic and fishing within the marine reserve.<sup>105</sup> Thus, it seems probable that a residency-based user fee such as the one currently adopted for use at Hanauma Bay Nature Park, would sustain challenges under the Privileges and Immunities

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98. *Id.* at 373. The combination license, which cost \$225 entitled non-residents to take one elk, one deer, one black bear, and game birds and to fish with hook and line. Montana residents could purchase a license solely for elk for only \$9, or, a license granting all the privileges under the non-resident combination license for only \$30. *Id.*

99. *Id.* at 390-391.

100. *Hawaii Boating Ass'n v. Hawaii*, 651 F.2d 661 (1981).

101. *Id.* at 664.

102. *Id.* at 665 n.5.

103. *Id.* The court found it "beyond dispute" that small boat harbors should be classified as recreational and that a liveaboard use is merely incidental to the recreational one.

104. Green fees at the Ala Wai Golf Course, a HDPR facility on the outskirts of Waikiki are currently \$10 for Hawaii residents and \$40 for non-Hawaii residents. Interview with Clarence Nakatsukasa, Manager, Ala Wai Golf Course (Nov. 2, 1995).

105. HAW. ADMIN. RULES, § 13-256-87 (1994).

Clause. The fee schedule's sustainability under provisions of the Fourteenth Amendment, however, is less clear.

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>106</sup> The first clause of this amendment, the Privileges and Immunities Clause relating to rights of national citizenship, and the third, the Equal Protection Clause, are pertinent to the issue at hand.

Hanauma Bay's newly adopted fee schedule could be facially challenged under the Equal Protection Clause, not only because it explicitly exempts native Hawaiians from having to pay both parking and beach access fees if visiting the park for cultural purposes, but also because it discriminates against a particular class of people—non-Hawaii residents—by requiring them to pay a \$3 fee to enter the beach portion of the park. The Supreme Court established that a challenged statute must be subjected to "strict scrutiny" if it impairs a fundamental right, or, if the classification itself is inherently "suspect."<sup>107</sup> The Court has deemed race and national origin as being suspect classifications under the clause and has limited fundamental rights to include those related to voting,<sup>108</sup> criminal proceedings,<sup>109</sup> interstate travel,<sup>110</sup> marriage and procreation,<sup>111</sup> and to a certain extent, education.<sup>112</sup>

Native Hawaiians would certainly be deemed a suspect class based on national origin.<sup>113</sup> In *City of Richmond v. J.A. Croson, Co.*,<sup>114</sup> the U.S.

106. U.S. CONST. amend. XIV, § 1, cl. 2.

107. See *Korematsu v. United States*, 323 U.S. 214 (1944). Under strict scrutiny, the state must demonstrate that the challenged statute is necessary to achieve a "compelling state interest." See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972). In practice, this has proven virtually impossible. As a result, most state and local statutes subjected to strict scrutiny are invalidated. In the absence of a need for strict scrutiny, mere rationality is all that is required to validate a statute under the Equal Protection Clause. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). The court must determine that the challenged statute is rationally related to a valid legislative goal. *Id.*

108. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

109. *Douglas v. California*, 372 U.S. 353 (1963).

110. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

111. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

112. *Brown v. Board of Education*, 347 U.S. 483 (1954).

113. Hawaiian Homes Commission Act (HHCA), 1920, § 201(a)(7); Act of July 9, 1921, C. 42, 42 Stat. 108 (codified as amended at 48 U.S.C. note prec. § 491 (1988) and HAW. CONST. Art. XIII, § 1), reprinted in 1 HAW. REV. STAT. 167, 167 (1985). "Native Hawaiian



Supreme Court held that a “benign” use of racial or national origin classifications, in a manner designed to assist previously disadvantaged groups, should be subject to strict scrutiny. Under this standard, any state actions that are explicitly class-based must be determined necessary to achieve a compelling state interest. The compelling nature of the state’s interest can be found by consulting article XIII, section 7 of the Hawaii constitution which provides, “the State . . . shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians, . . . subject to the right of the State to regulate such rights.”<sup>115</sup> Given that the state’s responsibility to preserve the cultural and religious rights of native Hawaiians is constitutionally mandated, the preservation of these rights would likely qualify as a compelling interest. Additional support for this view is found in Hawaii Revised Statutes section 1-1, which establishes English common law as the law of the State of Hawaii, “*except as . . . established by Hawaiian usage.*”<sup>116</sup> In *Kalipi v. Hawaiian Trust Co.*,<sup>117</sup> the Hawaii Supreme Court interpreted Hawaii Revised Statutes section 1-1 as ensuring the continuation of practices associated with the ancient Hawaiian way of life, so long as “no actual harm is done.”<sup>118</sup> In *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*,<sup>119</sup> the court expanded upon this view by concluding that while the state has some power to regulate the practice of customarily and traditionally exercised Hawaiian rights, it is obliged to protect the “reasonable” exercise of such rights to the extent feasible, and particularly on undeveloped lands. Hanauma Bay Nature Park is an undeveloped public park.<sup>120</sup> Thus, the provision in the newly adopted fee schedule which exempts native Hawaiians from having to pay parking or beach access fees when visiting Hanauma Bay for cultural or religious purposes not in contravention with the rules governing the use of the Bay, appears to be valid. There may be some difficulties in administering this provision, however, not only in determining which visitors qualify as native Hawaiians, but also in determining what cultural and religious practices are

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means any descendant of not less than one half part of the blood of the races inhabiting the Hawaiian islands previous to 1778.” *Id.*

114. 488 U.S. 469 (1989).

