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E Ho‘i ka Nani

Dru Hara* and Leeyannah Armaine V. Santos**

On March 15, 2024, the University of Hawai‘i Law Review hosted a Symposium titled *E Ho‘i ka Nani: Chief Justice Richardson’s Public Trust Legacy and Envisioning the Future of Wai*. In planning this Symposium, and given the timing,¹ we knew that we wanted to honor the legacy of Chief Justice William S. Richardson (“CJ” or “CJ Richardson”) as a jurist and an educator. That decision was easy. The hard part was deciding which part of his legacy to highlight, because, as many know, whenever you start down the path of trying to understand contemporary law in Hawai‘i, almost all roads lead to CJ.

Ultimately, we chose to spotlight CJ’s jurisprudence on the public trust, with a focus on water law. For one, the Richardson court decisions on the public trust revolutionized the framework for modern water law and policy in Hawai‘i.² Further, as we all know in Hawai‘i, *e ola i ka wai*, water is life, and this ubiquity requires that everyone, of all walks of life, be invested in the conservation, protection, and equitable distribution of water. For our law review board, water law is a topic where many of our individual fields of study converge, as it implicates environmental law, Native Hawaiian rights, and social and restorative justice. This academic year also marks fifty years since the landmark case *McBryde Sugar Co. v. Robinson* was decided by the Richardson court. The *McBryde* decision³ brought about a seismic shift in Hawai‘i water law and served as the catalyst for many of the resource protections we have today.

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¹ Chief Justice Richardson played a crucial role in establishing Hawai‘i’s first and only law school, which opened its doors to its first class in the Fall of 1973. Thus, the 2023–2024 school year marks the 50th anniversary of the law school.

² See *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973); *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982); *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982).

³ Associate Justice Kazuhisa Abe authored the *McBryde* opinion and held that the state holds all waters flowing in natural watercourses in trust for the people of Hawai‘i. *McBryde*, 54 Haw. at 176, 504 P.2d at 1333.

Law and the call for justice develop in real time. Now more than ever, our communities are alert to the fact that we need to pay serious attention to how our water resources are managed and protected. On O'ahu we are dealing with the crisis at Kapūkākī (Red Hill).⁴ And on Maui, which has long been ground zero for struggles over water, the fires that tore through the island in August 2023 have revealed a harsh truth about how the historical mismanagement of water has left our communities vulnerable to the impacts of climate change.⁵ As we planned the Symposium and continued to delve deeper into the issues and interests at stake, we began to understand the importance of the topic we decided to cover and realized that struggles over water on Maui and across our state are, in reality, a battle for the soul of Hawai'i.⁶

Law is just one instrument for justice. In this spirit, our Symposium departs from the formal tradition of focusing solely on the voices of legal scholars. In an earnest effort to find lasting and equitable solutions, we gathered lawyers, judges, community leaders, and other water experts together in

⁴ See generally Kevin Knodell, *Navy Investigating Fuel Leak at Red Hill*, HONOLULU CIV. BEAT (May 7, 2021), <https://www.civilbeat.org/2021/05/navy-investigating-fuel-leak-at-red-hill/> (reporting that while Navy officials do not believe any fuel has leaked into the environment outside of the Red Hill facility, community members have long sounded the alarms about petroleum contamination in the groundwater beneath the fuel storage tanks); Associated Press, *Hundreds of Military Families Sickened by Contaminated Pearl Harbor Water*, GUARDIAN (Dec. 3, 2021, 3:48 PM EST), <https://www.theguardian.com/us-news/2021/dec/03/hawaii-drinking-water-contamination-navy> (noting that hundreds of military families reported a fuel odor emanating from running water as well as physical symptoms such as stomach cramps and nausea); Andrea Malji et al., *The Navy's Fuel Leak in Hawai'i Outraged Local Activists. That's Happened Around the Globe.*, WASH. POST (Jan. 13, 2022, 7:00 AM EST), <https://www.washingtonpost.com/politics/2022/01/13/red-hill-fuel-water-contamination-activism/> (discussing that people of color often bear the burden of militarization's adverse impacts on the environment, and that grassroots community group O'ahu Water Protectors are demanding accountability and leading the opposition to the Navy's handling of the Red Hill fuel leaks).

⁵ Naomi Klein & Kapua'ala Sproat, *Why Was There No Water To Fight the Fire in Maui?*, GUARDIAN (Aug. 17, 2023, 4:02 PM EDT), <https://www.theguardian.com/commentisfree/2023/aug/17/hawaii-fires-maui-water-rights-disaster-capitalism>; Elahe Izadi & Zocann Murphy, *Lahaina's Deadly Fire Has Intensified Maui's Fights Over Water Rights*, WASH. POST (Aug. 23, 2023, 1:00 PM EDT), https://www.washingtonpost.com/climate-environment/2023/08/23/maui-water-rights-fires-lahaina/?nid=top_pb_signin&arcId=7MKUIMBFIJAX7DLU7ZLS44T5LA&account_location=ONSITE_HEADER_ARTICLE.

⁶ See Isaac Moriwake & Kekai Keahi, Guest Speakers, Maoli Thursday, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawai'i at Mānoa William S. Richardson School of Law: Maui Ola: E Ho'i ka Nani: Pondering Maui Komohana's Water Future (Nov. 2, 2023); William Brangham, Maca Lenei Buhre & Sam Lane, *Maui Faces Water Rights Questions as Island Continues Wildfire Recovery*, PBS NEWSHOUR (Nov. 17, 2023, 6:25 PM EST), <https://www.pbs.org/newshour/show/maui-faces-water-rights-questions-as-island-continues-wildfire-recovery>.

conversation to discuss the most pressing issues around water law today, with a particular focus on how water management, and the application of the public trust, will be critical to Maui Komohana’s recovery from the devastating fires.

In our first panel, we reflected on the legacy of Chief Justice Richardson, the visionary jurist who made so many contributions to justice over his lifetime.⁷ The legal experts on this panel illustrated the transformation of water law in Hawai‘i under the Richardson court.⁸ They expressed the power and the promise of the Hawai‘i public trust doctrine, grounded in traditional and customary Hawaiian practice, as not only an instrument for equity, but as an affirmative obligation that the state must enforce through its policies and administration of water management. In doing so, our first panel called upon the state and its agencies to take a proactive approach to conservation and the application of the public trust.

In Panel II, water protectors – lo‘i kalo farmers, kula kaiapuni kumu, and activists – from different generations shared their experiences advocating for water justice as leaders of their communities.⁹ They taught us the importance of farmers and cultural practitioners advocating for water before the court, the Commission on Water Resource Management (“Water Commission”), and the legislature. More importantly, they underscored the importance of having lawyers, policymakers, and elected officials put their feet and their hands in the soil too. As the panel concluded, they also emphasized the importance of winning in the court of public opinion, and how essential it is to foster community in approaching that goal. Social change demands a coalition, and each of us has a role and a stake in our water future.

Panel III¹⁰ discussed the challenges of upsetting the status quo, and how the interests that exercise control over our water policy are still tethered to a

⁷ University of Hawai‘i Law Review, *Panel I – Fifty Years of McBryde v. Robinson: Chief Justice Richardson’s Legacy in Water Rights*, YOUTUBE (Apr. 8, 2024), https://www.youtube.com/watch?v=AGaBGzwmDJM&list=PLzHOTI_rIVKvaYpqXWL-g8-UQn8W63bwU&index=2 [https://perma.cc/J869-YHGC].

⁸ Professor Emerita Melody K. MacKenzie moderated this panel alongside panelists Associate Justice Richard J. Pollack (ret.), Professor Williamson B.C. Chang, and water law litigator Isaac Moriwake.

⁹ University of Hawai‘i Law Review, *Panel II – Kūkulu Kaiāulu: Uplifting Community Water Protectors*, YOUTUBE (Apr. 8, 2024), https://www.youtube.com/watch?v=9fd7zQnhleU&list=PLzHOTI_rIVKvaYpqXWL-g8-UQn8W63bwU&index=3 [https://perma.cc/2US6-22V9]. Water protectors Hōkūao Pellegrino, Uncle Paul Reppun, and Kanoë Steward shared their insights in Panel II moderated by lāhui lawyer Kaulu Lu‘uwai.

¹⁰ University of Hawai‘i Law Review, *Panel III – Plantation Disaster Capitalism: The Legacy of Settler Colonialism in Maui Komohana*, YOUTUBE (Apr. 8, 2024), https://www.youtube.com/watch?v=7lMFcy_xdZ8&list=PLzHOTI_rIVKvaYpqXWL-g8-UQn8W63bwU&index=4 [https://perma.cc/XF2J-6PVN].

plantation legacy.¹¹ The panelists highlighted how real progress toward restorative justice is possible when the Water Commission and the state approach their public trust obligations in good faith, consistent with CJ Richardson's vision and the mandate of our constitution.¹² But they also warned that this progress is fragile and vulnerable so long as politics continue to permeate our water policy. Landed interests, the governor, and other political forces can strip away hard won protections and public trust frameworks with the snap of a finger.¹³ Although the public trust provides a legal backstop, on the ground, the community is the real backstop, and historically, it is the community who has carried this burden.¹⁴

In our final panel, we heard from water experts that existing systems do not serve the people.¹⁵ It is not enough for the community to have a seat at the table. The community, and the Native Hawaiian community in particular, need the ability to set that table, and to set the menu.¹⁶ The solutions are there. Housing, food, economic stability, climate security, and fire resilience. We have the model for a circular economy based in traditional and customary

¹¹ See, e.g., Klein & Sproat, *supra* note 5. Professor D. Kapua'ala Sproat moderated this panel with Lahaina community leader Kekai Keahi and attorneys Elena Bryant and Wayne Tanaka.

¹² See HAW. CONST. art XI, §§ 1, 7, art XII, § 7.

¹³ Claire Wang, *How 19th-Century Pineapple Plantations Turned Maui into a Tinderbox*, GUARDIAN (Aug. 27, 2023, 7:00 AM EDT), <https://www.theguardian.com/environment/2023/aug/27/maui-wildfire-water-plantations-ecology>; Patricia Tummons, *Emergency Order May Bring More Hardship to Taro Farmers*, ENV'T HAW. (Sept. 1, 2023), <https://environment-hawaii.org/?p=15347>; Council for Native Hawaiian Advancement, *Know Your Wai: Where Did the Water Go?*, YOUTUBE (Nov. 17, 2023, 00:51:05–53:11), <https://www.youtube.com/watch?v=oV-DkewhNCQ>.

¹⁴ E.g., Wang, *supra* note 13; A. U'ilani Tanigawa Lum, *Ola Ka Wai I Ka Malu 'Ulu O Lele: A Collective Memory of Injustice in Maui Komohana*, 47 U. HAW. L. REV. (forthcoming Winter 2024) (discussing the Maui Komohana community's herculean organizing efforts that has effectively been carrying the burden in light of plantation disaster capitalism).

¹⁵ University of Hawai'i Law Review, *Panel IV – Water Issues on the Road Ahead*, YOUTUBE (Apr. 8, 2024), https://www.youtube.com/watch?v=di8UIxJoyoY&list=PLZHOTI_rIVKvaYpqXWL-g8-UQn8W63bwU&index=5 [<https://perma.cc/GL8Y-GB4P>]. Our classmate and Volume 46 author Holly K. Doyle moderated our last panel alongside Lahaina farmer and community leader Kaipō Kekona, water policy expert Dr. Jonathan Likeke Scheuer, and storyteller and current Honolulu Board of Water Supply Chair Nā'ālehu Anthony.

¹⁶ *Id.* at 00:43:24–45:50.

practice.¹⁷ And water is at the heart of everything.¹⁸ But it takes a shift in priorities. It takes the overturning of entrenched interests. And it takes all of us moving together on every front.

As the only law review in the State of Hawai‘i, we have a responsibility to engage with, address, and contribute to the local and national discourse on emerging legal issues that greatly impact our Hawai‘i and Pacific Island communities. Thus, we decided to hold this Symposium to further uplift these important dialogues, with the hope that providing a forum for community voices will continue these ongoing and critical conversations, make an impact on public opinion, and help bring about a change in the prevailing narrative in favor of those who have been wronged.

It is also why we chose to publish the pieces in this Issue. This Issue opens with welcome remarks from Dean Camille Nelson and a tribute to Chief Justice Richardson written by Professor Emerita Melody K. MacKenzie, both of which provide the necessary foundation and background for understanding the significance of honoring CJ Richardson’s public trust legacy in 2024, specifically his jurisprudence around water law, in light of the August 2023 Maui wildfires. The subsequent scholarship from Richardson students builds upon the central theme of rectifying historic mismanagement of water in Hawai‘i, and Maui in particular. From reclaiming Lahaina’s wastewater to restoring full flow to Mokuhinia, each piece centers community-led efforts that redress Maui’s history of settler colonialism and forge a path forward for all communities.

We hope that with every piece, you consider the following: We are at an inflection point. Our hope for the future hinges on whether we can pivot our society. Do we want to continue the status quo? Or do we want to make the difficult choices necessary to ensure our future. The most insidious form of

¹⁷ See generally Kamanamaikalani Beamer et al., *Island and Indigenous Systems of Circularity: How Hawai‘i Can Inform the Development of Universal Circular Economy Policy Goals*, 9 *ECOLOGY & SOC’Y* 1 (2023) (using the ancestral circular economy of Hawai‘i prior to colonization as a model to understand how “circular economies in capitalist market systems can be refined and sustained in the contemporary period.”).

¹⁸ See *id.* (describing how the ancestral Hawaiian economic system “mirrored the natural structures of the water cycle” and how “[a]ncestral societies created social systems . . . that mimicked water’s natural regenerative processes while enabling social-environmental equity.”); D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 *MARQ. L. REV.* 127, 140 (2011) (“In ‘Ōlelo Hawai‘i, . . . the word for fresh water is wai. . . . The term for law is kānāwai, because Hawai‘i’s early laws evolved around the management and use of fresh water. Given that wai, or water, is at the heart of each of these concepts, it is no coincidence that both wealth and the law were and continue to be defined by access to and appropriate management of Hawai‘i’s fresh water.”) (citations omitted).

settler colonialism is complacency.¹⁹ All of us, whether we are kanaka or not, depend on water for our survival. And as we search for sustainable solutions, we must ask ourselves the question of if we might be looking for answers through a colonized lens.²⁰

We would like to extend our deepest gratitude to all of our panelists²¹ and moderators²² for their invaluable time, expertise, and wisdom, particularly those who made the trip from Maui. Mahalo to Kumu Hula Cody Pueo Pata who opened the space for the Symposium with oli, pule, and 'ike Hawai'i to ground our substantive discussions around wai.²³ We would also like to thank our sponsors for their generous support.²⁴ With their contributions, the law review was able to host its first in-person symposium in several years, allowing us to reach a broader audience and further uplift the work and efforts of leaders and activists in our very own community.

Mahalo to our Faculty Advisors, Professors Justin Levinson and Miyoko Pettit-Toledo for their wisdom, guidance, and support at every step as we planned this timely event, and our Faculty Support Specialist, Julie Suenaga, for her tireless work behind the scenes and commitment to supporting the journal. We would also like to express immense gratitude to Professors D. Kapua'ala Sproat and A. U'ilani Tanigawa Lum, and the entire Ka Huli Ao team, for sharing their invaluable insights and mana'o.

This Symposium, and the work of the law review, would not be possible without the support of Dean Camille Nelson and other members of the faculty and staff who have dedicated themselves to making our law school a truly unique and supportive environment for learning. We also thank our Volume

¹⁹ University of Hawai'i Law Review, *Panel III – Plantation Disaster Capitalism: The Legacy of Settler Colonialism in Maui Komohana*, YOUTUBE (Apr. 8, 2024, at 01:26:19–01:26:57), https://www.youtube.com/watch?v=7lMFcy_xdZ8&list=PLzHOTI_rIVKvaYpqXWL-g8-UQn8W63bwU&index=4 [https://perma.cc/XF2J-6PVN].

²⁰ *Id.* at 00:42:26–00:43:07.

²¹ Panel I (Fifty Years of *McBryde v. Robinson*: Chief Justice Richardson's Legacy in Water Rights): Associate Justice (ret.) Richard Pollack, Isaac Moriwake, and Professor Williamson B.C. Chang. Panel II (Kūkulu Kaiāulu: Uplifting Community Water Protectors): Hōkūao Pellegrino, Paul Reppun, and Kanoelani Steward. Panel III (Plantation Disaster Capitalism: The Legacy of Settler Colonialism in Maui Komohana): Elena Bryant, Kekai Keahi, and Wayne Tanaka. Panel IV (Water Issues on the Road Ahead): Nā'ālehu Anthony, Kaipo Kekona, and Dr. Jonathan Scheuer.

²² Professor Emerita Melody K. MacKenzie (Panel I), Kaulu Lu'uwai (Panel II), Professor D. Kapua'ala Sproat (Panel III), and Holly Doyle (Panel IV).

²³ University of Hawai'i Law Review, *Opening Protocol by Kumu Pueo Pata*, YOUTUBE (Apr. 8, 2024), https://www.youtube.com/watch?v=oAcDKRtek1s&list=PLzHOTI_rIVKvaYpqXWL-g8-UQn8W63bwU&index=1 [https://perma.cc/4Q38-JP72].

²⁴ Hawai'i Community Foundation, Kamehameha Schools, the University of Hawai'i Office of Student Equity, Excellence, and Diversity, the Ka Huli Ao Center for Excellence in Native Hawaiian Law, the Jon Van Dyke Foundation, William S. Richardson School of Law, and William S. Richardson School of Law Student Bar Association.

