A recent decision by the Hawai'i Supreme Court regarding the traditional and customary rights of Native Hawaiians is important because it firmly recognizes the state's obligation to protect those rights.

What is the PASH case?
The PASH case refers to a lawsuit that was brought by a Big Island community group, Public Access Shoreline Hawai'i (PASH), after it was denied participation in a public hearing. PASH took legal action because it was alarmed at the development of the Kona Point Resort, which would have impacted 450 acres of shoreline property in the hauula'a of Kohala.

Nansay was asking the Hawai'i County Planning Commission for a permit to develop these lands when PASH stepped forward and asked to be a part of a hearing on whether Nansay should receive the permit. In this hearing various groups would be required to present their evidence and arguments for or against the granting of the permit. PASH believed that the commission needed to hear reasons why the environment should be protected and traditional and customary rights safeguarded. The commission, however, decided that PASH could not participate in the hearing.

What did the Hawai'i Supreme Court rule?
The state Supreme Court reversed the Hawai'i County Planning Commission's decision and determined that PASH had made a claim that deserved full consideration. The court said the state has an obligation to protect the traditional and customary rights of Native Hawaiians and it recognized that unique conditions are placed on the rights of landowners in Hawai'i which limit the landowner's use of his or her land. In other words, property ownership in Hawai'i is not the same as it is in the continental United States. The Hawai'i Supreme Court ruled that land ownership in Hawai'i is not only based on the common law of England and America, but includes the traditional ideals of Hawaiian land tenure. The decision recognized the traditional relationship Native Hawaiians have with the land and the importance of maintaining that relationship.

Why is the ruling important?
The Supreme Court's ruling ensures that in the future, the permitting process will allow the interests of Native Hawaiians to be brought to the table for consideration.

The Hawai'i State Constitution Article XII section 7:
The State reafirms and 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 who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

The Hawai'i revised statutes 7-1: Where the landlords have obtained...allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take fire wood, house timber, thatch, or ki leaf... for their own private use... not... to sell for profit. The people shall also have the right to drinking water, running water, and the right of way. The springs, water and roads shall be free to all, on lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

The Hawai'i revised statutes 1-1: The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State in all cases, except as... fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.
What PASH is according to the Hawaiʻi Supreme Court:

- Native Hawaiian rights cannot be regulated out of existence by unreasonable or burdensome laws, permits, or fees.
- The Hawaiʻi Supreme Court did not clearly define when a tradition must be established.
- A Hawaiian tradition should be determined by balancing the reasons for continuing it and the harm it poses.
- The Hawaiʻi Supreme Court is counting on Native Hawaiians to regulate themselves.
- While there may have been disruptions to the continuous practice of a tradition or custom, the right to exercise that custom & tradition has not been lost.

What PASH is not:

- The Hawaiʻi Supreme Court's decision is not a new law but a recognition of laws over 150 years old, and traditional practices which pre-date these laws.
- The PASH case does not support access to fully developed land for any reason.
- The PASH decision does not hinder or harm Hawaiʻi's economy, rather it restores balance to decisions over cultural preservation and necessary development.

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