115. HAW. CONST. art. XIII, § 7.

116. HAW. REV. STAT. § 1-1 (1993) (emphasis added).

117. 656 P.2d 745 (1982).

118. *Id.* at 751.

119. 903 P.2d 1246, 1271 (1995).

120. Mak & Moncur, *supra* note 12, at 51.

reasonable in the park, especially because all fishing, collecting of living and non-living resources, and canoeing are prohibited.<sup>121</sup>

Turning to the non-resident admission fee, residency restrictions have been subject to strict scrutiny in the past because they disadvantage a class of persons who have exercised their right to interstate travel. In *Shapiro v. Thompson*,<sup>122</sup> the Supreme Court held that a residency requirement for welfare assistance was unconstitutional because it infringed upon this right. Thus, it could be argued that all residency requirements interfere with interstate travel. In cases where residency restrictions have been struck down, however, some other “basic” right has been involved such as the right to vote<sup>123</sup> or the right to emergency medical care.<sup>124</sup> In *Fisher v. Reiser*,<sup>125</sup> the U.S. Court of Appeals for the 9th Circuit noted the need to consider the “nature of the benefit denied” in cases involving the right to travel.<sup>126</sup> The dissent in *Fisher* interpreted the court’s decision to indicate that “deprivations which are only uncomfortable are not enough” to invoke strict scrutiny.<sup>127</sup> Applying this standard, the 9th Circuit later held that Hawaii’s statute granting preferential mooring fees to state residents did not operate as a “significant penalty” on the right to travel.<sup>128</sup> The court also determined that “non-residents of Hawaii” did not comprise a suspect class based on race or national origin.<sup>129</sup> Thus, the court determined the statute to be valid on equal protection grounds by finding that a disparate fee structure attempting to equalize costs between residents and non-residents was rationally related to the legislative goal of maintaining the state’s small boat harbors.<sup>130</sup> The U.S. Supreme Court further supports this view. In *Baldwin*, the Court stated “[w]e perceive no duty on the State to have its licensing structure parallel or identical for both residents and nonresidents,

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121. HAW. ADMIN. RULES, § 13-28-2 (1994) (prohibited activities within Hanauma Bay Marine Life Conservation District), and § 13-256-87 (1994) (Hanauma Bay restricted zone). No watercraft of any description shall operate within the Bay. The established traditional uses of the area are fishing, collecting of living and non-living resources, and canoeing. *Id.*

122. 394 U.S. 618 (1969).

123. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

124. *Memorial Hospital v. Mariposa County*, 415 U.S. 250 (1974).

125. 610 F.2d 629 (9<sup>th</sup> Cir. 1979) *cert. denied*, 447 U.S. 930 (1980). The case involved a Nevada statute granting cost of living increases to workers’ compensation beneficiaries who continued to reside in Nevada, but denying increases to those who moved outside the state. The court upheld the statute, finding it did not involve a genuinely significant deprivation. *Id.*

126. *Id.* at 635.

127. *Id.* at 639 n.5.

128. *Hawaii Boating Ass’n v. Hawaii*, 651 F.2d 661, 665 (1981).

129. *Id.*

130. *Id.* at 666.

or to justify to the penny any cost differential it imposes in a purely recreational, non-commercial, nonlivelihood setting. Rationality is sufficient.”<sup>131</sup>

Therefore, Hanauma Bay’s non-resident admission fee would likely sustain an equal protection challenge, because maintenance of the marine sanctuary is a valid legislative goal to which the collection of fees from non-residents as a cost-equalizing measure is rationally related. The newly adopted fee schedule could be invalidated on equal protection grounds only upon a finding that restricting the use of the Bay imposes a significant penalty on the right to travel. Although the Supreme Court has indicated that the right to interstate travel cannot be infringed by restricting the right “to use highways and other instrumentalities of interstate commerce,”<sup>132</sup> it seems doubtful that this argument would prevail when applied to the Hanauma Bay user fee given the non-commercial nature of the Bay and the fact that vessel traffic in the Bay is currently prohibited.<sup>133</sup>

The rights protected under the Privileges and Immunities Clause of the Fourteenth Amendment differ from those protected under Article IV, relating to state citizenship. In *The Slaughter House Cases*,<sup>134</sup> the Supreme Court held that the Fourteenth Amendment’s Privileges and Immunities Clause protects against state infringement of a limited set of “national” privileges. Expressly included within the listed privileges of national citizenship was the right to “use navigable waters of the United States, however they may penetrate the territory of the several States.”<sup>135</sup> This rule, as it applies to U.S. citizens’ rights to use navigable waters, has yet to be interpreted by the federal courts.