46 Editorial Board and Staff Writers for their incredible work and devotion to make the Symposium a success and to publish this Issue. We especially extend our gratitude to our Symposium Committee, made up of dedicated Law Review members²⁵ who have devoted their time and energy into helping us plan this magnificent Symposium. We could not have done it without you.

Mahalo piha to those who joined us at the Symposium, and to our readers. Whether you joined us at the Symposium or chose to read this Symposium Issue, you now join us in carrying a kuleana forward to fight for our water future – for the soul of Hawai'i. And as you 'auamo that kuleana, we hope you think like Chief Justice William S. Richardson. Think of the little guy downstream.²⁶

E ola i ka wai.

²⁵ Kalei Akau (Executive Editor), Hanna Taum (Executive Editor), Taylor Takeuchi (Managing Editor), Lydia Treanor (Outside Articles Editor), Robin Girard (Casenote Editor), and Isabelle Constant (Podcast Editor).

²⁶ Mari Matsuda, *A Richardson Lawyer*, 33 U. HAW. L. REV. 61, 67 (2010).

Welcome Remarks

Camille A. Nelson *

On behalf of the William S. Richardson School of Law, I am honored to welcome you to the University of Hawai‘i Law Review symposium. Good morning, and welcome to our students, staff, and professors; greetings also to justices, judges, attorneys, legal professionals, and community members joining us in person and online. Thank you to the speakers and moderators joining us today; we appreciate you contributing your time and inspiring mana‘o to this important conversation. I would also like to warmly welcome panelists and guests from Maui Komohana who are joining us in person and online. Finally, I would like to acknowledge several distinguished members of the judiciary, Chief Justice Mark Recktenwald and Justices Todd Eddins, Lisa Ginoza, and Vladimir Devens, and Judge Barbara (Bebe) Richardson, who are joining us in person and online. Thank you all for being with us here today!

This symposium highlights the legacy of Chief Justice Richardson and the future of water in Hawai‘i. We celebrate two momentous anniversaries: First, the 50th anniversary of the law school founded by Chief Justice Richardson.¹ He approached the founding of our law school from the perspective of equity, with the goal that the State of Hawai‘i, too, should offer quality legal education and, with it, the dream that access to education would lead to a more just and equitable society.²

It has also been 50 years since the Richardson Court first affirmed water rights in Hawai‘i through the public trust doctrine in the landmark case *McBryde v. Robinson*.³ So, in many ways, Chief Justice Richardson’s vision guides this symposium. In doing so, Chief Justice Richardson embraced an inclusive equity-seeking approach, one which sought to recenter Native

* Dean and Professor of Law, University of Hawai‘i at Mānoa, William S. Richardson School of Law. The author wishes to express her gratitude to the University of Hawai‘i Law Review editors. Not only was their work of the highest caliber, but they were also an absolute pleasure to work with. Mahalo.

¹ See Melody K. MacKenzie, *Ka Lama Kū O Ka No’eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 5 (2010) (discussing Chief Justice Richardson’s commitment to education for Hawai‘i’s disadvantaged groups, which led to the establishment of the law school). See generally CAROL S. DODD, *THE RICHARDSON YEARS: 1966–1982* (1985) (providing a biography of Chief Justice Richardson).

² See generally MacKenzie, *supra* note 1 (honoring Chief Justice Richardson’s role as a jurist, mentor, and leader in Hawai‘i).

³ *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973).

Hawaiian customary law in our modern jurisprudence.⁴ There is perhaps no greater example of this than the public trust jurisprudence, through which he set forth the fundamental framework that has since shaped the landscape of water law in Hawai‘i.⁵

This symposium marks these five decades and contemplates the next 50 years. We acknowledge and celebrate the community leaders, advocates, students, and those within our legal community who continue to further this vision set forth by Chief Justice Richardson through their work and commitments. We are confident that through this convergence of expertise and voices, solutions for our future—equitable, lasting solutions—will emerge.

As Hawai‘i’s only law school, the William S. Richardson School of Law is at the center of intersecting local, national, and global discourse. Through their scholarship and work in communities, our students, alumni, and faculty remain at the forefront of transformative justice movements for communities here in Hawai‘i and beyond.⁶ Today’s event centers on the unique struggle for justice for the people of Maui. However, the consequential discussions that are the focus of today’s program will have important implications for water management and policy across all of Hawai‘i and may serve as a model beyond our borders.

In closing, I would like to extend a special thank you to the Law Review Symposium Committee, led by Editors-in-Chief Leeyannah Santos and Dru Hara, and Executive Editors Kalei Akau and Hanna Taum – we appreciate

⁴ *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 746 (1982) (setting the foundation for future Hawai‘i court cases that affirmed Native Hawaiian traditional and customary rights); see MacKenzie, *supra* note 1, at 11 (discussing Chief Justice Richardson’s *Kalipi v. Hawaiian Trust Co.* opinion that affirmed and protected Native Hawaiian gathering rights).

⁵ See *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982) (affirming the influence of the riparian water rights in Hawai‘i law); *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982) (clarifying and explaining the doctrines of appurtenant and riparian rights and reaffirming Hawai‘i’s public trust doctrine rooted in traditional Native Hawaiian law); *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977); *In re Robinson*, 49 Haw. 429, 421 P.2d 570 (1966); *In re Kelley*, 50 Haw. 567, 445 P.2d 538 (1968); see also MacKenzie, *supra* note 1, at 7–9 (discussing the string of cases decided by the Richardson court that advocated for natural resources to be held for the benefit of the public in Hawai‘i).

⁶ See, for example, Charles Lawrence, *Each Other’s Harvest*, in *CARVING OUT A HUMANITY: RACE, RIGHTS, AND REDEMPTION* 12–27 (Janet Dewart Bell & Vincent M. Sutherland eds., 2020); Mari J. Matsuda, *This is (Not) Who We Are: Korematsu, Constitutional Interpretation, and National Identity*, 128 *YALE L.J. F.* 657 (2019); Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization’s Harms*, 27 *WM. & MARY BILL RTS. J.* 501 (2018); D. Kapua‘ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 *STAN. ENVTL. L. J.* 157 (2016); Eric K. Yamamoto, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court*, 18 *UCLA ASIAN PAC. AM. L. J.* 71 (2014); Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 *COLUM. L. REV.* 1607 (2012) for stellar examples of scholarship from Richardson professors.

your hard work and evocation of Chief Justice Richardson's vision in the centering of this symposium. These student editors have dedicated countless hours over the last several months to creating this multi-disciplinary forum highlighting the complex landscape of water issues in Hawai'i. They have done so with diligence, skill, grace, and professionalism and they have put together a phenomenal program.

I thank you all for being here to engage with these important conversations.

The Vision of Chief Justice William S. Richardson

Melody Kapilialoha MacKenzie*

Hō mai ka ‘ike nui, ka ‘ike iki

*Grant knowledge of the great things, and of the little things.*¹

I. INTRODUCTION – KA ‘IKE NUI, KA ‘IKE IKI

As the William S. Richardson School of Law (“Law School” or “WSRSL”) celebrates the 50th anniversary of its founding, and the University of Hawai‘i Law Review nears the 45th anniversary of its first issue, this piece begins with a traditional blessing. This blessing was given in the introduction to the very first issue of the Law Review in Fall 1979 by Chief Justice William S. Richardson of the Hawai‘i Supreme Court.² He explained that:

In early Hawaii, when a skillful piece of work was completed, a feast was held at which the finished product was blessed. This blessing was essential, not for every product of the artisan, but for the first such work—the first mat, quilt, fish-net. The blessing accrued not only to the completed work but also to all future works by the artisan. The prayer given was composed to fit the occasion and addressed to the guardian spirit identified with the material used in the work. Traditionally, the prayer would contain the phrase:

* This Tribute draws from and builds upon an article, “Ka Lama Kū O Ka No‘eau: The Standing Torch of Wisdom,” written by the author that appeared in a volume honoring Chief Justice Richardson published by the University of Hawai‘i Law Review in Winter 2010. Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3 (2010). I have been a direct beneficiary of C.J. Richardson’s vision many times over – I graduated in the first class from the Law School, was his law clerk for several years following graduation, and have had the honor and joy of being a professor at the Law School and the Founding Director of Ka Huli Ao Center for Excellence in Native Hawaiian Law.

¹ Chief Justice William S. Richardson, *Ka ‘ike nui, ka ‘ike iki*, 1 U. HAW. L. REV. ix, ix (1979).

² *Id.*

Hō mai ka ‘ike nui, ka ‘ike iki.

*Grant knowledge of the great things,
and of the little things.*

Ka ‘ike nui referred to knowledge of the work as a whole, while ka ‘ike iki referred to knowledge of the details of the materials and technique which a good artisan should thoroughly understand.³

Former Associate Justice of the Hawai‘i Supreme Court, Robert G. Klein, later commented that this ancient prayer:

[B]lesses the work as a whole and the craftsmanship behind it. It is very apropos to CJ’s vision of the law as a combination of the wisdom of modern and ancient Hawai‘i—uniquely Hawaiian law. Where else but in Hawai‘i would we ever read an introduction to a law review like this one?⁴

William S. Richardson has been the only Kānaka ‘Ōiwi⁵ Chief Justice of the Hawai‘i Supreme Court since the time of the Hawaiian Kingdom.⁶ His vision of justice for Hawai‘i’s people was expansive and looked to the past and to ‘Ōiwi customs and values, to help shape the future of the law and, indeed, of Hawai‘i itself.⁷ His vision was fulfilled not only through the decisions of the Hawai‘i Supreme Court, but also through the establishment of the Law School that today bears his name, a school that seeks to embody the values he represented.⁸

This opening to the Law Review’s issue celebrating the Law School’s 50th anniversary and the development of the law on wai (water) and the restorative justice values brought into focus in recent cases, begins with a short

³ *Id.*

⁴ Robert G. Klein, *William S. Richardson: Developing Hawai‘i’s Lawyers and Shaping the Modern Hawai‘i Court System*, 33 U. HAW. L. REV. 33, 34 (2010).

⁵ In this Tribute, the terms Native Hawaiian and Kanaka ‘Ōiwi are used interchangeably to refer to the Indigenous People inhabiting Hawai‘i prior to 1778.

⁶ See UNIV. HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., *Hawai‘i Legal History: Justices*, <https://law-hawaii.libguides.com/hawaii/legalhistory/justices> (last updated July 13, 2023, 11:05 AM).

⁷ Klein, *supra* note 4, at 33–34; Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6 (2010) [hereinafter MacKenzie, *Ka Lama Kū O Ka No‘eau*].

⁸ Klein, *supra* note 4, at 37.

discussion of C.J. Richardson,⁹ his life and journey. It then briefly reviews some of the major cases his court decided, the continuing importance of those cases, and their effect on the law today. The Tribute then turns to the Law School, its impactful programs, and its professors and graduates and their effect, not only in Hawai'i, but throughout the Pacific and Asia and, indeed, the world. The Tribute then concludes with a short mahalo piha to C.J. Richardson for his knowledge, wisdom, compassion, and vision – expressed through his 'ike nui and 'ike iki.

II. WILLIAM S. RICHARDSON – KA LAMA KŪ O KA NO‘EAU¹⁰

In Hawaiian tradition, admiration for a wise person is often expressed using the phrase “ka lama kū o ka no‘eau,” literally meaning “the standing torch of wisdom.”¹¹ This is indeed a fitting description of William Shaw Richardson. C.J. Richardson was born into a working-class Hawaiian, Chinese, and Caucasian family in 1919.¹² His father was from Maui while his mother was from Kohala, Hawai'i Island.¹³ While growing up, C.J. “worked as a newsboy and pineapple hand for spare change.”¹⁴ His father built the family's house from surplus lumber, and “his mother sewed shirts using buttons collected from used clothing. He didn't own a pair of shoes until he was in the sixth grade.”¹⁵ He grew up in Kalihi and Kaimukī and went to public schools, graduating from Roosevelt High School in 1937.¹⁶ C.J. attended the University of Hawai'i where he majored in business and economics and was captain of the swim team.¹⁷ His classmates included those

⁹ Throughout this Tribute, Chief Justice Richardson will be referred to as C.J. Richardson or just C.J..

¹⁰ MARY KAWENA PUKUI, 'ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 155 (1983).

¹¹ *Id.*; see MacKenzie, *Ka Lama Kū O Ka No‘eau*, *supra* note 7, at 3. For a more detailed biography of C.J. Richardson, see CAROL S. DODD, *THE RICHARDSON YEARS: 1966-1982* (1985).

¹² Dennis Hevesi, *William S. Richardson, Ex-Chief Justice in Hawaii, Dies at 90*, N.Y. TIMES (June 25, 2010), <https://www.nytimes.com/2010/06/25/us/25richardson.html>; Interview by Warren Nishimoto & Daniel W. Tuttle with William S. Richardson, Hawai'i Supreme Court, Chief Justice, in Honolulu, Haw. (Jan. 24, 1990), transcript at 919, *available at* <https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/f462efab-ad40-4adb-b14a-4c294bd23631/content> [hereinafter Richardson Interview].

¹³ Richardson Interview, *supra* note 12.

¹⁴ Michael Tsai, *Justice 'gave life to Hawaiian law'*, HONOLULU STAR-ADVERTISER (June 22, 2010), <https://www.staradvertiser.com/2010/06/22/hawaii-news/justice-gave-life-to-hawaiian-law/>.

¹⁵ *Id.*

¹⁶ Richardson Interview, *supra* note 12, at 918.

¹⁷ *Id.* at 918, 921.

who would become well-known political figures in Hawai‘i’s history, including the late U.S. Senator Spark M. Matsunaga.¹⁸

Although he was not interested in a law career, his grandfather had been an attorney in the Hawaiian Kingdom, and C.J. was tapped as the one in his generation to continue that tradition.¹⁹ He graduated in 1941 from the University of Hawai‘i and ended up attending the University of Cincinnati College of Law.²⁰ Having to travel so far away from Hawai‘i to get his law degree, as well as the financial sacrifice his family made to send him to law school, made a deep impression on C.J.²¹ After he received his law degree – with the outbreak of World War II, he worked extra hard to complete his degree in two years – he went into the Army, where he saw combat in the South Pacific as a platoon leader with the 1st Filipino Infantry Regiment.²² Once he got out of the Army, he opened his own small law firm in Honolulu in 1946.²³ He also became politically active in the Democratic party, helping to organize the Hawaiian community in support of Democratic candidates.²⁴

Because of C.J. Richardson’s background – his humble beginnings, his long journey to attend law school, his service in World War II, and his desire to change the “second-class” status of Hawai‘i’s people, he committed himself to social justice by changing Hawai‘i’s political and government structure.²⁵ C.J. Richardson consistently encouraged Kānaka ‘Ōiwi and other underrepresented groups to participate in the legal system to make positive change for all of Hawai‘i’s people.

C.J. Richardson was a proponent of statehood, in part because he chafed under the restrictions that territorial status brought to Hawai‘i, such as the high taxes that the people of Hawai‘i paid without receiving any direct

¹⁸ *Id.* at 920.

¹⁹ *Id.* at 922–23. C.J. Richardson’s grandfather, John Richardson, was a strong supporter of Queen Lili‘uokalani. See Tsai, *supra* note 14. He was one of four leaders of the po‘e aloha ‘āina who, in 1897, carried two sets of petitions to present to members of the U.S. Senate. NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 157–58 (2004). The petitions, by Hawaiian nationalist organizations, Hui Aloha ‘Āina and Hui Kālai‘āina, had almost thirty-eight thousand signatures opposed to the U.S. annexation of Hawai‘i. UNIV. HAW. AT MĀNOA LIBR., *Hawai‘i – Kū‘ē Petitions Anti-Annexation*, <https://guides.library.manoa.hawaii.edu/kuepetitions> (last updated Mar. 20, 2023, 8:58 AM).

²⁰ Tsai, *supra* note 14; Richardson Interview, *supra* note 12, at 918.

²¹ See Richardson Interview, *supra* note 12, at 923–24.

²² Tsai, *supra* note 14.

²³ Richardson Interview, *supra* note 12, at 924–25.

²⁴ *Id.* at 930–31; Tsai, *supra* note 14 (describing how C.J. Richardson served as the chair of the Hawai‘i Democratic Party from 1956 to 1962).

²⁵ Richardson Interview, *supra* note 12, at 933; Tsai, *supra* note 14.

benefit.²⁶ Moreover, he strongly felt that it was unfair to have Hawai‘i’s governor, as well as judges of the Hawai‘i Supreme Court, and many other government officials, appointed by the U.S. President and confirmed by the U.S. Senate.²⁷ Oftentimes, the people appointed had no connection with Hawai‘i and didn’t understand the history, culture, and values of Hawai‘i.²⁸

When Hawai‘i’s admission as a state was being debated in Congress, C.J. was chair of the Democratic Party and gave testimony supporting statehood.²⁹ In a 1990 oral history interview, he expressed his concern over how, during the territorial period, the Hawaiian Homes Commission Act³⁰ had been so poorly implemented.³¹ Moreover, he strongly pushed for the return of “ceded lands” to Hawai‘i.³² The “ceded lands” were Government and Crown Lands of the Hawaiian Kingdom that had been transferred to the United States in 1898 after the illegal overthrow of the Kingdom.³³ Indeed, he testified on “what should happen to the federal ceded lands. [He] thought that those lands were supposed to come back to the state of Hawai‘i.”³⁴

In 1966, Governor John Burns nominated William S. Richardson, who was then Lieutenant Governor of the state, to be Chief Justice of the Hawai‘i

²⁶ Richardson Interview, *supra* note 12, at 933.

²⁷ *Id.* at 931–32 (“And it was hard for a young lawyer, who had been through the war, to come back and take a second-class position in a trial”); James A. Burns, *William S. Richardson: A Leader in Hawai‘i’s Post-WWII Political and Judicial Revolution*, 33 U. HAW. L. REV. 25, 26 (quoting C.J. Richardson) (“[I]t was obvious that the appointments were being dictated by the Big Five I couldn’t live my whole life under this kind of set-up. I had the choice to either try to change the system or join the system.”).

²⁸ Williamson B.C. Chang, *The Life of the Law is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson*, 33 U. HAW. L. REV. 99, 105–06 (2010); see Richardson Interview, *supra* note 12, at 931–32 (discussing 1956 Democratic party) (“See, some of them were appointees of the Democratic presidents who were of no help to us.”); Burns, *supra* note 27, at 26.

²⁹ Tsai, *supra* note 14; Richardson Interview, *supra* note 12, at 924 (describing both friends and enemies acquired during the statehood campaign).

³⁰ Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-32, 42 Stat. 108 (1921).

³¹ Richardson Interview, *supra* note 12, at 936. A 1964 Legislative Reference Bureau report found that less than eleven percent of available lands were leased to Hawaiian beneficiaries of the Hawaiian Homes Commission Act. LEGIS. REFERENCE BUREAU, THE HAWAIIAN HOMES PROGRAM: 1920-1963: A CONCLUDING REPORT 12 (1964), https://lrb.hawaii.gov/wp-content/uploads/1964_TheHawaiianHomesProgram_AConcludingReport.pdf.

³² Richardson Interview, *supra* note 12, at 936.

³³ Melody Kapilialoha MacKenzie, *Historical Background, in NATIVE HAWAIIAN LAW: A TREATISE* 2, 27 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua‘ala Sproat eds., 2015) [hereinafter NATIVE HAWAIIAN LAW: A TREATISE]; JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI‘I? 212–14 (2007).

³⁴ Richardson Interview, *supra* note 12, at 936.

Supreme Court.³⁵ As he contemplated this moment in his life, he fully understood the great responsibilities of the office. He said:

The man who is Chief Justice must balance the rules of the past to conform with the state of society today. . . . He must bring the old rules in line with modern times. He must remember that those rules were made under a different structure.

He must live in the past—but not only the past. He must adopt the fundamental principles of the past and bring them into focus with the present. And in Hawaii, the present—like the past—is a time of migration.³⁶

For C.J. Richardson, the past included much more than just the principles of Anglo-American law; it also included ‘Ōiwi custom, traditions, and values.³⁷ The past, the present, and the future included a concern for the average citizen, for the dispossessed, the unrepresented, and those without a voice.³⁸ *Ka lama kū o ka no‘eau*.

III. DECISIONS OF CHIEF JUSTICE RICHARDSON’S HAWAI‘I SUPREME COURT – I KA WĀ MA MUA, KA WĀ MA HOPE

‘Ōiwi scholar, Dr. Lilikalā Kame‘eleihiwa, explains that in ‘Ōlelo Hawai‘i “the past is referred to as *Ka wā ma mua*, or ‘the time in front or before.’ Whereas the future . . . is *Ka wā mahope*, or ‘the time which comes after or behind.’”³⁹ As she explains, the Native Hawaiian people, “stand[] firmly in the present, with [our] back[s] to the future, and [our] eyes fixed upon the past, seeking historical answers for present-day dilemmas.”⁴⁰ Thus, Native Hawaiians look to the past for guidance from ancestral knowledge when faced with the challenges of today.

Looking to the past – *ka wā ma mua* – characterizes C.J. Richardson and the decisions of his court. Words like groundbreaking, activist, and visionary

³⁵ Burns, *supra* note 27, at 28–29.

³⁶ MacKenzie, *Ka Lama Kū O Ka No‘eau*, *supra* note 7 (citing Gene Hunter, *Democrat Richardson Has His Heart in Hawaii*, HONOLULU ADVERTISER (Feb. 26, 1966)).

³⁷ *See id.*

³⁸ *Id.*

³⁹ LILIKALĀ KAME‘ELEIHIWA, NATIVE LANDS AND FOREIGN DESIRES: PEHEA LĀ I PONO AI? 22 (1992).

⁴⁰ *Id.* at 22–23.

are terms that have been utilized in describing the Richardson court,⁴¹ but C.J. Richardson was a realist in the sense that he recognized and accepted his responsibility. He knew that he, along with his fellow jurists, had the opportunity to transform the law, infusing it with traditional ‘Ōiwi knowledge, and he took that opportunity.⁴² As Williamson B.C. Chang, an ‘Ōiwi legal scholar and law professor, has observed, C.J. Richardson succeeded:

[B]ecause of the nature of his jurisprudence, which had four qualities: it was constitutional, restorative, unifying, and island-based. His jurisprudence survived constitutional attack. It was restorative of Hawaiian sovereignty and values, yet it was also unifying, uniting Hawaiians and the immigrant communities that had settled in Hawai‘i. Finally, it was a jurisprudence particularly appropriate for an island society.⁴³

As seen in his judicial decisions, C.J. Richardson had the ability to seek and provide balance – balancing the past and the future; balancing Western law and ‘Ōiwi customs and understandings; and balancing the rights of the individual and the rights of the collective.⁴⁴

C.J. Richardson identified the 1968 case *In re Ashford*⁴⁵ as the decision that he believed had the greatest impact on Hawai‘i and of which he was most proud.⁴⁶ In *Ashford*, the issue was where shoreline boundaries, described as “ma ke kai” or “along the ocean,” should be set.⁴⁷ The Richardson court, based on kama‘āina testimony about Hawaiian usage and practice,⁴⁸ determined that under ancient Hawaiian tradition, custom, and usage, seaward boundaries described as “ma ke kai” are located along the upper reaches of the wash of waves.⁴⁹ In two subsequent opinions, the court extended the *Ashford* decision to other lands that had been registered in Land

⁴¹ See Simeon R. Acoba Jr., *The Richardson Years: A Golden Age of Law in Hawai‘i*, 33 U. HAW. L. REV. 71, 75 (2010); Aviam Soifer, *For CJ Richardson: Hawai‘i’s Bold and Gentle Dreamer*, 33 U. HAW. L. REV. 17, 20–22 (2010); Chang, *supra* note 28, at 102–03.

⁴² MacKenzie, *Ka Lama Kū o ka No‘eau*, *supra* note 7, at 11.

⁴³ Chang, *supra* note 28, at 102.

⁴⁴ MacKenzie, *Ka Lama Kū o ka No‘eau*, *supra* note 7, at 6; Jon M. Van Dyke & Maile Osika, *William S. Richardson: A Visionary with a Common Touch*, 33 U. HAW. L. REV. 83, 83 (2010).

⁴⁵ 50 Haw. 314, 440 P.2d 76, *rehearing denied*, 50 Haw. 452, 440 P.2d 76 (1968).

⁴⁶ See DODD, *supra* note 11, at 79 n.28.

⁴⁷ *In re Ashford*, 50 Haw. at 314–15, 440 P.2d at 76–77.

⁴⁸ *Id.* at 316–17, 440 P.2d at 787.

⁴⁹ *Id.* at 315, 440 P.2d at 77.

Court, and clarified that in determining boundaries where both a debris line and vegetation line lying further mauka are evident, the boundary is presumed to be at the vegetation line.⁵⁰ Similarly, where azimuth⁵¹ and distance measurements are at odds with natural monuments showing the high water mark further inland, the high water mark controls.⁵² The court specifically applied public trust principles, recognizing that “land below high watermark is held in public trust by the State, whose ownership may not be relinquished, except where . . . consistent with certain public purposes.”⁵³

In an oral history interview he gave years after he left the Hawai‘i Supreme Court, C.J. Richardson discussed why the court so often called upon Hawaiian custom and usage in its decisions.⁵⁴ He stated, “[I]f we could find what the law was . . . the rights of way, the old rights of way, the old trails, the gathering rights, these are all old Hawaiian ways. You have a present day statute, interpreting them, [and] you interpret them in light of Hawaiian history.”⁵⁵ He continued, “[Y]ou got your own conscience, your own background to live with and to try to use what you think . . . [will be] the benefit to the people of Hawai‘i.”⁵⁶

The Richardson court’s decisions on water are undoubtedly the most widely known.⁵⁷ C.J. Richardson did not write the formative 1973 water rights opinion *McBryde Sugar Co. v. Robinson*,⁵⁸ but he strongly agreed with the majority, and reaffirmed this decision in subsequent opinions.⁵⁹ *McBryde* clarified Hawai‘i law and held that water flowing in natural watercourses belongs to the state.⁶⁰ The court concluded that in the Māhele process resulting in fee-titles in Hawai‘i, Kamehameha III reserved for himself as sovereign and for the common good the right to use water.⁶¹ Land titles and

⁵⁰ *Cnty. of Hawaii v. Sotomura*, 55 Haw. 176, 182, 517 P.2d 57, 62, *rehearing denied*, 55 Haw. 677 (1973), *cert. denied*, 419 U.S. 872 (1974); *In re Sanborn*, 57 Haw. 585, 590–91, 562 P.2d 771, 774–75 (1977).

⁵¹ In surveying, an azimuth is an angle of measurement from a bearing line. *Azimuth*, DICTIONARY.COM, <https://www.dictionary.com/browse/azimuth> (last visited Feb. 3, 2024).

⁵² *In re Sanborn*, 57 Haw. at 590–91, 562 P.2d at 774–75.

⁵³ *Id.* at 593–94, 562 P.2d at 776 (citing *Sotomura*, 55 Haw. at 183–84, 517 P.2d at 63).

⁵⁴ Richardson Interview, *supra* note 12, at 943–44.

⁵⁵ *Id.* at 944.

⁵⁶ *Id.*

⁵⁷ For an in-depth discussion of Hawai‘i water law, see D. Kapua‘ala Sproat, *From Wai to Kānāwai: Water Law in Hawai‘i*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 33, at 522–610.

⁵⁸ 54 Haw. 174, 504 P.2d 1330 (1973).

⁵⁹ *Robinson v. Ariyoshi*, 65 Haw. 641, 655, 658 P.2d 287, 299 (1982); *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 539–40, 656 P.2d 57, 63–64 (1982).

⁶⁰ *McBryde*, 54 Haw. at 186–87, 504 P.2d at 1339.

⁶¹ *Id.* at 185–87, 504 P.2d at 1338–39.

grants stemming from the Māhele did not convey any right to private ownership of water.⁶² Thus, the State of Hawai'i, as successor to the king, owned all waters flowing in natural watercourses and held the water in trust for the people.⁶³

In 1982, in *Robinson v. Ariyoshi*,⁶⁴ C.J. Richardson emphasized that the *McBryde* decision clarified ambiguous facets of Hawai'i water law but did not depart from settled legal principles.⁶⁵ This case was also instrumental in affirming the role of the riparian doctrine, that those owning land along a river or stream have the right to use of that water in Hawai'i law.⁶⁶ C.J. Richardson authored a second important water rights case the same year. In *Reppun v. Board of Water Supply*,⁶⁷ the court's opinion helped explain the doctrines of appurtenant and riparian rights, including whether such rights may be transferred or extinguished.⁶⁸

The public trust doctrine, articulated in the shoreline boundary cases and the *McBryde* case, was specifically adopted into the Hawai'i State Constitution in 1978.⁶⁹ This doctrine embodies the 'Ōiwi principle that all

⁶² *Id.*

⁶³ *Id.* at 186–87, 504 P.2d at 1339.

⁶⁴ 65 Haw. 641, 658 P.2d 287.

⁶⁵ *Id.* at 676, 658 P.2d at 311.

⁶⁶ *Id.* at 648–50, 658 P.2d at 294–95.

⁶⁷ 65 Haw. 531, 656 P.2d 57 (1982).

⁶⁸ Appurtenant water rights attach to land that used water, most often to cultivate kalo or other crops, when the land was converted to fee simple ownership, usually through the Māhele process. *See id.* at 545–48, 656 P.2d at 67–69.

⁶⁹ HAW. CONST. art. XI, § 1; art. XII, § 4. Article XI § 1 provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

HAW. CONST. art. XI, § 1. Article XII § 2 provides:

The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian

public natural resources are held in trust by the aliʻi or sovereign for the benefit of the people.⁷⁰ While other pieces in this issue provide an in-depth analysis of the impacts of water rights disputes and emerging water issues in Hawaiʻi,⁷¹ it is worth briefly noting that the lasting impact of the Richardson court's water rights decisions can be seen today. For instance, in the 2000 decision of the Hawaiʻi Supreme Court in the *Waiāhole Combined Contested Case Hearing (Waiāhole I)* case,⁷² the court fully “adopt[ed] the public trust doctrine as a fundamental principle of constitutional law in Hawaiʻi”⁷³ and recognized that the state agency dealing with these resources, the Commission on Water Resource Management, has a responsibility to protect and restore important water resources.⁷⁴ The court stated, “[u]nder the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state.”⁷⁵ More recently, in the 2014 *Kauai Springs, Inc. v. Planning Commission of the County of Kauaʻi*⁷⁶ case, the court highlighted six principles that both state and county agencies must use in fulfilling their trust responsibilities⁷⁷ – and emphasized that an agency's

Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

HAW. CONST. art. XII, § 2.

⁷⁰ D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawaiʻi's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 139–40 (2011).

⁷¹ See Holly K. Doyle, *E Hoʻi ka Nani i Mokuʻula Lā: The Commission on Water Resource Management's Public Trust Duty to Fully Restore Mokuʻula and Mokuhinia*, 46 U. HAW. L. REV. 313 (2024); Elena Chang, *Wai Ea: Restoring Hawaiʻi's Public Trust and Reclaiming Lahaina's Water Future*, 46 U. HAW. L. REV. 366 (2024).

⁷² 94 Hawaiʻi 97, 9 P.3d 409 (2000).

⁷³ *Id.* at 132, 9 P.3d at 444.

⁷⁴ *Id.* at 133, 9 P.3d at 445. The 1987 State Water Code established the Commission on Water Resource Management, a state agency whose “duty is both to promote ‘maximum beneficial use’ of water and to steward water for the benefit of the public.” Summer Sylva, *Indigenizing Water Law in the 21st Century: Na Moku Aupuni O Koʻolau Hui, a Native Hawaiian Case Study*, 16 CORNELL J. L. & PUB. POL’Y 563, 568 (2007) (citing Douglas W. MacDougal, *Private Hopes and Public Values in the “Reasonable Beneficial Use” of Hawaiʻi's Water: Is Balance Possible?*, 18 U. HAW. L. REV. 1, 1 (1996)).

⁷⁵ *Waiāhole I*, 94 Hawaiʻi at 141, 9 P.3d at 453.

⁷⁶ 133 Hawaiʻi 141, 324 P.3d 951 (2014).

⁷⁷ *Id.* at 174–75, 324 P.3d at 984–85. The six principles, as enumerated by the court are as follows:

duty and authority “is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use.”⁷⁸

C.J. Richardson’s 1982 decision in *Kalipi v. Hawaiian Trust*⁷⁹ on Native Hawaiian gathering rights was groundbreaking. In *Kalipi*, the court recognized that traditional and customary rights are protected by several different sources in Hawai‘i law, including a specific recognition of such rights in a 1978 amendment to the Hawai‘i State Constitution.⁸⁰ The court

-
- a. The agency’s duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use.
 - b. The agency must determine whether the proposed use is consistent with the trust purposes:
 - i. the maintenance of waters in their natural state;
 - ii. the protection of domestic water use;
 - iii. the protection of water in the exercise of Native Hawaiian and traditional and customary rights; and
 - iv. the reservation of water enumerated by the State Water Code.
 - c. The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection.
 - d. The agency should evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water.
 - e. If the requested use is private or commercial, the agency should apply a high level of scrutiny.
 - f. The agency should evaluate the proposed use under a “reasonable and beneficial use” standard, which requires examination of the proposed use in relation to other public and private uses [including, *inter alia*, factors such as actual need and the absence of a practicable alternative water source].

Id.

⁷⁸ *Id.* at 174, 324 P.3d at 984.

⁷⁹ 66 Haw. 1, 656 P.2d 745 (1982).

⁸⁰ *Id.* at 4–5, 656 P.2d at 748; HAW. CONST., art. IX, § 7; HAW. REV. STAT. § 7-1. The statute provides that:

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of

determined that lawful residents of an ahupua‘a may, consistent with ‘Ōiwi customs and traditions, enter undeveloped lands within the ahupua‘a to gather certain items.⁸¹ In addressing the contention that such rights are anachronisms that are inconsistent with private property rights, C.J. Richardson held that, pursuant to the state constitution, courts are obligated “to preserve and enforce such traditional rights.”⁸² The *Kalipi* decision set the foundation for later cases affirming and expanding the recognition of ‘Ōiwi traditional and customary rights.⁸³

In another key decision, C.J. Richardson established the standard by which actions of the state should be judged in dealing with beneficiaries of the Hawaiian Homes Commission Act. Referring back to his earlier concerns about the mismanagement of the Hawaiian Homelands program in the 1982 case of *Ahuna v. Department of Hawaiian Home Lands*,⁸⁴ C.J. Richardson declared that the state must, in managing trust lands and interacting with lessees, “adhere to high fiduciary duties normally owed by a trustee to its beneficiaries,” and the state should be judged by the “most exacting fiduciary standards.”⁸⁵ The state’s trust duties thus include “the obligation to administer the trust solely in the interests of the beneficiary[ies]” and to “use reasonable care and skill” in dealing with trust property.⁸⁶

The importance of the *Ahuna* court’s explanation of these trust duties is evident in other landmark cases in which the Hawai‘i Supreme Court has applied these same strict fiduciary standards in the state’s dealing with the

the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HAW. REV. STAT. § 7-1.

⁸¹ *Kalipi*, 66 Haw. at 6–8, 656 P.2d at 748–50.

⁸² *Id.* at 4, 656 P.2d at 748.