While the public’s rights to use navigable waters were historically limited to uses associated with navigation, commerce and fishing, since the United State’s adoption of the public trust doctrine, a number of state

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131. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 391 (1978).

132. *United States v. Guest*, 383 U.S. 745, 757-60 (1966). The Court also alluded to the fact that the right to interstate travel could not be impinged by restricting access to public facilities. The statute at issue, however, appears to have been struck down based on the use of a racial classification.

133. HAW. ADMIN. RULES, §§ 12-28-2, 13-256-87 (1994).

134. 83 U.S. 36, 79 (1873).

135. *Id.* at 79. Other enumerated rights of national citizenship include the right to peaceably assemble and petition for redress of grievances, the right to assert any claim against the government, the privilege of the writ of habeas corpus, the right to protection of the Federal Government when on the high seas or within the jurisdiction of a foreign government, the rights secured by treaties with foreign nations, and the right of free access to seaports, through which all operations of foreign commerce are conducted. It may be significant to note that the right to use navigable waters was distinguished from that of the right to free access to seaports. *Id.*

courts have expanded the list of protected rights in navigable waters to include recreational uses.<sup>136</sup> Thus, non-Hawaii residents who are also citizens of the United States could plausibly argue that by requiring payment of a fee as a prerequisite to using Hanauma Bay, the state of Hawaii has abridged their privileges and immunities as U.S. citizens under the Fourteenth Amendment. This argument is not likely to prevail, however, as the Supreme Court has determined that municipal regulations and restrictions affecting the use of streets and public places are not in conflict with constitutional guarantees if they are a proper exercise of the state's police powers.<sup>137</sup> The city could assert that the collection of fees as a means to limit access to the Bay is a valid exercise of the state's police powers in that it serves to promote the preservation of an important natural resource for the welfare of the general public. This argument is bolstered by the fact that, as provided in article IX, section 8 of the Hawaii constitution, the state is required to promote and maintain a healthful environment, including the prevention of any "excessive demands" upon the environment and its resources.<sup>138</sup> Thus, as Hanauma Bay has been certainly subject to "excessive demands," the city could claim that by collecting the fees which are targeted towards enhancing the management of the Bay, it is assisting the state in fulfilling its responsibilities under article IX, section 8.

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136. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296 (1972) ("The public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses."). See also *State v. Village of Lake Delton*, 93 Wis. 2d 78 (1979); *Galt v. State of Montana*, 225 Mont. 142 (1987); *Southern Idaho Fish and Game Ass'n. v. Picabo Livestock, Inc.*, 96 Idaho 360 (1974); *Marks v. Whitney*, 6 Cal. 3d 251 (1971) (also provided public with right to protect tide lands in natural state to serve as ecological units for scientific study or as environments providing food and habitat for birds and marine life); *Opinion of the Justices*, 365 Mass. 681 (1974). In contrast, Maine has elected to confine protected public uses to traditional uses associated with fishing and navigation. See *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989). For more complete coverage of the issue see JACK ARCHER, ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* 22-30 (1994).

137. *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) (upholding the right of a municipality to regulate the use of public places by requiring permits to hold meetings, sell goods and discharge firearms). However, in a later case, *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1938), the Court invalidated a city ordinance requiring permits to peaceably assemble on public property. The Court distinguished the result reached in *Davis* by noting that the statute at issue in *Hague* dealt exclusively with a right provided for in the Privileges and Immunities Clause of the Fourteenth Amendment, while that in *Davis* involved other rights as well. See also JACK ARCHER ET AL., *supra* note 136, at 3. "The police power is a broad and valuable basis for the exercise of state regulatory authority that will rarely be invalidated so long as it is rationally related to a legitimate state goal and does not unduly burden interstate commerce." (*citing* *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945)).

138. HAW. CONST. art. IX, § 8.

Moreover, the city could assert that it is not denying non-residents the right to use Hanauma Bay, but merely collecting a fee to help pay for the maintenance of the park, which Hawaii residents contribute to through their payment of taxes.

Thus, while it appears likely that Hanauma Bay's non-resident admission fee would withstand a challenge under the Privileges and Immunities Clause of the Fourteenth Amendment, the issue cannot be conclusively determined at this time. Because of the paucity of case law examining the application of the Fourteenth Amendment's Privileges and Immunities Clause as it relates to a U.S. citizen's right to use navigable waters, further judicial review is needed to finally resolve this issue.

To summarize, the fee schedule recently adopted for use at Hanauma Bay Nature Park will likely be found constitutional under the Privileges and Immunities Clause, article IV, section 2, and the Equal Protection Clause of the Fourteenth Amendment. As the above analysis indicates, a non-resident admission fee to enter the beach portion of the park does not significantly impinge on a fundamental right and appears to be rationally related to the legitimate state interest of preserving a unique natural resource. In addition, the fee exemption for native Hawaiians who visit the park for cultural or religious purposes would also pass constitutional muster as it is closely related to achieving the state's compelling interest of ensuring Hawaiians' customary rights, as provided in article XIII, section 7 of the Hawaii constitution and Hawaii Revised Statute section 1-1. The validity of a non-resident user fee under the Privileges and Immunities Clause of the Fourteenth Amendment, while probable, requires further judicial interpretation of the "national" right to use navigable waters under the rule of the *Slaughter House Cases*.