⁸³ *E.g.*, *Pele Def. Fund v. Paty*, 73 Hawai‘i 578, 837 P.2d 1247 (1992), *cert. denied*, 507 U.S. 918 (1993); *Pub. Access Shoreline Haw. v. Cnty. of Haw. Plan. Comm’n*, 79 Hawai‘i 425, 903 P.2d 1246 (1995); *Ka Pa‘akai O Ka‘Aina v. Land Use Comm’n*, 94 Hawai‘i 31, 7 P.3d 1068 (2000).

⁸⁴ *Ahuna v. Dep’t. of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982).

⁸⁵ *Id.* at 338–39, 640 P.2d at 1168–69.

⁸⁶ *Id.* at 340, 640 P.2d at 1169.

public land trust.⁸⁷ C.J. Richardson’s concern during the statehood hearings about the “ceded lands,” his articulation of the trust responsibility in the *Ahuna* case, the jurisprudence his court developed on the public trust doctrine, and his landmark holding in the *Kalipi* case all came together to help shape a 2019 Hawai‘i Supreme Court decision. In *Ching v. Case*,⁸⁸ Kanaka ‘Ōiwi cultural practitioners claimed that their traditional practices, which relied on ‘āina and access to trails located in Pōhakuloa on Hawai‘i Island, were being irrevocably damaged.⁸⁹ They challenged the state’s failure to monitor the actions of the U.S. Army pursuant to a lease of 22,900 acres of public trust lands at Pōhakuloa.⁹⁰ The Army controls the land under a sixty-five-year lease for one dollar, with the lease set to expire in 2029.⁹¹ In addition, the Army has direct ownership or control of another 80,000 acres of land at Pōhakuloa.⁹² The Hawai‘i Supreme Court determined that the state had breached its trust duties in failing to monitor and ensure that the terms of the lease, including a provision that required the Army to remove or deactivate “all live or blank ammunition upon completion of a training exercise or prior to the entry by . . . the public,”⁹³ were met. In doing so, the court compared the state’s duties to those of a “common law trustee, including an obligation to protect and preserve the resources however they are utilized.”⁹⁴ The court also applied the public trust doctrine to the Pōhakuloa lands and thus confirmed the high fiduciary trust standard with regard to actions of the state, consistent with the standard set by the Richardson court in the *Ahuna* case.⁹⁵

⁸⁷ *Pele Defense Fund*, 73 Haw. at 604 n.18, 837 P.2d at 1263 n.18; Off. of Hawaiian Affs. v. Hous. & Cmty Dev. Corp. of Haw., 117 Haw. 174, 195, 177 P.3d 884, 905 (2008), *reversed as Haw. v. Off. of Hawaiian Affs*, 556 U.S. 163 (2009).

⁸⁸ *Ching v. Case*, 145 Hawai‘i 148, 449 P.3d 1146 (2019).

⁸⁹ *Id.* at 154–55, 449 P.3d at 1152–53.

⁹⁰ *Id.*

⁹¹ *Id.* at 152, 449 P.3d at 1150.

⁹² Russell Subiono & Sophia McCullough, *Military Leaders Say 30K Acres of Land Vital to National Security, Others Want It Returned to State*, HAW. PUB. RADIO (Aug. 25, 2021, 9:47 AM), <https://www.hawaiipublicradio.org/the-conversation/2021-08-25/military-leaders-30k-acres-of-land-national-security-state-training-diplomacy> (“In total, Pohakuloa encompasses nearly 110,000 acres, the largest military installation in the Pacific region.”).

⁹³ *Ching*, 145 Hawai‘i at 178, 182–83, 449 P.3d at 1176, 1180–81.

⁹⁴ *Id.* at 152, 449 P.3d at 1150.

⁹⁵ See generally D. Kapua‘ala Sproat & M.J. Palau-McDonald, *The Duty to Aloha ‘Āina: Indigenous Values as a Legal Foundation for Hawai‘i’s Public Trust Doctrine*, 57 HARV. C.R.-C.L. L. REV. 525 (2022) for an in-depth discussion and critique of the *Ching v. Case* decision.

In 2006, C.J. Richardson gave opening remarks at the Pūwalu ‘Ekolu of the Ho‘ohanohano I Nā Kūpuna,⁹⁶ reminding us that:

[W]hatever our individual interests and goals, we are linked together and to this land. Each of us struggles, in their own way, to retain within us the learning and wisdom of our ancestors. We walk that delicate balance between two worlds—the modern and sometimes impersonal society that surrounds us, and the highly personal and ancient culture we carry within us. The times ahead present great challenges and possibilities for Hawaiians. I believe that we can meet these challenges, if we maintain our link with the past and our hope for the future.⁹⁷

These words embody C.J. Richardson’s wisdom, his ability to walk on the path of justice, and his use of his ancestors’ wisdom to chart the way forward. I ka wā ma mua, ka wā ma hope.

IV. THE IMPACT OF THE LAW SCHOOL AND ITS GRADUATES – EO E NĀ PUNAHELE O KA PUA LEHUA, E KŪ, E HO‘OMAU! E PA‘A A PA‘A I KA HOE MAMALA A KELELEIKI E!

Heed the call, those of you who are favored by the lehua blossom.

Stand! Persevere!

*Hold fast to the splintered paddle of Kaleleiki!*⁹⁸

For the 2005 law school graduation ceremony, graduate Kahikino Noa Dettweiler wrote an Oli Aloha to honor C.J. Richardson.⁹⁹ The oli compares C.J. to the lehua flower, a poetic reference to someone of profound skill and

⁹⁶ W. PAC. REG’L FISHERY MGMT. COUNCIL, HO‘OHANO HANO I NĀ KŪPUNA: DRAFT PROCEEDINGS FROM THE HONOR OUR ANCESTORS PUWALU SERIES (2006–2007). The three meetings convened by the Western Pacific Regional Fisheries Management Council aimed to “gather the knowledge from [Native Hawaiians and from] around the islands, [to determine] how to preserve and care for it, and how to transmit it and its underlying wisdom to the highly complex and challenging modern settings in which we now live.” *Id.* at 2. *Puwalu Ekolu, Lawena Aupuni*, the third of the three forums, took place on December 19–20, 2006. *Id.* at 7. This discussion aimed to “initiate community consultation between policy-makers and Native Hawaiians, and to integrate the knowledge from the first two meetings into public policy.” *Id.*

⁹⁷ William S. Richardson, *Use of Traditional Practices in Present-Day Law*, Puwalu ‘Ekolu (Third Conference): Opening Remarks, 24(2) CURRENT–J. OF MARINE EDU. 15, 18 (2008).

⁹⁸ Kahikino Noa Dettweiler, *Oli Aloha No William S. Richardson*, 33 U. HAW. L. REV. 1, 2 (2010).

⁹⁹ *Id.*

wisdom¹⁰⁰ and alludes to Kamehameha's Kānāwai Māmalahoe or Law of the Splintered Paddle, which is enshrined in the Hawai'i State Constitution and has become a symbol of the Law School.¹⁰¹ The law declared, "Let the old men, the old women and the children go and sleep by the wayside; let them not be molested."¹⁰² One version of the story about this law recounts that several commoners of Puna were fishing when the young chief Kamehameha approached them.¹⁰³ Knowing only that a stranger and a chief approached and fearing trouble, the men fled.¹⁰⁴ But Kamehameha pursued.¹⁰⁵ When Kamehameha's ankle was caught in a lava crevice, Kaleleiki, one of the fishermen, turned back, hit Kamehameha on the head with a paddle, splitting it in two.¹⁰⁶ Years later, Kaleleiki and his companions were brought before Kamehameha for punishment.¹⁰⁷ However, instead of sentencing them to death, Kamehameha recognized his own responsibility in causing the incident.¹⁰⁸ He proclaimed the Law of the Splintered Paddle, protecting even the most defenseless from oppression by those with more power and authority.¹⁰⁹ Thus, this oli reminds us that the Law School's graduates fulfill C.J.'s highest aspirations when we protect those who are powerless, when we fight for those who lack economic security and life's basic necessities, and when we seek justice for Hawai'i's native people and, indeed, for all people in our homeland, and beyond.¹¹⁰

¹⁰⁰ *Id.*

¹⁰¹ W.D. WESTERVELT, HAWAIIAN HISTORICAL LEGENDS 174–76 (1923); HAW. CONST. art. IX, § 10 (1978).

¹⁰² PUKUI, *supra* note 10, at 35; WESTERVELT, *supra* note 101.

¹⁰³ WESTERVELT, *supra* note 101, at 167–68.

¹⁰⁴ *Id.* at 168.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 168–69; SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAII 125–26 (1992).

¹⁰⁷ WESTERVELT, *supra* note 101, at 173–75.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 174–76; KAMAKAU, *supra* note 106; JULIE STEWART WILLIAMS, KAMEHAMEHA THE GREAT 58–59, 86–87 (rev. ed. 1993); see Troy H. Andrade, *Ke Kānāwai Māmalahoe: Equality in Our Splintered Profession*, 33 U. HAW. L. REV. 245, 245–46 (2010) (discussing another version of the mo'olelo (story) of the promulgation of the Kānāwai Māmalahoe). See also STEPHEN L. DESHA, KAMEHAMEHA AND HIS WARRIOR KEKŪHAUPI'O 205–16 (Frances N. Frazier trans., 2000), for a complete account of one version of the mo'olelo along with a summary of several other versions.

¹¹⁰ MacKenzie, *Ka Lama Kū o ka No'eau*, *supra* note 7, at 14–15; Mari Matsuda, *A Richardson Lawyer*, 33 U. HAW. L. REV. 61, 65–69 (2010).

The establishment of the Law School in 1973 was one of C.J. Richardson's greatest achievements.¹¹¹ C.J. believed that everyone in Hawai'i should have the opportunity to obtain a legal education, and he led an uphill battle to form Hawai'i's only law school.¹¹² A majority of Hawai'i's downtown law firms and lawyers opposed its creation and the state legislature was reluctant to fund it.¹¹³ In advocating for the creation of the Law School, C.J. "deployed his easygoing consensus-building skills in concert with unyielding determination and strength."¹¹⁴ C.J.'s diplomacy and perseverance eventually prevailed. He solicited and allied himself with advocates in Hawai'i and on the U.S. continent, and he was successful in persuading the University of Hawai'i and the legislature, and ultimately the downtown law firms, to establish and support the Law School.¹¹⁵

The Law School originally encompassed several wooden buildings in the UH-Mānoa quarry, with only the dream of a brick-and-mortar building to come.¹¹⁶ Emeritus Professor Mari Matsuda, who graduated in 1980, describes her time at the quarry Law School and C.J. Richardson's guidance:

Every step of the way, I was embraced by a law school community that pushed me to succeed, in a tradition of mutual care that no law school anywhere else has ever attained. This ethic of community was forged under the watch of the most powerful lawyer in the state. CJ beamed as he witnessed our bonds grow strong. He was running the entire judicial system of Hawai'i and writing decisions that would change the course of history, yet he took the time to come to our parties, even if a party was just some beer and pipikaula on the steps looking out over the muddy parking lot.¹¹⁷

Of all the reasons for the creation of the Law School, C.J.'s primary motive was to give the fullest opportunities possible to Hawai'i's people.¹¹⁸ C.J. Richardson particularly wanted to ensure that those who understood the

¹¹¹ Burns, *supra* note 27, at 37; Richardson Interview, *supra* note 12, at 946–47; Ivan M. Lui-Kwan, *A Beloved Teacher Whose Vision Had No Boundaries*, 33 U. HAW. L. REV. 39, 40–41 (2010).

¹¹² Richardson Interview, *supra* note 12, at 946–47.

¹¹³ See Lui-Kwan, *supra* note 111, at 40–41, 43; Matsuda, *supra* note 110, at 62.

¹¹⁴ Lui-Kwan, *supra* note 111, at 43.

¹¹⁵ *Id.*; Klein, *supra* note 4, at 37.

¹¹⁶ See Matsuda, *supra* note 110, at 61–62.

¹¹⁷ *Id.* at 63.

¹¹⁸ *Id.* at 62–63; Richardson Interview, *supra* note 12, at 946–47; MacKenzie, *Ka Lama Kū o ka No'eau*, *supra* note 7, at 5.

culture and values of Hawai‘i would be able to shape its laws and policies.¹¹⁹ Today, because of C.J.’s vision, more than 4,000 graduates¹²⁰ of the William S. Richardson School of Law – many from disadvantaged, minority, and Indigenous Hawaiian and Pacific communities – practice law, hold elected office, serve in the judiciary, teach law, and lead community service organizations in Hawai‘i, throughout the Pacific, and beyond.¹²¹

Avi Soifer, Professor and former Dean of the Law School, while acknowledging all of C.J. Richardson’s accomplishments, recently stated:

If compelled to choose only one aspect of his impact, however, I would emphasize his ongoing and still growing effect on law on the ground, with particular attention to Native Hawaiian law, culture, and pride. His namesake Law School, created to afford access to all – no matter what a person’s background and financial standing – has been a key element of his legacy that provides opportunity . . . [including] to those who have overcome all kinds of adversity.¹²²

In Hawai‘i alone, C.J.’s influence can be seen in how the current judiciary operates. Not only has it maintained its independence – resisting calls for elected judges or more legislative involvement in reappointments – but many within the judiciary are also WSRL graduates, including a number of administrative staff.¹²³ With the recent appointment of a new Associate

¹¹⁹ Richardson Interview, *supra* note 12, at 946–47; Lui-Kwan, *supra* note 111, at 40–41; MacKenzie, *Ka Lama Kū o ka No‘eau*, *supra* note 7, at 5.

¹²⁰ Of the 4,000 graduates, more than 3,800 are Juris Doctors. E-mail from Trisha Nakamura, Interim Assoc. Dean for Student Servs., William S. Richardson Sch. of L. at Univ. of Haw., to Melody Kapilialoha MacKenzie, Professor of L. Emerita, William S. Richardson Sch. of L. at Univ. of Haw. (Apr. 15, 2024, 3:47 PM HST) (on file with author).

¹²¹ See Lui-Kwan, *supra* note 111, at 41; MacKenzie, *Ka Lama Kū o ka No‘eau*, *supra* note 7, at 5.

¹²² E-mail from Aviam Soifer, former Dean, William S. Richardson Sch. of L. at Univ. of Haw., to Melody Kapilialoha MacKenzie, Professor of L. Emerita, William S. Richardson Sch. of L. at Univ. of Haw. (Jan. 11, 2024, 5:24 AM HST) (on file with author) [hereinafter Soifer E-mail].

¹²³ For instance, the Administrative Director of the Courts, Rodney Maile ‘78 is a WSRL graduate, the new Deputy Administrative Director of the Courts, Daylin-Rose Heather ‘14, and the Director of Policy & Planning for the Courts, Brandon M. Kimura ‘10 are also WSRL graduates. See Press Release, Daylin-Rose Heather Appointed Deputy Administrative Director of the Courts (Apr. 20, 2024) *available at* https://www.courts.state.hi.us/news_and_reports/2024/01/daylin-rose-heather-appointed-deputy-administrative-director-of-the-courts (last visited Jan. 21, 2024).

Justice, three WSRSL graduates now serve on the Hawai‘i Supreme Court.¹²⁴ In addition, three WSRSL graduates serve on the Intermediate Court of Appeals.¹²⁵ Moreover, it is estimated that at least thirty percent of all Hawai‘i state court judges are WSRSL graduates.¹²⁶ In the U.S. Federal Courts, the first Native Hawaiian woman and WSRSL graduate was recently confirmed as a U.S. District Court Judge,¹²⁷ while two WSRSL graduates have served as Magistrate Judges.¹²⁸

¹²⁴ Associate Justices Sabrina S. McKenna ‘82, Todd W. Eddins ‘91, and Lisa M. Ginoza ‘89 are William S. Richardson School of Law Graduates. *Associate Justice Sabrina S. McKenna*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/courts/supreme/justices/associate_justice_sabrina_s_mckenna (last visited Feb. 3, 2024); *Associate Justice Todd W. Eddins*, HAW. STATE JUDICIARY, <https://www.courts.state.hi.us/judge-todd-w-eddins> (last visited Feb. 3, 2024); *Associate Justice Lisa M. Ginoza*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/courts/appeals/associate_judge_lisa_m_ginoza (last visited Feb. 3, 2024).

¹²⁵ Associate Judges Katherine G. Leonard ‘91, Sonja M.P. McCullen ‘02, and Kimberly T. Guidry ‘02 are WSRSL graduates. *Associate Judge Katherine G. Leonard*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/courts/appeals/associate_judge_katherine_g_leonard (last visited Feb. 16, 2024); *Associate Judge Sonja M.P. McCullen*, HAW. STATE JUDICIARY, <https://www.courts.state.hi.us/associate-judge-sonja-m-p-mccullen> (last visited Feb. 16, 2024); *Associate Judge Kimberly T. Guidry*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/news_and_reports/2023/07/associate-judge-kimberly-t-guidry (last visited Feb. 16, 2024).

¹²⁶ Chart Depicting William S. Richardson School of Law Graduate Hawai‘i Circuit and District Court Judges (Mar. 5, 2024) (on file with author). Indeed, the National Judicial College (NJC) recently selected 2nd Cir. District Family Court Judge Adrienne N. Heely Caires, a 1998 graduate, as one of 60 courageous judges in commemoration of the 60th anniversary of the founding of the NJC. Press Release, Maui Judge Who Nearly Lost Her Home in the Wildfires Named A “Courageous Judge” by National Judicial College (Jan. 2, 2024), *available at* https://www.courts.state.hi.us/news_and_reports/2024/01/maui-judge-who-nearly-lost-her-home-in-the-wildfires-named-a-courageous-judge-by-national-judicial-college.

¹²⁷ Hawai‘i State Circuit Court Judge, Shanlyn A.S. Park, a 1995 WSRSL graduate, was confirmed by the U.S. Senate to the U.S. District Court on November 30, 2023. Press Release, United States Circuit Court of Appeals for the Ninth Circuit (Nov. 30, 2023), <https://www.hid.uscourts.gov/cms/assets/d2f127aa-2a12-4e7d-b10a-b09c7d03d6f6/Press%20Release.pdf>. She will fill a judgeship that will be vacant when U.S. District Judge Leslie E. Kobayashi assumes senior status on Oct. 9, 2024. *Id.*

¹²⁸ Magistrate Judge Rom A. Trader ‘87 and Magistrate Judge Barry M. Kurren, ‘77 are WSRSL graduates. *Judge Rom A. Trader*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/courts/circuit/judges/rom_trader (last visited Feb 16, 2024); Mag. Judge Rom A. Trader (RT), U.S. DIST. CT.: DIST. OF HAW., <https://www.hid.uscourts.gov/judges/13> (last visited Feb 16, 2024); *Biography*, U.S. DIST. CT.: DIST. OF HAW., https://www.hid.uscourts.gov/docs/bios/BMK_Bio.pdf (last visited Feb 16, 2024).

Similarly, WSRS� graduates have played and continue to play a major role at the Hawai‘i State Legislature – currently, there are at least three State Senators and six members of the House of Representatives who graduated from WSRS�, including the current Speaker of the House.¹²⁹

In the Executive branch, John D. Waihe‘e III, Governor of Hawai‘i from 1986 to 1994, who graduated in WSRS�’s very first class in 1976, is an excellent example of C.J.’s legacy.¹³⁰ Richardson graduates have also served as Lieutenant Governor, as the state Attorney General, and as directors of numerous departments, including the Department of Land and Natural Resources, the Department of Hawaiian Homelands, and the Department of Commerce and Consumer Affairs.¹³¹ Numerous Richardson graduates have

¹²⁹ Currently, in the House, Speaker of the House Scott Saiki ‘91, along with Representatives Della Au Bellati ‘03, Scot Matayoshi ‘12, Micah Aiu ‘16, Sonny Ganaden ‘06, and Linda Ichiyama ‘10 are WSRS� graduates; in the Senate, Senators Carol A. Fukunaga ‘76, Maile Shimabukuro ‘00, and Jarrett Keohokalole ‘15 are WSRS� graduates. *Representative Scott K. Saiki (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=117&year=2024> (last visited Feb 16, 2024); *Representative Della Au Belatti (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=7&year=2024> (last visited Feb 16, 2024); *Representative Scot Z. Matayoshi (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=89&year=2024> (last visited Feb 16, 2024); *Representative Micah P.K. Aiu (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=248&year=2024> (last visited Feb 16, 2024); *Representative Sonny Ganaden (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=44&year=2024> (last visited Feb 16, 2024); *Representative Linda Ichiyama (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=60&year=2024> (last visited Feb 16, 2024); *Senator Carol Fukunaga (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=168&year=2024> (last visited Feb 16, 2024); *Senator Maile S.L. Shimabukuro (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=207&year=2024> (last visited Feb 16, 2024); *Senator Jarrett Keohokalole (D)*, HAW. STATE LEGISLATURE, <https://www.capitol.hawaii.gov/legislature/memberpage.aspx?member=187&year=2024> (last visited Feb 16, 2024).

¹³⁰ Before he was elected as Governor in 1986, John D. Waihe‘e III played a key role in creating the Office of Hawaiian Affairs during the 1978 Constitutional Convention. GREAT LIVES FROM HISTORY: ASIAN AND PACIFIC ISLANDER AMERICANS 782 (Gary Okiihiro ed., 2013). As governor, he developed affordable housing and green initiatives, increased funding for nature reserves, and enacted legislation to protect wildlife. *Id.* at 782–83. Governor Waihe‘e “remained a staunch advocate of Native Hawaiian culture his entire political career, placing himself in stark opposition to previous governors, who were either federally appointed or easily swayed by outside investors and mainland politicians.” *Id.* at 783.

¹³¹ For example, 1981 graduate James R. “Duke” Aiona served as Lieutenant Governor from 2002 to 2010. See *Former Lt. Gov. James ‘Duke’ Aiona Files Papers to Run For*

served their communities at the county level, including two current members of the Honolulu City Council and a past mayor of Honolulu, the current mayor of Maui County and a current member of the Maui County Council, and a past mayor of Hawai‘i Island.¹³²

Governor, HAW. NEWS NOW (June 7, 2022, 1:24 PM HST), <https://www.hawaiinewsnow.com/2022/06/07/former-lt-gov-james-duke-aiona-files-papers-run-governor/>. 1981 graduate Earl Anzai was Attorney General of the State of Hawai‘i, and the current Attorney General of the State of Hawai‘i is 2001 graduate Anne Lopez. Victoria Budiono, *Former Hawaii AG Earl Anzai Dies At 81*, HONOLULU CIV. BEAT (July 28, 2023), <https://www.civilbeat.org/beat/former-hawaii-ag-earl-anzai-dies-at-81/>; *Anne Lopez*, DEMOCRATIC ATTORNEYS GENERAL ASS’N, <https://dems.ag/profile/anne-lopez/> (last visited Apr. 19, 2024). 1985 graduate Dawn N.S. Chang is the current Director of the Department of Land and Natural Resources (DLNR) and 2011 graduate Ryan Kanaka‘ole was recently confirmed by the state senate as DLNR’s First Deputy. *Dawn S. Chang*, DEPT. OF LAND & NAT. RES., <https://dlnr.hawaii.gov/boards-commissions/blnr-board/dawn-n-s-chang/> (last visited Apr. 17, 2024); *About DLNR*, DEPT. OF LAND & NAT. RES., <https://dlnr.hawaii.gov/about-dlnr/> (last visited Apr. 28, 2024); G.M. 594, 2024 Senate, Reg. Sess. (Haw. 2024). 1979 graduate Kali K. Watson is the current Director of the Department of Hawaiian Homelands. Press Release, Green Nominates Kali Watson to Lead Department of Hawaiian Home Lands (Feb. 22, 2024), *available at* <https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-green-nominates-kali-watson-to-lead-department-of-hawaiian-home-lands/>. 1982 graduate Nadine Ando is the current Director of the Department of Commerce and Consumer Affairs. *Green Announces Nominees for 14 State Departments*, MAUI NEWS (Dec. 2, 2022), <https://www.mauinews.com/news/local-news/2022/12/green-announces-nominees-for-14-state-departments/>. 2006 graduate Catherine Betts was the Director of the Department of Commerce and Consumer Affairs but recently left that position to become Executive Director of the Hawai‘i State Bar Association. *See Catherine Betts*, HAW. STATE BAR ASS’N, <https://hsba.informz.net/InformzDataService/OnlineVersion/ind/bWFpbGluZ0luc3RhbmNISWQ9OTE3NDA0NyZzdWJzY3JpYmVYSWQ9OTU1MzgZMTY1> (last visited Apr. 11, 2024).

¹³² 1995 WSRL graduate Tommy Waters chairs the Honolulu City Council while 2016 graduate Matthew Weyer sits on the Honolulu City Council. *About*, TOMMY WATERS FOR HONOLULU CTY. COUNCIL, <https://www.tommy-waters.com/about/> (last visited Apr. 17, 2024); *Meet Matt*, MATT WEYER, <https://www.mattweyer.com/meet-matt> (last visited Apr. 17, 2024). 1984 WSRL graduate Kurt Caldwell served as Honolulu’s mayor from 2013 to 2021. Matthew Nuttle, *Former Honolulu Mayor Kirk Caldwell Ends Campaign for Hawaii Governor*, KITV (May 13, 2022), https://www.kitv.com/news/local/former-honolulu-mayor-kirk-caldwell-ends-campaign-for-hawaii-governor/article_9c6ccd3c-cc00-11ec-bef8-2fad8499e62d.html. Keani Rawlins-Fernandez, a 2015 graduate, represents Moloka‘i on the Maui County Council while 1986 graduate Richard Bissen is the current mayor of Maui County. *About Me*, KEANI RAWLINS-FERNANDEZ, <https://www.keanirawlinsfernandez.com> (last visited Apr. 17, 2024); Mahealani Cypher, *Maui Mayor Richard Bissen: He Kupa ‘Aina o Maui*, KA WAIOLA (May 1, 2023), <https://kawaiola.news/ea/maui-mayor-richard-bissen-he-kupa-aina-o-maui/>. 1996 WSRL graduate William “Billy” Kenoi (deceased) served as

At the 1978 state Constitutional Convention, Richardson graduates and future graduates¹³³ played a significant role in the adoption of amendments that increased the recognition of Kanaka ‘Ōiwi tradition and custom, ensured that the purposes of the public land trust were fulfilled, attempted to restore justice to Native Hawaiians by moving toward self-governance, recognized ‘Ōlelo Hawai‘i as an official language of Hawai‘i, and clarified that all public natural resources are held by the State in trust for the people of Hawai‘i.¹³⁴

Over the years, the Law School has also developed a number of impactful programs including the ‘Ulu Lehua Scholars, the UH Elder Law Program, the Environmental Law Program, the Hawai‘i Innocence Project, the Medical-Legal Partnership for Children in Hawai‘i, and the Refugee and Immigration Law Clinic.¹³⁵

The oldest program, the ‘Ulu Lehua Scholars, which began in 1974 as the Pre-Admissions Program, demonstrates the Law School’s commitment to making legal education accessible to all of Hawai‘i’s distinct and diverse communities.¹³⁶ Each year, the program admits a small number of students who have shown “an extraordinary commitment to social justice and community service, an ability to overcome educational and other forms of adversity, an impressive academic record, and the intelligence and seriousness of purpose required to succeed in law school, pass the bar, and

mayor of Hawai‘i County from 2008 to 2016. *Billy Kenoi, Former Hawaii County Mayor, Dies After Lengthy Battle With Cancer*, HAW. NEWS NOW (Jan. 27, 2021, 8:59 AM HST), <https://www.hawaiinewsnow.com/2021/01/27/billy-kenoi-former-hawaii-county-mayor-has-died-after-lengthy-battle-with-cancer/> (last visited Apr. 11, 2024).

¹³³ At the 1978 Constitutional Convention, the following delegates were graduates of WSRSL: Bruce Barnes ‘77; Anthony Chang ‘76; Carol A. Fukunaga ‘76; Franklin Hayashida ‘76; Michael Liu ‘77; Craig G. Nakamura ‘77; and John D. Waihee, III ‘76. Others who subsequently graduated from WSRSL included: Mary Ann Barnard ‘84; Dona Hanaïke ‘79; Yvonne Izu ‘83; and, David Stegmaier ‘86. Standing Committees, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at xv–xx (1980), https://ags.hawaii.gov/wp-content/uploads/2019/07/hsa_1978concon_fa.pdf.

¹³⁴ HAW. CONST., art. XII, § 7 (Traditional & Customary Rights); art. XII, § 4 (Public Trust); art. XII, §§ 5–6 (Office of Hawaiian Affairs); art. XV, § 4 (Official Languages); art. XI, § 1 (Conservation & Development of Resources); art. XI, § 7 (Water Resources); *see also* Doyle, *supra* note 71, at 337–41; Chang, *supra* note 71, at 397–404.

¹³⁵ For more information on these programs, *see Committed to Learning*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/academics/> (last visited Jan. 20, 2024) and *Committed to Social Justice*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/social-justice/> (last visited Jan. 20, 2024).

¹³⁶ *Ulu Lehua Scholars Program*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/academics/jd-juris-doctor-program/ulu-lehua-scholars-program/> (last visited Jan. 20, 2024).

become a public spirited legal professional.”¹³⁷ At the time of writing, the ‘Ulu Lehua program has produced 438 graduates.¹³⁸

Another example is Ka Huli Ao Center for Excellence in Native Hawaiian Law, established in 2005 with a mission to promote “education, scholarship, community outreach and collaboration on issues of law, culture and justice for Native Hawaiians and other Pacific and Indigenous peoples.”¹³⁹ Ka Huli Ao’s Director, Professor D. Kapua‘ala Sproat, a 1998 Richardson graduate, recently stated, “Ka Huli Ao . . . is proud to carry on the kuleana of Chief Justice William S. Richardson . . . who committed himself to building a more just society for underrepresented communities – and for all.”¹⁴⁰

Former Dean and Law Professor, Avi Soifer, has indicated that:

Native Hawaiian law has proven to be a vital aspect not only of the law of the state of Hawai‘i, but in the development of national and international indigenous law. That said, the founding of Ka Huli Ao can be singled out as a major example of CJ’s past, current, and flourishing future legacy.

His advice and his presence played a major role in launching . . . the Center. The importance of his role in the early days cannot be overestimated. Not only was he an inspiration and an advisor but, in his characteristic low-key way, CJ helped steer the Center to and through its beginnings.¹⁴¹

Today, those who have gone through the Native Hawaiian law program and received Native Hawaiian Law certificates number over 160 graduates, and many are practicing in and expanding the reach of this area of law.¹⁴² Indeed, the work of the students in the Native Hawaiian Rights Clinic in supporting and aiding the Maui Komohana community in their long fight to

¹³⁷ *Id.*

¹³⁸ E-mail from Troy H. Andrade, Professor and Dir. of the Ulu Lehua Scholars program, William S. Richardson Sch. of L. at Univ. of Haw., to Melody Kapilialoha MacKenzie, Professor of L. Emerita, William S. Richardson Sch. of L. at Univ. of Haw. (Mar. 4, 2024, 5:24 PM HST) (on file with author).

¹³⁹ *Ka Huli Ao Center for Excellence in Native Hawaiian Law*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/academics/ka-huli-ao/> (last visited Jan. 20, 2024).

¹⁴⁰ *Committed to Social Justice*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/social-justice/> (last visited Jan. 20, 2024).

¹⁴¹ Soifer E-mail, *supra* note 122.

¹⁴² *Makahiki Greetings from Ka Huli Ao*, Posting of Center for Excellence in Native Hawaiian Law, nhlawctr@hawaii.edu, to LISTSERV@lists.hawaii.edu (Dec. 29, 2023) (on file with author) [hereinafter *Makahiki Greetings from Ka Huli Ao*].

keep water flowing in their streams and to their lo'i kalo is highlighted in this issue of the Law Review.¹⁴³

The Law School has also had a major impact throughout Asia and the Pacific. Former Dean, Professor of Law Emeritus, and 1981 WSRSL graduate Larry Foster points out the numerous contributions of WSRSL professors and graduates in the development of law in parts of Asia, including one professor's ground-breaking work on comparative and cross-border insolvency and commercial law,¹⁴⁴ and another professor's appointment by the UN Human Rights Council as an independent expert representing the Asia-Pacific States as a member of the United Nations Working Group on Enforced or Involuntary Disappearances.¹⁴⁵ In addition, research by another professor, aided by a recent graduate, explores the history and status quo of women in the Japanese Legal Academy,¹⁴⁶ and another Richardson law professor is an expert on Hong-Kong and the human rights issues raised there.¹⁴⁷ There is also the ground-breaking work of Professor Eric Yamamoto and his "scholar advocate" law students who have participated in a program he created for developing and translating cutting-edge justice theory for usage on the front-lines in addressing claims resulting from the massacre of thousands of people on Jeju Island,¹⁴⁸ and of the World War II Korean

¹⁴³ See *West Maui Water Rights' for Community Members Focus of UH Law Clinic*, UNIV. OF HAW. NEWS (Oct. 3, 2023), <https://www.hawaii.edu/news/2023/10/03/west-maui-water-rights/>; A. U'ilani Tanigawa Lum, *He Wai Ola: Effectuating Water Justice in Maui Komohana*, KA WAI OLA (Oct. 1, 2023), <https://kawaiola.news/aina/he-wai-ola-effectuating-water-justice-in-maui-komohana/>.

¹⁴⁴ *Pacific-Asia Focus Has a Global Reach*, in PAC.-ASIAN L. STUD. PROGRAM E-NEWS 2, 4 (2019), https://law.hawaii.edu/files/content/news/UHLawSchool_PALS-062519.pdf; *Charles D. Booth*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/people/charles-d-booth/> (last visited Jan. 21, 2024).

¹⁴⁵ For more information, see *Tae Ung Baik*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/people/tae-ung-baik/> (last visited Jan. 21, 2024).

¹⁴⁶ For more information, see *Mark A. Levin*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/people/mark-a-levin/> (last visited Jan. 21, 2024).

¹⁴⁷ For more information, see Carole J. Peterson, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/people/carole-j-petersen/> (last visited Jan. 21, 2024).

¹⁴⁸ E.g., Eric K. Yamamoto & Suhyeon Burns, *Apology & Reparation: The Jeju Tragedy Retrials and the Japanese American Coram Nobis Cases as Catalysts for Reparative Justice*, 45 U. HAW. L. REV. 5 (2022); ERIC K. YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE: UNITED STATES, SOUTH KOREA AND THE JEJU 4.3 TRAGEDY (2021); Eric K. Yamamoto, Miyoko Pettit, & Sara Lee, *Unfinished Business: A Joint South Korea and*

“comfort women.”¹⁴⁹ Moreover, the legacy of Professor Jon Van Dyke in his areas of expertise – international ocean law, human rights, environmental law, and the rights of Native Hawaiians – have had a lasting impact on Hawai‘i and the world.¹⁵⁰

Highlighting the Law School’s reach into the Pacific, Julian Aguon, a CHamoru attorney, scholar, and 2009 WSRSL graduate from Guam notes:

[S]everal Richardson grads have gone home to their islands and immediately put the law to use in service of their communities. They have taken on some of the most important and visionary legal work of all - everything from representing their countries in international climate change negotiations, to defending their peoples’ right to self-determination, to arguing for the reversal of racist, turn-of-the-century precedent justifying the disparate treatment of the territories, to fighting for their country’s continued sovereignty and statehood, such as in the context of fixing maritime boundaries amidst sea level rise. They have represented countries and communities before all manner of regional and international tribunals including, for instance, the International Court of Justice and the International Tribunal for the Law of the Sea.¹⁵¹

Ka Huli Ao in particular has sought to increase the Law School’s ties with the Pacific, including by co-hosting the Pacific Judicial Council’s 2023 Custom and Traditional Law Conference.¹⁵² The Pacific Judicial Council was

United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice, 15 ASIAN-PAC. L. & POL’Y J. 1 (2014).