#### IV. THE VALIDITY OF A NON-RESIDENT FEE UNDER HAWAII'S PUBLIC TRUST DOCTRINE AND COASTAL ACCESS LAWS

The origins of the public trust doctrine are found in ancient Roman jurisprudence, which provided that the sea and its shores were "common to all."<sup>139</sup> This principle was later incorporated in English common law and ultimately emerged as the basis of the American legal theory governing public use of ocean and coastal resources.<sup>140</sup> As noted in the leading case

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139. Michelle A. Ruberto & Kathleen A. Ryan, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 SUFFOLK U.L. REV. 354 (1990).

140. *Id.* at 364, 369.

of *Illinois Central Railroad Company v. Illinois*,<sup>141</sup> the public trust doctrine was initially designed to preserve the use of natural water resources for navigation, commerce, and fishing.<sup>142</sup> The doctrine requires that states hold lands covered by tide waters within their boundaries in trust for the unimpaired use by the public, thereby protecting their property interest in the lands.<sup>143</sup> In 1899, the Hawaii Supreme Court adopted the reasoning of *Illinois Railroad* and held: "The people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their own common use. . . . The lands under the navigable waters in and around the territory of the Hawaiian Government are held in trust for the public uses of navigation."<sup>144</sup>

Hawaii later incorporated the public trust doctrine into its state constitution in order to guarantee privileges on state lands held in trust. Article XI, section 1 of Hawaii's constitution provides that "[a]ll public natural resources are held in trust by the State for the benefit of the people." As noted previously, a number of state courts have expanded the public trust doctrine beyond its original scope to protect rights other than those associated solely with navigation, fishing, and commerce. The public's right to recreational use and the right to preserve the lands in their natural state so that they may serve as environments that provide food and habitat for birds and marine life have been recognized.<sup>145</sup> While Hawaii law does not expressly define uses protected under the public trust doctrine, the Hawaii Supreme Court has implied that uses other than navigation, commerce, and fishing should be encompassed. In *State v. Zimring*,<sup>146</sup> the court noted that the state's duty to protect and maintain public trust property was "implemented by devoting the land to actual public uses, e.g., recreation."<sup>147</sup> Thus, a strong argument can be made that recreation is a protected right under Hawaii's public trust doctrine. As stated previously, visits to Hanauma Bay are largely recreational in nature.<sup>148</sup> This recreational nature of the Bay can also be seen from the Bay's designation as a

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141. 146 U.S. 387 (1892).

142. *Id.* at 452.

143. *Id.* at 435.

144. Valerie J. Lam, *Beach Access: A Public Right*, 23 HAW. B. J. 65, 84 (1991), (citing *King v. Oahu Ry. & Land Co.*, 11 Haw. 717, 725 (1899)).

145. ARCHER, note 136.

146. 566 P.2d 725 (Haw. 1977).

147. *Id.* at 735.

148. State of Hawaii Data Book, 1993-1994, 205 (State of Haw. Dep't of Bus., Econ. and Tourism ed., 1994). At any given time, eighty percent of visitors are sunning themselves, while the remaining twenty percent are swimming. See also HAW. ADMIN. RULES, § 13-256-87 (1994).

State Underwater Park. Once the premise that recreation is a protected right under Hawaii's public trust doctrine is accepted, the question then becomes, to whom do Hawaii's public trust rights apply?

*Illinois Central Railroad*<sup>149</sup> is instructive in this regard as it provides that Illinois' public trust doctrine was a title held in trust "for the people of the State."<sup>150</sup> Therefore, it appears that under the public trust doctrine, states in their role as trustees are obliged only to protect the rights of their own citizens to use public trust lands. Thus, non-residents may not be able to assert that their rights to use public trust lands, for whatever purpose, are protected.

Such a result appears to conflict with that reached in the widely cited New Jersey Supreme Court case of *Borough of Neptune City v. Borough of Avon-by-the-Sea*<sup>151</sup> which invalidated a beach user fee that discriminated against non-borough residents. In this case, the court held that under the public trust doctrine "the beach and the ocean waters must be open to all on equal terms."<sup>152</sup> *Borough of Neptune* can be distinguished from the facts at hand, however, because it only established that residents of a coastal state cannot be treated differently with respect to use of shoreline areas and resources.<sup>153</sup> The case was not determinative on whether non-state residents may be treated differently than state residents in this regard.<sup>154</sup> Thus, under existing law it appears that only Hawaii residents could successfully assert a claim under the state's public trust doctrine. This could change, however, as the question of to whom Hawaii's public trust doctrine applies has yet to be interpreted by Hawaii courts.

While the above analysis may shed light on the rights protected on Hawaii's public trust lands and the persons to whom they apply, they do not resolve the issue of gaining access to the state's trust property, which is relevant to the situation at Hanauma Bay. Non-Hawaii residents are not being barred from using Hanauma Bay. They are subject to the same rights and privileges as state residents in using the Bay waters and adjoining land.

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149. 146 U.S. 387 (1892).