¹⁴⁹ Eric K. Yamamoto & Sara Lee, *Korean “Comfort Women” Redress 2012 Through the Lens of U.S. Civil and Human Rights Reparatory Justice Experiences*, 11 J. KOREAN L. 123 (2012). For more information on Professor Yamamoto’s research and ground-breaking work, see *Eric K. Yamamoto*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/people/eric-k-yamamoto/> (last visited Jan. 21, 2024).

¹⁵⁰ Professor Van Dyke, along with his wife, Sherry P. Broder, were also instrumental in pursuing the claims of those brutalized by the Marcos regime in the Philippines. See *Jon Van Dyke Institute*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/academics/jom-van-dyke-institute/> (last visited Jan. 21, 2024) for more information on Professor Van Dyke and his ground-breaking work.

¹⁵¹ E-mail from Julian Aguon, Lecturer in L., William S. Richardson Sch. of L. at Univ. of Haw., to Melody Kapilialoha MacKenzie, Professor of L. Emerita, William S. Richardson Sch. of L. at Univ. of Haw. (Jan. 10, 2024, 3:59 PM HST) (on file with author).

¹⁵² *Makahiki Greetings from Ka Huli Ao*, *supra* note 142.

established over twenty-five years ago for jurists from American Samoa, Guam, the Federated States of Micronesia, the Northern Mariana Islands, Palau, and the Marshall Islands.¹⁵³ Ka Huli Ao has also strengthened ties with the Maori of Aotearoa/New Zealand by hosting Justice Joe Williams, the first New Zealand Supreme Court Justice of Maori descent, and attending conferences in Aotearoa that discuss expanding the rights of Indigenous Peoples.¹⁵⁴

In Hawai'i, Richardson graduates are also very active in providing legal services to traditionally disadvantaged peoples and in protecting Hawai'i's natural and cultural resources. This ranges from public interest organizations like Earthjustice Hawai'i,¹⁵⁵ the Native Hawaiian Legal Corporation,¹⁵⁶ the Sierra Club of Hawai'i,¹⁵⁷ the Legal Aid Society of Hawai'i,¹⁵⁸ to land conservation organizations such as the Trust for Public Land¹⁵⁹ and Hawai'i Land Trust.¹⁶⁰ In all of these organizations and efforts, Richardson graduates

¹⁵³ *Id.* The Pacific Judicial Council encourages "dialogue on matters of common interest in areas including, but not limited to, the following: continuing legal education, preservation of custom and tradition within the confines of existing judicial systems, coordination with law enforcement agencies, public education in the areas of substance abuse and domestic community relations, and judicial administration." See PACIFIC JUDICIAL CONFERENCE, <https://pacificjudicialcouncil.org/about-council/overview> (last visited Mar. 4, 2024).

¹⁵⁴ Beverly Creamer, *New Zealand Maori Judge to Visit UH Law School for Jurist-in-Residence Program*, UNIV. OF HAW. MĀNOA (Mar. 23, 2018), <https://manoa.hawaii.edu/news/article.php?ald=9154>

¹⁵⁵ Isaac Moriwake '98 leads Earthjustice's Mid-Pacific Office as its Managing Attorney with Senior Attorney Kylie Wagner Cruz '14, Senior Associate Attorneys Elena Bryant '11 and Mahesh Cleveland '18, Counsel Kapua Sproat '98, and Regional Engagement Specialist Marti Townsend '05. *Who We Are*, EARTHJUSTICE, <https://earthjustice.org/office/mid-pacific> (last visited Feb. 3, 2024).

¹⁵⁶ Current Native Hawaiian Legal Corporation attorneys Kirsha Durante '04, Li'ulā Christensen '09, Ashley Obrey '09, Henderson Huihui '20, Terina Fa'agau '21, and Devin Kamealoha Forest '22 are WSRL graduates. *Our Staff*, NATIVE HAWAIIAN LEGAL CORP., <https://nativehawaiianlegalcorp.org/our-people/> (last visited Feb. 3, 2024).

¹⁵⁷ Chapter Director Wayne Tanaka '09 leads the Sierra Club of Hawai'i alongside Chapter Organizer Sharde Merberg Freitas '14. *Our Staff*, SIERRA CLUB OF HAWAII, <https://sierraclubhawaii.org/staff> (last visited Feb. 3, 2024).

¹⁵⁸ Executive Director David Kauila Kopper '10 and Deputy Director Angela Lovitt '97 lead the Legal Aid Society of Hawai'i with attorneys Connie Liu '06, Makia Minerbi '08, and Scott Shishido '10. *Staff*, LEGAL AID SOC'Y HAW., <https://www.legalaidhawaii.org/staff1.html> (last visited Feb. 18, 2024).

¹⁵⁹ Lea Hong '91 is the Hawai'i State Director for Trust for Public Land. *Lea Hong*, TRUST FOR PUBLIC LAND, <https://www.tpl.org/about/lea-hong> (last visited Feb. 3, 2024).

¹⁶⁰ President and Chief Executive 'Olu Campbell '15 leads Hawai'i Land Trust with Director of 'Āina Protection Shae Kamakaala '14 and 'Āina Protection Manager and Associate General Counsel Lu'ukia Nakanelua '19. *HILT Staff*, HAW. LAND TRUST, <https://www.hilt.org/staff-read-more/#shae-kamakaala> (last visited Feb. 3, 2024).

are the leaders and the “backbone,” putting in the hard work to ensure that our people, our ‘āina, and our island culture survive and grow.

Recently, when asked about the Law School’s impact, two 2015 graduates responded that WSRL, “does an exceptional job cultivating leaders who value the well-being of our people and our place. These values are embedded into Richardson graduates who eventually undertake various roles in our community and significantly shape our society in every sector. . . .”¹⁶¹ They also noted that, WSRL graduates:

[R]ecruit the next generation of clerks, associates, prosecutors, public defenders, . . . [and more] from Richardson . . . because of their intelligence, work ethic, and commitment to remain in and invest in our community and people. This has created an extraordinarily strong network where Hawaii’s leaders are mentored by Richardson graduates, and in turn guide, grow and cultivate our community long after graduation.¹⁶²

From the earliest days of the Law School until today – fifty years later – Richardson students, graduates, and professors are shaping the law here in Hawai‘i and beyond our shores for the benefit of current and future generations. Those blessed by the lehua are standing and persevering while holding fast to the splintered paddle of Kaleleiki! Eo e nā punahele o ka pua lehua, e kū, e ho‘omau! E pa‘a a pa‘a i ka hoe mamala a Keleleiki e!

V. CONCLUSION – KA ‘IKE NUI, KA ‘IKE IKI

Chief Justice William S. Richardson, the visionary who looked to ancestral wisdom and practice to chart the way forward for Hawai‘i, the one who brought to life the Law School that now bears his name, and the man who, with his gentle smile and modest demeanor, won the hearts and loyalty of so many of us, is greatly missed today. He ensured that in interpreting the law, the Hawai‘i Supreme Court looked to and addressed the small details of each case while understanding the ‘ike nui, the larger impact and greater meaning of each case – how the case would advance justice, restore the wai to our streams and lo‘i kalo, ensure that Hawai‘i’s native people are able to continue to practice and grow their culture, and make certain that all people of Hawai‘i benefit from the wise use of our natural resources.

¹⁶¹ E-mail from Pohai Nu‘uhiwa Campbell & ‘Olu Campbell to Melody Kapilialoha MacKenzie, Professor of L. Emerita, William S. Richardson Sch. of L. at Univ. of Haw. (Jan. 16, 2024, 12:01 PM HST) (on file with author).

¹⁶² *Id.*

C.J. Richardson appreciated the importance of having attorneys, judges, lawmakers, decisionmakers, and leaders who understood the ‘ike iki and, most importantly, the ‘ike nui. And his vision of the Law School was to help ensure that the future of Hawai‘i would be consistent with the values of our ancestors, to ensure the care and protection of those in need, and to open educational and professional avenues for all, especially for Hawai‘i’s most disadvantaged groups. Today, the Law School continues C.J.’s vision through “its commitment to social justice advocacy and scholarship on behalf of the underprivileged and underserved in our community and beyond.”¹⁶³ C.J. Richardson understood and embraced the importance and value of both ka ‘ike nui and ka ‘ike iki, and as a result, there are many of us who have benefitted from C.J.’s attention to the small details, and his commitment in bringing those details together to reach ka ‘ike nui, the greater vision of justice for Hawai‘i and beyond.

¹⁶³ See *Committed to Social Justice*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., <https://law.hawaii.edu/social-justice/> (last visited Jan. 21, 2024).

E Ho‘i ka Nani i Moku‘ula Lā:¹ The Commission on Water Resource Management’s Public Trust Duty to Fully Restore Moku‘ula and Mokuhinia

Holly K. Doyle*

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* University of Hawai‘i at Mānoa William S. Richardson School of Law, Class of 2024. Mahalo piha to Uncle Kai Keahi, Aunty Blossom Feiteira, and Aunty U‘ilani and Uncle Ke‘eaumoku Kapu for the time and ‘ike you shared with me. This Article is dedicated to you and all the loea in Maui Komohana who envision a just water future for Hawai‘i nei. Mahalo nunui to D. Kapua‘ala Sproat and MJ Palau-McDonald who reviewed and commented on multiple drafts of this Article, and to U‘ilani Tanigawa Lum for your encouragement. And huge thanks once again to the University of Hawai‘i Law Review’s editorial team for your meticulousness, flexibility, and aloha. This Article would not be what it is without you all.

¹ P.H. Kekuaiwa, *He Inoa No Manoana*, KA NUPEPA KUOKOA, June 14, 1862, at 4; LEI NĀHONOAPI‘ILANI: SONGS OF WEST MAUI 24–25 (Nicholas Keali‘i Lum & Zachary Alaka‘i Lum eds., 2019) [hereinafter LEI NĀHONOAPI‘ILANI].

IV. CONCLUDING THOUGHTS: “THINK OF THE LITTLE GUY, THE GUY
DOWNSTREAM.” 364

* * *

Eia a‘e nō ‘o Kihawahine	<i>Here is Kihawahine</i>
Ke kia‘i ‘aumakua ‘o Mokuhinia	<i>The ‘aumakua guardian of Mokuhinia</i>
‘A‘ahu i ke kapa ‘ōlenalena	<i>Adorned in ‘ōlena hued kapa</i>
E ‘ulono i ka pule e pa‘a ai ka ‘āina ē	<i>Offering prayers to secure ‘āina</i>

—He Mele no Kihawahine
Translated by U‘ilani Tanigawa Lum²

“The truth is that I believe that God was angry,” Martin
said, that these lands were not being used “as God
intended.”

—Peter Martin, West Maui Land Company
The Washington Post³

“We’re at their mercy. They’re playing God with us.”

—Lauren Palakiko, Kalo Farmer
NBC News⁴

I. INTRODUCTION

West Maui Land Company executive Glenn Tremble painted bullseyes on the backs of Native Hawaiian cultural practitioners and kalo (taro) farmers in his August 10, 2023, letter to the Commission on Water Resource

² Nā ‘Aikāne o Maui, Inc. Application for Surface Water Use Permit for Proposed New Use in a Designated Surface Water Mgmt. Area, Attachment E, at 2, Sept. 13, 2023 [hereinafter Nā ‘Aikāne WUPA].

³ Imogen Piper, Joyce Lee, Elahe Izadi & Brianna Sacks, *Maui’s Neglected Grasslands Caused Lahaina Fire to Grow with Deadly Speed*, WASH. POST (Sept. 2, 2023, 6:00 AM), <https://www.washingtonpost.com/investigations/interactive/2023/lahaina-wildfires-invasive-grass-destruction/>.

⁴ Alicia Victoria Lozano & Ben Goggin, *Maui Residents Say Water Official Removed After Wildfires Was Unfairly Targeted*, NBC NEWS (Aug. 25, 2023, 12:30 AM HST), <https://www.nbcnews.com/news/us-news/maui-fire-kaleo-manuel-water-official-removed-unfairly-rcna100974>.

Management (“Water Commission” or “Commission”).⁵ Tremble insinuated that the “first Native Hawaiian to lead the state water commission [] had impeded” efforts to fight the August 8 inferno that engulfed Lahaina.⁶ Governor Josh Green was similarly “quick to cast blame on” Native Hawaiian communities when he falsely accused kalo farmers and kia‘i wai (water protectors) of “fighting against the release of water to fight fires[.]”⁷

⁵ See Letter from Glenn Tremble, Vice President, West Maui Land Co., to M. Kaleo Manuel, Deputy Dir., Comm’n on Water Res. Mgmt. (Aug. 10, 2023), <https://www.documentcloud.org/documents/24172537-1st-letter-tremble-to-cwrm> [hereinafter Tremble Letter] (“At around 6:00 p.m., we received [the Commission’s] approval to divert more water. . . . We anxiously awaited the morning knowing that we could have made more water available to [Maui Fire Department] if our request had been immediately approved.”). Tremble’s allegations caught the attention of national news media outlets, and far-right wing pundits and presidential candidates chimed in, blaming “pagan Hawaiian culture,” “wokeism,” and the “equity agenda” for the Maui fires. *Charlie Kirk Blames Maui Wildfires on “Pagan Hawaiian Culture”*, MEDIA MATTERS FOR AM. (Aug. 17, 2023, 2:41 PM EDT), <https://www.mediamatters.org/charlie-kirk/charlie-kirk-blames-maui-wildfires-pagan-hawaiian-culture>; Lozano & Goggin, *supra* note 4.

⁶ Anita Hofschneider & Jake Bittle, *The Libertarian Developer Looming over West Maui’s Water Conflict*, GRIST (Nov. 27, 2023), <https://grist.org/indigenous/developer-peter-martin-west-maui-water-wildfire/>; see Stewart Yerton, *The Lahaina Fire Could Prompt the State to Change How It Manages Water on Maui*, HONOLULU CIV. BEAT (Aug. 16, 2023), <https://www.civilbeat.org/2023/08/the-lahaina-fire-could-prompt-the-state-to-change-how-it-manages-water-on-maui/> [hereinafter Yerton, *Lahaina Fire Could Change Maui Water Management*]; Tremble Letter, *supra* note 5; Lozano & Goggin, *supra* note 4.

⁷ Bill Weir, *‘Disaster Capitalism at Its Finest’: Fights over Water amid West Maui’s Charred Ruins Ignite New Fears*, CNN (Aug. 21, 2023, 5:29 PM EDT), <https://www.cnn.com/2023/08/21/us/hawaii-lahaina-water-wildfire/index.html>; Elahe Izadi & Zoëann Murphy, *Lahaina’s Deadly Fire Has Intensified Maui’s Fight over Water Rights*, WASH. POST (Aug. 23, 2023, 1:00 PM EDT), https://www.washingtonpost.com/climate-environment/2023/08/23/maui-water-rights-fires-lahaina/?nid=top_pb_signin&arcId=7MKUIMBFIJAX7DLU7ZLS44T5LA&account_location=ONSITE_HEADER_ARTICLE; Stewart Yerton, *A State Official Refused to Release Water for West Maui Fires*, HONOLULU CIV. BEAT (Aug. 15, 2023), <https://www.civilbeat.org/2023/08/a-state-official-refused-to-release-water-for-west-maui-fires-until-it-was-too-late/>; Ku‘uwehi Hiraishi, *Lāhainā Fires Reveal Ongoing Power Struggle for West Maui Water Rights*, HAW. PUB. RADIO (Aug. 17, 2023, 5:50 PM HST), <https://www.hawaiipublicradio.org/local-news/2023-08-17/lahaina-fires-reveal-ongoing-power-struggle-for-west-maui-water-rights> [hereinafter Hiraishi, *Fires Reveal Power Struggle for West Maui Water*] (“Gov. Josh Green in a press conference Tuesday was quick to cast blame on communities like Kaua‘ula who are fighting to keep water in their streams.”). Green’s “Trumpian” accusation is especially ironic considering that kuleana landowners in Kaua‘ula Valley, including the Palakiko ‘ohana, relied on Kaua‘ula Stream water to battle the “2018 wildfire linked with Hurricane Lane.” Hiraishi, *Fires Reveal Power Struggle for West Maui Water*, *supra*.

Tremble and Green targeted these individuals and communities for an ulterior motive.⁸ They did it to upend the Commission’s unanimous decision to designate Maui Komohana (West Maui) as a ground and surface water management area.⁹

Maui Komohana community members spent decades advocating for water management area designation¹⁰ because they “had no choice.”¹¹ Uncle Kekai “Kai” Keahi, one of Lahaina’s kupa‘āina (native-born) and foremost water leaders, put it simply: “Our aquifer is so depleted that if we didn’t get

“Every house on our property was lost except two houses. The only two houses that stood after that fire was my house and my dad’s house,” Palakiko said. “Our water lines were burnt, so we had to scoop water with buckets from the ‘auwai. So that’s how important this water was to us. If we didn’t have this water that is running, our house would have burnt just like everyone else’s.”