150. *Id.* at 452.

151. 294 A.2d 47 (N.J. 1982).

152. *Id.* at 54. The court in *Neptune* also ruled that while municipalities may charge reasonable fees for use of their beaches, they "may not discriminate in any respect between residents and non-residents." *Id.* at 55.

153. *Id.*

154. It may be significant to note that residency restrictions in municipally owned beaches have in most cases been struck down. See *Brindley v. Borough of Lavallette*, 33 N.J. Super. 344 (1954) (equal protection argument); *Gewirtz v. City of Long Beach*, 69 Misc. 2d 763 (1972) (use of doctrine of dedication, as cited in Thomas J. Agnello, Jr., *Non-Resident Restrictions in Municipally Owned Beaches: Approaches to the Problem*, 10 COLUM. J.L. & SOC. PROB. 177-178 (1973)).

Non-residents are, however, treated differently in attaining access to the Bay in that each individual over the age of thirteen is required to pay a \$3 admission fee, while Hawaii residents are not individually subject to an admission fee, only their vehicles are assessed a \$1 parking fee. The city's levying of a \$3 admission fee from non-Hawaii residents in order to gain access to the Bay, a state-owned resource, raises a number of interesting legal questions.

The first question raised is whether the city is authorized to restrict access to state owned waters and submerged lands. A similar issue was contemplated in *City of New Smyrna Beach v. Internal Improvement Trust Fund*.<sup>155</sup> In *New Smyrna Beach*, the State of Florida, as owner and trustee of all lands seaward of the Atlantic Ocean's mean high water mark, sought an injunction, claiming that the City of New Smyrna had no right or authority to impose access restrictions to state lands in the form of a beach toll.<sup>156</sup> Because Florida is a "home rule" state which expressly authorizes municipalities to charge user fees,<sup>157</sup> the court held that the city could legally impose a fee for use of the beach within its municipal boundaries, provided the fee was reasonable and used for beach maintenance, traffic management, parking and law enforcement.<sup>158</sup> The fact that the city, and not the state, had paid to maintain the beach weighed heavily in the decision.<sup>159</sup> Like Florida, Hawaii is also a "home rule" state and authorizes municipalities to establish fees and charges for its services.<sup>160</sup> The City and county of Honolulu has undertaken the bulk of the financial responsibility in managing Hanauma Bay Nature Park, like the City of New Smyrna. Thus, the city of Honolulu and the surrounding county would likely be authorized under its home rule powers to impose a reasonable fee for the use of the beach area adjoining Hanauma Bay; in so doing would restrict

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155. 543 So.2d 824 (Fla. Dist. Ct. App. 1989).

156. *Id.* at 825.

157. *Id.* at 828. Under Florida's Municipal Home Rule Powers Act, cities have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services. *See also* FLA. STAT. ch. 166.021 (1987).

158. *Id.* *See also* *City of Daytona Beach Shores v. State*, 483 So.2d 405 (Fla. 1985). The court found that the public trust doctrine, which requires that Florida's beach sovereignty lands must be accessible to the public does not prohibit local governments from imposing reasonable user fees for motor vehicle beach access, so long as it is expended solely for the protection and welfare of the public using the beach, as well as for improvements that will enhance the public's use of sovereign property.

159. *Id.* at 826. The state had never expended any funds or contributed to the management of the beach. *Id.*

160. HAW. REV. STAT. § 46-1.5(8) (1993).



access to the state-owned Bay. Whether the city can restrict access in a discriminatory manner remains to be determined.

Hawaii Revised Statute section 115-1, "Public Access to Coastal and Inland Recreation Areas," provides:

[T]he absence of public access to Hawaii's shorelines and inland recreation areas constitutes an infringement upon a fundamental right of free movement in public space and access to and use of coastal and inland recreation areas. The purpose of this chapter is to guarantee the right of public access to the sea, shorelines, and inland recreation areas.

The legislative history of this statute acknowledges the need "to develop recreational opportunities for residents *and visitors*."<sup>161</sup> Thus, non-Hawaii residents could claim that their right to gain access to Hanauma Bay and the beach portion of the park is on equal footing with that of state residents, and as such, the \$3 entry fee infringes upon their right of access. However, a subsequent section of Hawaii Revised Statutes 115 grants the counties the right to restrict passage over a public right-of-way by resolution or ordinance, provided that the restriction is in the public interest.<sup>162</sup>

While this argument could prove successful, the city could argue that the imposition of an entry fee limits access to the Bay and is in the public's interest, given the deteriorating condition of the Bay due to its overuse and the fact that past attempts at regulation have proven insufficient.<sup>163</sup> The discriminatory nature of the fee could also be justified on equitable grounds if the fee is viewed as a user fee which Hawaii residents also pay through their payment of taxes that go towards the cost of maintaining the facility for the benefit of the general public. This view is supported from a "user pays" perspective, particularly in light of the fact that non-Hawaii residents currently constitute the vast majority park users (over 80%).<sup>164</sup> Problems could arise with this approach, though, if it can be shown that non-Hawaii residents are paying more for the privilege of using the park through the payment of entry fees than Hawaii residents are paying for the same

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161. Stand. Comm. Rep. No. 759-74, 15th Haw. Leg. Reg. Sess., 1974, Sen. J. 1042 (emphasis added).