There are no nearby fire hydrants in Kaua‘ula Valley, just one stream, which families rely on for their crops, livestock, household needs, and more importantly fire protection.

Id.

⁸ See Piper, Lee, Izadi & Sacks, *supra* note 3; Yerton, *Lahaina Fire Could Change Maui Water Management*, *supra* note 6; Izadi & Murphy, *supra* note 7 (“But in recent weeks, after the fire, Green said that he ‘foresees’ changing or entirely eliminating that designation.”).

⁹ E.g., Tremble Letter, *supra* note 5, at 2 (“[W]e respectfully request that [the Commission] immediately suspend the various interim instream flow standards and other regulations in the area. . . . No one is happy there was water in the streams while our homes, our businesses, our lands, and our lives were reduced to ash.”); Press Release, Comm’n on Water Res. Mgmt., Entire Lahaina Aquifer Sector Area Designated as Surface Water & Ground Water Mgmt. Area (June 15, 2022), <https://dlnr.hawaii.gov/blog/2022/06/15/nr22-085/> [hereinafter Lahaina Designation Notice]; Michael Corkery, Mike Baker & Shawn Hubler, *Lahaina Fire Prompts a Shift in Maui’s Long-Running Water Fights*, N.Y. TIMES (Aug. 20, 2023), <https://www.nytimes.com/2023/08/20/us/maui-hawaii-water-supply.html>. Water management area designation empowers the Commission to manage all new and existing water withdrawals, diversions, and uses by requiring everyone—kalo farmers and developers alike—to apply for and obtain water use permits. HAW. REV. STAT. § 174C-48(a) (2011); HAW. ADMIN. R. § 13-171-11(a) (eff. 1988). Only true domestic users and those using catchment systems are exempt from permitting requirements. HAW. REV. STAT. § 174C-48(a); HAW. ADMIN. R. § 13-171-11(a).

¹⁰ Council for Native Hawaiian Advancement, *Know Your Wai: Where Did the Water Go?*, YOUTUBE (Nov. 17, 2023, 00:51:05–00:53:11), <https://www.youtube.com/watch?v=oV-DkewhNCQ>.

¹¹ Interview with Kekai Keahi, in Honolulu, Haw. (Nov. 2, 2023) (on file with author) [hereinafter Keahi Interview].

designation for Lahaina, our future would be done.”¹² Though a blunt and imperfect instrument, designation is currently the state’s best tool for preserving and protecting wai (freshwater) and “ensuring a sustainable and resilient water future[.]”¹³

Land use developers and their political lapdogs, however, have routinely opposed designation and government management of wai.¹⁴ Their opposition to Maui Komohana’s designation, then, was unsurprising.¹⁵ But no one expected the display of “bare-knuckle politics” after the August 2023 wildfires, “where the developers partnered with the politicians to take advantage of a desperate situation and make yet another water grab to take what they were unable to accomplish legally[.]”¹⁶ Kupa‘āina like Uncle Kai believed the protections designation offered Lahaina were forever set in stone.¹⁷ “I never realize that with one snap of his finger, Josh Green and his emergency proclamation could wipe the entire state water code out.”¹⁸

Indeed, soon after the fires, West Maui Land Company “asked the Green administration to suspend” the Commission’s water management of Maui Komohana.¹⁹ “‘I would love to see it gone,’ [Tremble] said of the designation.”²⁰ Days later, “Green temporarily suspended the designation and loosened streamflow regulations – terms that Native Hawaiians had

¹² *Id.* The Water Commission is required to designate water management areas where “water resources in an area may be threatened by existing or proposed withdrawals or diversions of water[.]” HAW. REV. STAT. § 174C-41(a).

¹³ Lahaina Designation Notice, *supra* note 9.

¹⁴ See JONATHAN L. SCHEUER & BIANCA K. ISAKI, WATER AND POWER IN WEST MAUI 15 (2021); Written Testimony in Opposition to Designation from Glenn Tremble, Treasurer/Secretary, Launiupoko Irrigation Co., to M. Kaleo Manuel, Deputy Dir., Comm’n on Water Res. Mgmt. (June 13, 2022) [hereinafter Tremble Testimony in Opposition to Designation]; Written Testimony in Opposition to Designation from Glenn Tremble, Treasurer/Secretary, Olowalu Water Co., to M. Kaleo Manuel, Deputy Dir., Comm’n on Water Res. Mgmt. (June 13, 2022).

¹⁵ See SCHEUER & ISAKI, *supra* note 14, at 15 (“[O]pposition to state management over water . . . has come from land use developers, counties, and misunderstandings about the nature of [water management area] designation.”).

¹⁶ Council for Native Hawaiian Advancement, *supra* note 10, at 00:49:53–50:28; Naomi Klein & Kapua‘ala Sproat, *Why Was There No Water to Fight the Fire in Maui?*, GUARDIAN (Aug. 17, 2023, 4:02 PM EDT), <https://www.theguardian.com/commentisfree/2023/aug/17/hawaii-fires-maui-water-rights-disaster-capitalism>; Weir, *supra* note 7.

¹⁷ Council for Native Hawaiian Advancement, *supra* note 10, at 00:51:28–51:52.

¹⁸ *Id.* at 00:51:34–51:52.

¹⁹ Tremble Letter, *supra* note 5, at 2–3; Corkery, Baker & Hubler, *supra* note 9.

²⁰ Yerton, *Lahaina Fire Could Change Water Management*, *supra* note 6.

fought hard to implement.”²¹ Green, whose gubernatorial campaign was funded by developers and construction super PACs,²² “said it was likely that the state would modify its oversight of West Maui’s water as part of broader efforts to ensure more water was available for fighting fires.”²³

And Peter Martin, West Maui Land Company’s co-founder and Chief Executive Officer,²⁴ resurrected Manifest Destiny rhetoric from the eighteenth and nineteenth centuries²⁵ when he complained that the “real problem” behind the fires is the “water commission and its code, which [is] so overbearing that it prevented him from” developing the invasive grasses carpeting his land into “irrigated, landscaped parcels, or even small hobby farms.”²⁶ Later, Martin went even further when he said “protecting water for

²¹ Claire Wang, *How 19th-Century Pineapple Plantations Turned Maui into a Tinderbox*, GUARDIAN (Aug. 27, 2023, 7:00 AM EDT), <https://www.theguardian.com/environment/2023/aug/27/maui-wildfire-water-plantations-ecology>; Patricia Tummons, *Emergency Order May Bring More Hardship to Taro Farmers*, ENV’T HAW. (Sept. 1, 2023), <https://environment-hawaii.org/?p=15347>.

²² Blaze Lovell, *This Hawaii Super PAC Is Spending Millions to Defeat One Political Opponent This Year*, HONOLULU CIV. BEAT (Aug. 5, 2022), <https://www.civilbeat.org/2022/08/this-hawaii-super-pac-is-spending-millions-to-defeat-one-political-opponent-this-year/>. Governor Green’s ties with development interests appear to run deep. Chad Blair, *New Hawaii Justice Recently Held a Top Position in the Super PAC That Helped Put Gov. Green in Office*, HONOLULU CIV. BEAT (Nov. 22, 2023), <https://www.civilbeat.org/2023/11/new-hawaii-justice-recently-held-a-top-position-in-the-super-pac-that-helped-put-gov-green-in-office/>. For example, “Brooke Wilson, who was a registered lobbyist for the Hawaii Regional Council of Carpenters, has been Green’s chief of staff since he was elected lieutenant governor.” *Id.* And most recently, Governor Green nominated—and the Senate Judiciary Committee confirmed—“Hawaii’s new Supreme Court justice” who, “until earlier this year[,] served as a director for a powerful political action committee that helped elect Josh Green governor.” *Id.*

²³ Corkery, Baker & Hubler, *supra* note 9. In an interview with Honolulu Civil Beat reporter Stewart Yerton, Green affirmed without hesitation that he foresaw lifting water management area designation and asserted that the rules implemented by his emergency proclamation required its lifting. *A Conversation with Governor Josh Green*, HONOLULU CIV. BEAT (Aug. 17, 2023), <https://www.facebook.com/civilbeat/videos/304452395404176> (on file with author).

²⁴ Carolyn Kormann, *Why Maui Burned*, NEW YORKER (Oct. 30, 2023), <https://www.newyorker.com/magazine/2023/11/06/maui-wildfire-response-recovery>.

²⁵ ROGER BELL, *LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS* ix (1984) (“Planters, missionaries, and traders carried to the distant islands the political and ideological imperatives of ‘manifest destiny.’”).

²⁶ Kormann, *supra* note 24; Piper, Lee, Izadi & Sacks, *supra* note 3 (“The fields where the fires started and spread are primarily owned by three parties: Kamehameha Schools, also known as the Bishop Estate, an educational trust that is one of the state’s largest private land owners; the state of Hawaii; and Peter Martin, a prominent local developer.”). A lawsuit filed

Native Hawaiian cultural practices [is] ‘a crock of shit,’ and [] invasive grasses and ‘this stupid climate-change thing’ had ‘nothing to do with the fire.’”²⁷ “‘The truth is that I believe that God was angry,’ Martin said, that these lands were not being used ‘as God intended.’”²⁸ This “misuse” of the land, Martin opined, angered God, whose fury snapped power lines and set the fields ablaze.²⁹ It begs the question: whose god?

For Maui Komohana’s kupa‘āina, god is a mo‘o akua wai (freshwater deity) named Kihawahine.³⁰ Accounts differ, but many describe Lahaina and, in particular, the islet of Moku‘ula and its surrounding seventeen-acre, spring-fed pond, Loko ‘o Moku‘uhinia, as Kihawahine’s traditional residence.³¹ Moku‘ula was—and is—the political and spiritual piko (umbilicus) of the Kingdom of Hawai‘i.³² But when the sugar industrial

against West Maui Land Company (among others) alleged that the company “allowed highly flammable, invasive, nonnative vegetation, including foundain and guinea grass, to accumulate and overrun the land. This failure to safely maintain nonnative vegetation contributed significantly to the ignition of the Maui Fires, their rapid spread, and the blocking and slowing of the north and south escape routes.” Amended Complaint, Demand for Jury Trial & Summons at 5–6, *Na‘Aikane O Maui v. Maui Elec. Co.*, (No. 2CCV-23-0000298) (2nd Cir. Filed Sept. 29, 2023).

²⁷ Kormann, *supra* note 24.

²⁸ *Id.*; Piper, Lee, Izadi & Sacks, *supra* note 3.

²⁹ Piper, Lee, Izadi & Sacks, *supra* note 3.

³⁰ Commission on Water Resource Management, *September 19, 2023 Monthly Water Commission Meeting*, YouTube, at 3:17:20–3:35:38, 4:30:04–35:00, 8:27:32–33:10 (Sept. 19, 2023), <https://www.youtube.com/watch?v=i7cDjJD9gp0&t=12782s> [hereinafter *September 19, 2023 Commission Meeting*]; MARIE ALOHALANI BROWN, KA PO‘E MO‘O AKUA: HAWAIIAN REPTILIAN WATER DEITIES 43 (2022). Of course, Kihawahine is one of many akua connected to Maui Komohana. BROWN, *supra*, at 84, 103. This Article positions her as the relevant contrast to Peter Martin’s God because the analysis focuses on Moku‘ula and Moku‘uhinia, and Kihawahine’s relationship to these places is unique. Section III.C.1 discusses Mo‘o Kihawahine and the historical, cultural, spiritual, and political context surrounding Moku‘ula and Moku‘uhinia in greater detail. Importantly, Aunty Blossom Feiteira distinguishes western conceptions of gods and goddesses from ‘aumākua like Kihawahine. Blossom Feiteira, Ke‘caumoku Kapu, and U‘ilani Kapu, Guest Speakers, Maoli Thursday, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawai‘i at Mānoa William S. Richardson School of Law: Maui Ola: E Ho‘i ka Nani i Moku‘ula (Oct. 5, 2023) [hereinafter *Maoli Thursday with Moku‘ula Kahu*]. As an ‘aumākua, Kihawahine was a real person who was deified upon her death and transformed into a mo‘o akua wai. *Infra* note 216 and accompanying text.

³¹ PAUL CHRISTIAAN KIEGER ET AL., MOKU‘ULA: HISTORY AND ARCHAEOLOGICAL EXCAVATIONS AT THE PRIVATE PALACE OF KING KAMEHAMEHA III IN LAHAINA, MAUI 12, 14 (Paul Christiaan Klieger ed., 1995).

³² Video: Kāko‘o Maui (Council for Native Hawaiian Advancement 2023), <https://mele.vhx.tv/videos/kakoo-maui>; see discussion *infra* Section III.C.1.

complex³³ arrived, the “construction of ditches and reservoirs for canefields above Waianae severely disrupted the original flow of water into” Mokuhinia, and the pond shrank into a “stagnant swamp.”³⁴ After draining the area dry, sugar barons and their associates successfully campaigned to fill in Mokuhinia’s then-stagnant waters.³⁵ Today, a derelict baseball field entombs Moku‘ula and Mokuhinia.³⁶

Perhaps it is Mo‘o Kihawahine who is angry. Aunt Blossom Feiteira,³⁷ whose ‘ohana (family) traces its lineage to Kihawahine, understands the August 2023 wildfires as the mo‘o clearing and cleansing Maui Komohana.³⁸ Aunt U‘ilani Kapu, one of Moku‘ula and Mokuhinia’s kia‘i (guardians) and kahu (honored attendants), similarly interprets the wildfires as an expression of Kihawahine’s divine agitation, not God’s.³⁹ Maybe Kihawahine’s rage is born from settler-imperialism’s 150-year-long practice of dewatering Maui Komohana for capitalist exploitation.⁴⁰ After all, “if the wetlands had stayed

³³ See generally CAROL A. MACLENNAN, SOVEREIGN SUGAR: INDUSTRY AND ENVIRONMENT IN HAWAII 145–69 (2014) (“Beginning in the 1880s, [the industrial sugar plantation complex] changed a mixed agricultural and trade-oriented landscape into one organized by the needs of sugar.”); CAROL WILCOX, SUGAR WATER: HAWAII’S PLANTATION DITCHES (1996) (chronicling the construction of sugar plantation ditches, the sugar industry’s corresponding growth, and its economic, political, environmental, and societal impacts).

³⁴ KLIEGER ET AL., *supra* note 31, at 114.

³⁵ *Id.* at 115; Maoli Thursday with Moku‘ula Kahu, *supra* note 30; *infra* note 204 and accompanying text.

³⁶ KLIEGER ET AL., *supra* note 31, at 115.

³⁷ Aunt Blossom was president of the nonprofit organization, Friends of Moku‘ula, which dissolved in 2017. See <https://www.mokuula.com/> (last visited Apr. 10, 2024). Friends of Moku‘ula worked for the restoration of Moku‘ula and Mokuhinia and cultivated awareness of Kānaka ‘Ōiwi culture through educational programming. *Friends of Moku‘ula, Inc.*, FACEBOOK, <https://www.facebook.com/mokuula> (last visited Apr. 10, 2024).

³⁸ Interview with Blossom Feiteira, Maui Program Coordinator, Council for Native Hawaiian Advancement, in Wailuku, Maui, Haw. (Oct. 24, 2023) (on file with author) [hereinafter Feiteira Interview].

³⁹ *September 19, 2023 Commission Meeting*, *supra* note 30, at 3:32:18–3:32:55 (“You know, I see this fire as a piko. . . . So what is it saying to us? Kiha is agitated.”).

⁴⁰ See MACLENNAN, *supra* note 33, at 157–58 (“Clearly, the power of the sugar capitalists in the early twentieth century rested with their access to water”); SCHEUER & ISAKI, *supra* note 14, at 2 (“For both sugar and tourism, the proximity of relatively abundant water near dry areas where sugar can grow and tourists can sunbathe has been a tremendous asset. Its development required, however, the forceful displacement of existing land-holders and water users.”); Klein & Sproat, *supra* note 16 (“For over a century, water across Maui Komohana . . . has been extracted to benefit outside interests: first large sugar plantations and more recently, their corporate successors. These companies . . . have devoured the island’s natural resources . . . draining Indigenous ecologies of their natural moisture.”); KLIEGER ET AL., *supra* note 31, at 114 (“James Campbell of Lahaina and Henry Turton established Pioneer Mill Co. in 1865, covering vast uplands of Lahaina, Launiupoko, Wahikuli, and Kā‘anapali.”).

intact in and around Lahaina, the fires . . . likely wouldn’t have been as destructive.”⁴¹

As Lahaina begins to rebuild with the twin threat of plantation disaster capitalism⁴² and climate chaos looming,⁴³ the Water Commission will have to make difficult and complex decisions to responsibly manage our wai.⁴⁴

⁴¹ See discussion *infra* Section III.C.2 which explains how wetlands and Indigenous aquacultural systems including lo‘i kalo and loko i‘a kalo can mitigate fires, floods, and other disasters exacerbated by the climate emergency. Adele Peters, *Maui’s Lahaina Was Once Filled with Wetlands. Can It Be Rebuilt Differently?*, FAST Co. (Aug. 18, 2023), <https://www.fastcompany.com/90939766/mauis-lahaina-was-once-filled-with-wetlands-can-it-be-rebuilt-differently>. Charles van Rees—a wetland scientist who has studied Hawai‘i’s diminishing wetlands—said the August 8, 2023, fires “likely wouldn’t have been as destructive” had the “wetlands . . . stayed intact in and around Lahaina[.]” *Id.*

“This depends on the severity of the fire, but generally wildfires will skirt around the outside of wetlands, both because the moist soil inhibits the fire but also because wetlands in places like Hawaii don’t support the same tall, shrubby vegetation that sustains high-intensity fires,” says Van Rees. And if there were still large wetlands in place, some neighborhoods would never have been built.