162. HAW. REV. STAT. § 115-3.5 (1993).

163. This view was expressed by the California First District Court of Appeals in a recent case challenging the imposition of parking fees as a way to restrict beach access. While the court upheld the fees, it was not unsympathetic to the issue when it stated "[i]n an ideal world, people should not have to pay a fee to enjoy the coast. But we do not live in an ideal world. . . . That is an unpleasant fact of life in California in the 1990s." *Surfrider Found. v. California Coastal Comm'n*, 26 Cal. App. 4th 151 (1994).

164. Yoshishige, *supra* note 23.

privilege through the payment of taxes. A careful accounting of any fees collected should be undertaken to guard against this result. Admission fees as a general revenue-generating device for the city should be discouraged as the fees could be determined to be an illegal tax. The following section examines this and other related issues.

## V. USER FEE OR USER TAX

Article VIII, section 3 of Hawaii's State Constitution limits the taxing power of the counties to the taxation of real property, unless otherwise delegated by the legislature. Through Hawaii Revised Statutes section 46-1.5, the legislature has, however, granted counties the authority "to fix the fees and charges for all official services not otherwise provided for."<sup>165</sup> Thus, the City and County of Honolulu have the power to charge visitors a fee to use Hanauma Bay, but may not tax them for the privilege of doing so.

Distinguishing between a fee and a tax sometimes can be difficult. In *Commonwealth Edison Co. v. Montana*,<sup>166</sup> the U.S. Supreme Court defined a tax as producing revenue for the support of government. In contrast, user-fees were defined as imposing a specific charge for the use of publicly-owned or publicly provided facilities or services.<sup>167</sup> Although Hawaii courts have yet to render an opinion analyzing the differences between user fees and taxes, courts in other jurisdictions have. For example, in *Emerson College v. City of Boston*,<sup>168</sup> the court identified three common characteristics that can be used to distinguish user fees from taxes. The court found that user fees are: 1) levied in exchange for a particular governmental service which benefits the party paying the fee in a manner "not shared by other members of society;"<sup>169</sup> 2) paid by choice, in that the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge;<sup>170</sup> and, 3) are not collected to raise revenues, but to compensate the government entity for providing its services for its expenses.<sup>171</sup>

Thus, as stated above in connection with the city's authority to levy a fee in exchange for access to state-owned waters and submerged lands, it

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165. See HAW. REV. STAT. § 46-1(8) (1993 & Supp. 1994).

166. 453 U.S. 609 (1981).

167. *Id.* at 621.

168. 462 N.E.2d 1098 (1984).

169. National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974).

170. Vanceburg v. Federal Energy Regulatory Comm'n, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977).

171. Emerson College v. City of Boston, 462 N.E.2d at 1105.

appears that the city would be authorized to levy such a fee, provided it was reasonable and did not generate significantly more revenue than is needed to maintain and operate Hanauma Bay Nature Park. The original fee schedule encountered problems in this regard. Within only three months of imposing the fees, the city had collected \$1.3 million and it expected to generate more than \$4 million by the end of the year. Given that the estimated 1996 operating budget for the park was set at \$1.07 million,<sup>172</sup> the city stood to generate approximately \$3 million in excess of the amount needed to maintain the park. Case law from other jurisdictions indicates that the revenue collected from fees cannot “significantly and consistently” exceed the government’s cost of providing services.<sup>173</sup> A \$3 million excess would certainly be considered significant. Moreover, because the original fee schedule was projected to generate between \$2 and \$3 million more than the estimated park operating costs each year,<sup>174</sup> it would be considered a consistent excess. Therefore, the original fee schedule would most likely have been struck down as an illegal tax, had it been challenged in Hawaii’s courts. Further support for this view is found in the stated purposes behind the original fee schedule. Although the fees were originally proposed as a use disincentive,<sup>175</sup> several reports in the local press indicated that they were imposed as part of a revenue-generating package designed to even out the city’s \$80 million short-fall.<sup>176</sup>

The U.S. Supreme Court has held that lands held in trust for the public are not permitted to be used to satisfy municipal debts.<sup>177</sup> Therefore, city officials appear to have acted outside their authority in designing the original user fee schedule as a means of generating revenue to assist the city in averting a severe budget crisis. In order to remain legal, any fees collected at Hanauma Bay must be used to cover costs validly associated with the operation of the park, and perhaps to a limited extent, the maintenance of associated facilities. Thus, the legality of fees in amounts large enough to serve as a use disincentive is doubtful, as such fees would

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172. Hannemann, *supra* note 85.

173. Commonwealth v. Caldwell, 515 N.E.2d 589, 593 (Mass. 1987).

174. Hannemann, *supra* note 85. The operating budget for Hanauma Bay nature park is expected to increase to approximately \$2.36 million by the year 2000. *Id.*

175. Mak & Moncur, *supra* note 12, at 52.

176. Pai, *supra* note 19. See also Pang, *supra* note 79; Gordon Y.K. Pang, *Fees for Visits to Hanauma Bay Canceled*, HONOLULU STAR-BULL., Dec. 7, 1995, at A5; Editorial, *Hanauma Fees*, HONOLULU ADVERTISER, Oct. 14, 1995, at A8 (statement by city budget director that \$4 million generated by fees is desperately needed by the city, which is in a severe financial crunch.)

177. Meriwether v. Garrett, 102 U.S. 472 (1880) (holding tax levied by municipality for the use of public property invalid).

likely generate revenues far in excess of those needed to maintain the park and associated facilities.

The newly adopted fee schedule appears to have remedied this problem of generating fees in excess of actual operating costs. By assessing a \$1 parking fee to all vehicles entering the park and a \$3 admission fee to all non-residents over the age of thirteen who are entering the beach portion of the park, the city expects that it will generate approximately \$2.6 million each year.<sup>178</sup> All funds will be placed in a special fund entitled the Hanauma Bay Nature Preserve Fund, the stated purposes of which are the following: 1) the operation, maintenance and improvement of the Hanauma Bay Nature Preserve; 2) visitor education and orientation programs; 3) a carrying capacity study to determine the appropriate number of visitors the park can accommodate at any one time; and, if excess funds are available, 4) the operation, maintenance and improvement of other facilities within the Koko Head District Park such as Maunalua Bay beach park, Koko Head rifle range, and the Koko Crater botanical gardens. Thus, not only is the projected income from the imposition of the newly adopted fee schedule expected to be significantly less than the income generated under the originally imposed fees schedule, but the new schedule, contains a “spillover” provision, directing that funds in excess of those needed to maintain Hanauma Bay Nature Park be put towards the operation and maintenance of other facilities within the Koko Head Regional Park. Such an arrangement greatly reduces the possibility that the fees could serve as a general revenue generating device.

The collection of parking, non-resident admission and concession fees at Hanauma Bay will require a careful accounting by the city to ensure that all fees are applied only towards approved uses. As concession fees, which generate approximately \$1 million annually, are not included in the Special Fund established by the new fee schedule, the uses of these fees and their relationship to the new fee schedule should be determined. This is particularly important as several members of the local tourism industry have claimed that concession fees and parking fees would generate enough revenue to operate and improve the park.<sup>179</sup> Combining the concession fees with the parking and non-resident admission fees would raise the projected annual income from the newly adopted fee schedule to \$3.6 million, a short amount away from the \$4 million projected under the original, allegedly illegal, fee schedule. Thus, an accounting of all fees collected at the Bay is certainly warranted.

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178. Hanaike, *supra* note 89.

179. *Id.*

The city should strive through this accounting to assure that the amounts being paid by residents to use the Bay, through tax dollars, are relatively equal to those being paid by non-residents, through an admission fee. This will create an administrative burden for the city and should be considered.

In summary, while the city may arguably have the legal authority to levy a non-resident user fee at Hanauma Bay under the auspices of the state's police powers, it must take measures to ensure that its fee schedule cannot be construed as a general revenue-raising device. Any and all fees collected should be reasonable and should be put towards the maintenance and operation of Hanauma Bay Nature Park, and to a limited extent, other facilities within Koko Head Regional Park.

## VI. CONCLUSION

Hanauma Bay is a unique natural resource which should be protected for the enjoyment and appreciation of generations to come. As previous efforts to preserve the Bay have proven ineffective, the city is justified in seeking to establish new management strategies. While the newly adopted fee schedule may be legally viable under the U.S. Constitution, as well as Hawaii's constitution and coastal access laws, some additional factors should be considered prior to its implementation.

As the parking and non-resident admission fees will generate income that will be used to improve management of the Bay, develop educational programs, and conduct biological surveys and carrying capacity studies, it appears that they have the potential not only to improve the environmental quality of the Bay, but also to enhance the overall quality of the visitor experience. In this way, the fees can be viewed as meeting important management objectives. What the new fee schedule will not be able to do, however, is serve as a use deterrent. The city should devise alternative management strategies to meet this goal, and should collaborate with the state in identifying alternate sites to accommodate visitors who may be turned away once the park's carrying capacity is reached. The identification and establishment of alternative sites will acknowledge Hawaii's strong public policy of extending as much of Hawaii's shoreline as is reasonably possible to public use and ownership.<sup>180</sup> This could also avoid challenges of the city imposed access restrictions by turned away visitors. Along these lines, the city should devise a detailed management plan that accurately assesses the resources needed to meet a set of well-defined

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180. County of Hawaii v. Sotomura, 517 P.2d 57, 61-62 (1973).

objectives. In this way, any fees collected can be carefully tailored to meet the true operation and maintenance needs of the park. This would eliminate the potential for the collection of fees in excess of those needed to maintain the park and would help to reduce the possibility that the fees could be deemed an illegal tax. Although the newly adopted fee schedule has a "safety valve" of sorts, in that it provides that excess fees will be applied towards the maintenance of other facilities within the Koko Head Regional Park, evidence suggests that the income derived from the collection of parking and non-resident admission fees when combined with concession fees, may exceed the projected operating budget of the park.<sup>181</sup> The collection of all fees should be carefully evaluated, so as to avoid the seemingly illegal result of the original fee schedule.

In devising its management plan, the city should seek the assistance from the state, as co-owner of the park. The State, and more specifically the Department of Land and Natural Resources, should be forced to take a more active role in the management of its MLCD and underwater park. Article IX, section 8 of the Hawaii constitution provides that the State is empowered to promote and maintain a healthful environment, including the prevention of any excessive demands upon *its* resources.<sup>182</sup> Because the MLCD and underwater park are owned by the State and are currently subject to excessive use, the State should be required to seek ways to rectify the situation. The State's participation in the development of a management plan for the park would provide a much needed opportunity to resolve some of the jurisdictional dilemmas related to the management of the Bay itself.

In addition, the State's management expenditures could also be figured into the fee schedule, and the city and State could partition the fees proportionally, according to their respective inputs. Through its participation in devising a management plan for the park, the state may want to reevaluate the Bay's dual designation as both a MLCD and a State Underwater Park, given that the statutory purposes behind their establishment are in conflict. The statutory purposes of establishing a MLCD are

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181. See Hannemann, *supra* note 85. The projected operating budget of Hanauma Bay Nature Park is \$2.36 million by the year 2000. The new fee schedule is expected to generate \$2.6 million annually. In addition, park concessions bring in approximately \$1 million each year. The combined annual income from parking, admission and concession fees would approximate \$3.6 million. Thus, a surplus of more than \$1.2 million could be generated each year. Such a surplus could potentially cause the legality of the fee schedule to be questioned. *Id.*

182. HAW. CONST. art. IX, § 8.

“specific to protecting and conserving marine resources.”<sup>183</sup> In contrast, the objective for establishing an underwater park is to “enhance recreational activities.”<sup>184</sup> These two objectives can conflict, and often lead to the detriment of the environment through over use, as demonstrated by the recent history of Hanauma Bay. The DLNR has suggested that recreational objectives should be a “secondary benefit” within MLCDs.<sup>185</sup> Thus, given the Bay’s present level of deterioration, the state should consider eliminating the Bay’s designation as an underwater park. Removing the underwater park designation may also help in deflecting any legal challenges to the new fee schedule that are based on the public trust doctrine, given that Hawaii recognizes access to some recreational opportunities as a protected right.<sup>186</sup> Lastly, because the city is imposing parking and non-resident admission fees largely for use of the Bay, which is considered state public trust land, the State could plausibly assert under Hawaii Revised Statutes section 10-13.5 that acting in its capacity of the Office of Hawaiian Affairs, it is entitled to twenty percent of the revenues generated by the collection of fees.<sup>187</sup> This would no doubt prove quite controversial, particularly given the state’s lax involvement in management of the Bay. It is, however, something that the city may want to consider in any fee schedule or joint-management regime it applies.

The city should also fully consider some of the administrative burdens that accompany the new fee schedule. First the city will have to implement the fee waiver for native Hawaiians who elect to visit the park for cultural or religious purposes. Therefore, guidelines should be established regarding: 1) criteria for designation of native Hawaiian status and how such a designation will be verified upon park entry; and, 2) criteria for defining which cultural and religious purposes will be deemed reasonable, and not in conflict with park objectives, so as to result in harm.<sup>188</sup> In addition, the city may want to revisit its decision to employ the collection of parking fees by park staff, as opposed to the use of parking meters.

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183. Haw. Dep’t of Land & Nat. Resources, *Ocean Sites Throughout the State That Can be Developed into Underwater Parks*, H. Res. 333, 16<sup>th</sup> Legis., 1991 Sess., at 2 (Haw. 1991).

184. *Id.*

185. *Id.*

186. *See supra* note 105.

187. HAW. REV. STAT. § 10-13.5 (1993), Use of public land trust proceeds, provides that “[t]wenty per cent of all revenue derived from the public land trust shall be expended by [OHA].” *See also* Memorandum from William M. Tam, Deputy Attorney General, State of Hawaii, to the Honorable Susumu Ono, Chairman, State of Hawaii Board of Land and Natural Resources (June 24, 1982) (regarding submerged lands as part of the public trust under 5(f) of the Admission Act) at 16. Submerged lands are ceded lands and “subject to the public trust established in Section 5(f) of the Admission Act.” *Id.*

188. *See Yoshishige, supra* note 25.

Parking meters may be preferable in that they could be used to potentially shorten people's visits to the Bay, and therefore accommodate more visitors. Through the use of meters, visitors would pay in direct proportion to the time they spent using the Bay, and in that sense, their use would follow a "user-pays" principle.

Finally, special consideration should also be given to the fact that as the fee schedule being implemented at Hanauma Bay Nature Park is the first fee schedule imposed for use of a public beach in Hawaii, others, including private land owners, may follow the city's lead and attempt to impose similar fees in exchange for access to private lands or beaches.<sup>189</sup> The city, therefore, should do its best to set a laudable, non-exploitive, precedent, particularly in light of Hawaii being the "Aloha State," and the impact that widespread non-resident user fees could have tourism.

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189. See Lendio, *supra* note 24, at 9.