Id. See generally Charles B. van Rees & J. Michael Reed, *Wetland Loss in Hawai‘i Since Human Settlement*, 34 WETLANDS 335, 336, 341 (2014). “Water diversion and groundwater use increased exponentially with the arrival of Europeans and the advent of plantation agriculture in the 18th and 19th centuries and much of the landscape was converted to sugar cane, pineapple, and rice agriculture.” Van Rees & Reed, *supra*, at 336 (citation omitted).

⁴² “Plantation disaster capitalism” particularizes the disaster capitalism phenomenon to Hawai‘i. Klein & Sproat, *supra* note 16 (“Disaster capitalism has taken many forms in different contexts. . . . It’s always a little different, which is why some Native Hawaiians have taken to calling their unique version by a slightly different term: plantation disaster capitalism. It’s a name that speaks to contemporary forms of neocolonialism and climate profiteering, like real estate agents who have been cold-calling Lahaina residents who have lost everything to the fire and prodding them to sell their ancestral lands rather than wait for compensation.”). See generally NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007) (documenting how capitalist interests exploit crises including natural disasters or engineered political upheavals to implement controversial policies while the public is focused on recovery and survival); Emily Mae Czachor, *Maui Residents with Wildfire-Damaged Homes Are Being Targeted by Real Estate Scams, Officials Warn*, CBS NEWS (Aug. 15, 2023, 11:50 PM EDT), <https://www.cbsnews.com/news/maui-wildfires-residents-homes-damaged-targeted-scams-real-estate-officials-warn/> (detailing real estate and “imposter scams,” fraudulent offers for immediate clean-up and repairs, and application fees to qualify for funds from the Federal Emergency Management Agency).

⁴³ Klein & Sproat, *supra* note 16.

⁴⁴ See van Rees & Reed, *supra* note 41, at 347 (“Despite this freeing of agricultural water [after the sugar plantations closed], water demand is rising in Hawai‘i due to urban development and rapid population growth, leading to increased conflict over water resources.” (citation omitted)); *infra* Section III.C.2.

One of these decisions will be whether to allocate sufficient wai to fully restore Hawai‘i’s political and spiritual piko: Moku‘ula and its seventeen-acre, spring-fed pond, Mokuhinia.⁴⁵ The Commission and Native Hawaiian cultural practitioners can expect continued backlash (or whitelash)⁴⁶ from the development and tourism industries.⁴⁷ But this Article couples the state’s legal duty to aloha ‘āina with a Maoli restorative justice framework⁴⁸ to conclude that the Commission *must* restore Moku‘ula and Mokuhinia if it is to meaningfully fulfill its kuleana ko‘iko‘i (solemn responsibility).

⁴⁵ Comm’n on Water Res. Mgmt., Briefing on Site Visit to Lahaina Aquifer Sector, Water Resources & Systems of Kaua‘ula, Maui (Oct. 24, 2023), <https://files.hawaii.gov/dlnr/cwrm/submittal/2023/sb20231024B3.pdf>.

⁴⁶ See generally WESLEY LOWERY, AMERICAN WHITELASH: A CHANGING NATION AND THE COST OF PROGRESS (2023). “Whitelash” is the phenomenon that occurs after instances of racial progress, such as the historic election of President Obama as this nation’s first Black president. *Pulitzer Prize-Winning Journalist and Author Wesley Lowery on New Book, “American Whitelash”*, CBS NEWS (June 27, 2023), <https://www.cbsnews.com/video/pulitzer-prize-winning-journalist-and-author-wesley-lowery-on-new-book-american-whitelash/>.

In moments of racial advancement, of racial progress, it’s not inevitable that they’ve now won the grapple . . . the other side of the rope always tugs back. . . . [F]or as many people who were excited for [President Obama’s] victory, there were many people out there for whom this stoked an anxiety, a frustration, a fear.

Id. Similarly, in the context of Maui Komohana, Deputy Director Manuel’s historic appointment was the first time that Native Hawaiians were given a “chance to actually be heard.” Council for Native Hawaiian Advancement, *supra* note 10, at 00:51:55–52:57.

Kaleo was that guy that gave us the chance to actually be heard. So when the governor did his emergency proclamation, it was he that had Dawn Chang remove Kaleo because Kaleo gave us the voice, and when you give the people the voice, be aware, get power. To extinguish that power, he got rid of Kaleo. Which was a miscalculation cuz I know Lahaina went up in an uproar. People went crazy, the whole state went crazy cuz we knew what it meant. And we was taken back by how we lost this . . . all this work that we done, we lost it. Not just us, the whole state.

Id. But developers like West Maui Land Company were concerned that Deputy Director Manuel, a Native Hawaiian cultural practitioner, would be biased against them. See Lozano & Goggin, *supra* note 4. As a result, when an opportunity to oust Deputy Director Manuel presented itself, West Maui Land Company and Governor Green jumped on it. See *id.*

⁴⁷ See, e.g., Lozano & Goggin, *supra* note 4.

⁴⁸ See *infra* Section III.B (describing Professor D. Kapua‘ala Sproat’s Four Values framework) and note 151.

As for Kihawahine, her ki‘i (image, statue) sits on a shelf in Berlin’s Ethnological Museum.⁴⁹ Efforts to bring her home to Hawai‘i are underway,⁵⁰ but what will she return to? This piece is my pule (prayer) that Kihawahine returns to the wetland from which she was taken.⁵¹ Part II briefly documents how missionary families built the sugar plantation economy and laid the literal foundation for modern developers to continue profiting from water diversion. It then details the community-led restorative justice effort to designate Maui Komohana as a water management area and the threats designation faced following the August 2023 inferno.⁵² Part III outlines the state’s public trust duty to aloha ‘āina and, after applying a Maoli restorative justice analytical framework,⁵³ contends that the Commission must act affirmatively to fully restore wai to Mokuhinia.⁵⁴ Part IV concludes by reminding us all of our duty to “the little guy downstream.”⁵⁵

II. EXORCISING SUGAR’S GHOST

Most people miss them. The telltale signs that Hawai‘i is haunted. It is understandable; the apparition shapeshifts and hides in plain sight. In *Sovereign Sugar*, anthropologist Carol MacLennan pulls the sheet from its head, identifying it once and for all.⁵⁶ “Acting as an invisible force, sugar’s ghost continues to frequent the islands with its legacy of economic dominance.”⁵⁷ But before the sugar industrial complex became a ghost, it was the brainchild of missionary families who sought to transform Hawai‘i

⁴⁹ Ku‘uwehi Hiraishi, *The Return of Powerful Goddess Kihawahine Could Have Significant Impact on Lāhainā Community*, HAW. PUB. RADIO (Aug. 24, 2023, 11:33 AM HST), <https://www.hawaiipublicradio.org/local-news/2023-08-24/the-return-of-powerful-goddess-kihawahine-could-have-significant-impact-on-lahaina-community>. Kihawahine’s ki‘i is imbued with her mana. *Id.* Mana is difficult to describe, but some think of it as divine power. “This mana was coveted by many, including Kamehameha Nui, who was known to travel with her in carved form. . . . It was thought that the mana or spirit of a god would occupy the carved statue, and Kihawahine had been worshiped for generations at this point. . . . What happened to Kihawahine after Kamehameha died in 1810 remains unclear. But she ended up in the hands of German microbiologist Eduard Arning.” *Id.*

⁵⁰ *Id.*

⁵¹ BROWN, *supra* note 30, at 162.

⁵² *See infra* Part II.

⁵³ *See infra* Part III.

⁵⁴ *See discussion infra* Section III.A for a concise description of the state’s legal duty to aloha ‘āina.

⁵⁵ Mari Matsuda, *A Richardson Lawyer*, 33 U. HAW. L. REV. 61, 67 (2010).

⁵⁶ MACLENNAN, *supra* note 33, at 279.

⁵⁷ *Id.*

culturally and economically.⁵⁸ Today, land developers and water companies keep sugar's memory alive by inflicting the same harm through the same infrastructure.⁵⁹ The Water Code's architects believed water management area designation was the best way to finally put sugar to rest.⁶⁰

A. *Legacy Diverters: Sugar Plantations Turned Land and Water Companies*

Land- and business-holding missionaries were not part of the original plan designed by the American Board of Commissioners for Foreign Missions ("Board").⁶¹ In fact, a Board policy expressly forbade missionaries from such personal gain.⁶² Frequent, premature exoduses by missionary families back to the United States, however, incentivized the Board to "reverse[] its policy" and "encourage[] its people to become residents and citizens and allow[] them to acquire property."⁶³ And many did. They obtained "land adjacent to their [missionary] stations[,] and "purchased other tracts for plantations or investment."⁶⁴ Four families in particular rose "to dominate the corporate economy: Alexander, Baldwin, Castle, and Cooke."⁶⁵

"[S]econd-generation members of the Castle, Cooke, Alexander, and Baldwin families"⁶⁶ established an "economic empire composed of interlocking companies . . . nicknamed the 'Big Five,' after the large sugar plantation corporations—Castle & Cooke, Alexander & Baldwin, American Factors, C. Brewer & Co., and Theo. H. Davies."⁶⁷ American Factors acquired Pioneer Mill Company (or "Pioneer Mill"), a sugar plantation in Lahaina that guzzled water provided to it by "Honolua Ranch, which controlled the major water-producing watershed."⁶⁸

⁵⁸ *Id.* at 53. "Four family lineages figured prominently in the Big Five: Cookes, Castles, Alexanders, and Baldwins." *Id.* at 52.

⁵⁹ See *infra* notes 106–16 and accompanying text.

⁶⁰ See REV. COMM'N ON THE STATE WATER CODE, FINAL REPORT TO THE HAWAII STATE LEGISLATURE 2–3 (1994); *infra* note 138 and accompanying text.

⁶¹ MACLENNAN, *supra* note 33, at 67–68.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 65.

⁶⁵ *Id.*

⁶⁶ *Id.* at 72.

⁶⁷ *Id.* at 52.

⁶⁸ WILCOX, *supra* note 33, at 126; MACLENNAN, *supra* note 33, at 204. Today, Honolua Ranch goes by the name Maui Land and Pineapple Company. WILCOX, *supra* note 33, at 126 ("Honolua Ranch changed its name to Baldwin Packers, then Maui Pineapple Company, and finally, in 1969, to Maui Land and Pineapple Company, commonly referred to as Maui Land

Lahaina, with its fertile soil and abundant sunshine, was the perfect place to grow sugar cane.⁶⁹ Some historical accounts paint Lahaina as arid,⁷⁰ but Kumu Hula Pueo Pata illuminates how Kānaka ‘Ōiwi engineered the environment to harness the abundance of wai in the area.⁷¹ Kūpuna planted vast ‘ulu (breadfruit) groves, sometimes miles long.⁷² “Hahai no ka ua i ka

& Pine, or ML&P.”). It owns the Pu‘u Kukui Watershed Preserve which plays a critical role in “recharging the aquifer responsible for supplying a significant amount of the fresh water used by West Maui residents and businesses.” *MLP and State Dedicate \$3,120,000 to Protecting Critical West Maui Watershed*, LAHAINA NEWS (May 19, 2023), <https://www.lahainanews.com/news/local-news/2023/05/19/mlp-and-state-dedicate-3120000-to-protecting-critical-west-maui-watershed/>; *What We Do*, MAUI LAND & PINEAPPLE, CO., <https://www.mauiland.com/what-we-do> (last visited Feb. 15, 2024). Alexander & Baldwin eventually owned a large share of Pioneer Mill in the early twentieth century as its reach metastasized across Maui. MACLENNAN, *supra* note 33, at 204.

⁶⁹ WILCOX, *supra* note 33, at 126. Historical accounts by visiting captains in the early 1800s describe Lahaina as paradisaical:

“The environs of Lahaina are like a garden. It would be difficult to find a soil more fertile, or a people who can turn it to greater advantage; little pathways sufficiently raised, and kept in excellent condition, serve as communications between the different estates. These are frequently divided by trenches, through which a fresh and limpid stream flows tranquilly, giving life to the plantations, the sole riches of the country.”

KLIEGER ET AL., *supra* note 31, at 18. “Much of Lahaina seems to have remained in this state until sugar plantations drastically changed the land use in the area near the end of the nineteenth century.” *Id.*

⁷⁰ WILCOX, *supra* note 33, at 126. It seems more accurate to describe the areas surrounding Lahaina as arid, but not Lahaina itself due to ‘Ōiwi ingenuity. *See id.*; Kumu Cody Pueo Pata, Guest Speaker, Maoli Thursday, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawai‘i at Mānoa William S. Richardson School of Law: Maui Ola: I ka ‘Ōlelo nō ke Ola – Maui Komohana (Feb. 1, 2024) [hereinafter Maoli Thursday with Kumu Pueo Pata]; Keahi Interview, *supra* note 11.

⁷¹ Maoli Thursday with Kumu Pueo Pata, *supra* note 70; Adam Keawe Manalo-Camp, ‘O Ka Malu ‘Ulu o Lele, KA WAI OLA (Oct. 1, 2023), <https://kawaiola.news/moomeheu/moolelo/o-ka-malu-ulu-o-lele/>; KEPĀ MALY & ONAONA MALY, I HE WAHI MO‘OLELO NO KAUA‘ULA A ME KEKĀHI ‘ĀINA O LAHAINA I MAUI: A COLLECTION OF TRADITIONS AND HISTORICAL ACCOUNTS OF KAUA‘ULA AND OTHER LANDS OF LAHAINA, MAUI 22 (2007) (“Even the shelving cliffs of rocks were planted with esculent roots, banked in and watered by aqueducts from the rivulet with as much art as if their level had been taken by the most ingenious engineer. . . . It showed in a conspicuous manner the ingenuity of the inhabitants in modifying their husbandry to different situations of soil and exposure”); *see also* Keahi Interview, *supra* note 11; Council for Native Hawaiian Advancement, *supra* note 10, at 00:28:00–28:22.

⁷² Maoli Thursday with Kumu Pueo Pata, *supra* note 70; Kanaeokana, *Kaipo Kekona Keynote* | 22nd Annual Native Hawaiian Convention, YOUTUBE (Nov. 22, 2023, 00:03:33–

ululā‘au. *Rains always follow the forest.*”⁷³ When the ‘ulu leaves transpired, Mauna Kahālāwai (the West Maui Mountains)⁷⁴ caught the released water vapor.⁷⁵ The water vapor became rain clouds that gathered around the mountains and precipitated, enabling the flow of Kaua‘ula, Kahoma, and Kanahā streams.⁷⁶ ‘Ōiwi constructed ‘auwai, Indigenous canal systems with po‘owai (intakes) and ho‘i (returns), that ushered stream water to and from lo‘i kalo.⁷⁷ Because lo‘i are designed for flood irrigation, the wai circulating through the lo‘i both nourished kalo and recharged underground water sources.⁷⁸ And the malu (shade, protection) cast by the ‘ulu grove prevented evaporation by blocking the harsh sun, allowing water to remain in the earth.⁷⁹

So when the plantations cut down Lahaina’s ‘ulu groves to make way for sugar, they also “cut off their water source.”⁸⁰ Without the tree canopy to catch and produce the rains and the malu to retain them, Lahaina’s water resources dried up.⁸¹ To solve the problem they created, plantations engineered complex ditch and tunnel systems that diverted water from the perennial headlands of Lahaina’s streams to the now-arid lowlands.⁸²

04:31), <https://youtu.be/0dyICFuApAk?si=RCjvotxQRCS5Y9k> [hereinafter Kekona Keynote]; *Kaipo Kekona*, FEEDING HAWAII: PORTRAITS OF RESILIENCE, <https://www.feedinghawaii.org/talkstory/kaipo-kekona> (“Ka Malu ‘Ulu O Lele is the name of a large food forest system that took place in our area, in the moku of Lāhainā. And it extended from Launiupoko to just past Māla, and up to around 500 to 700 foot elevation. There’s a total of roughly about 10 and a half square miles.”).

⁷³ Maoli Thursday with Kumu Pueo Pata, *supra* note 70; MARY KAWENA PUKUI, ‘OLELO NO‘EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS No. 405 (Mary Kawena Pukui trans., 1983).

⁷⁴ Maui Filmworks, *The History of Moku‘ula as Told by Akoni Akana in 1999*, YOUTUBE (June 14, 2017), <https://www.youtube.com/watch?v=Gm4I4VggmOg> [hereinafter *Akoni Akana’s History of Moku‘ula*].

⁷⁵ Maoli Thursday with Kumu Pueo Pata, *supra* note 70; see Manalo-Camp, *supra* note 71.

⁷⁶ Maoli Thursday with Kumu Pueo Pata, *supra* note 70; Manalo-Camp, *supra* note 71.

⁷⁷ Maoli Thursday with Kumu Pueo Pata, *supra* note 70; MALY & Maly, *supra* note 71, at 9–10, 104.

⁷⁸ Maoli Thursday with Kumu Pueo Pata, *supra* note 70; Keahi Interview, *supra* note 11; Kekona Keynote, *supra* note 72.

⁷⁹ Maoli Thursday with Kumu Pueo Pata, *supra* note 70; Keahi Interview, *supra* note 11; Kekona Keynote, *supra* note 72.

⁸⁰ Maoli Thursday with Kumu Pueo Pata, *supra* note 70; MACLENNAN, *supra* note 33, at 205 (“American Factors . . . operations obtain[ed] their waters from the West Maui Mountains.”).

⁸¹ Keahi Interview, *supra* note 11; see *infra* Section III.C.2.

⁸² WILCOX, *supra* note 33, at 126–37 (cataloging the extensive ditch systems constructed by Honolulu Ranch (today, Maui Land & Pine) and Pioneer Mill).

Honolua Ranch, a Baldwin enterprise, entered an agreement with Pioneer Mill which provided that it “would build and own the Honokohau Ditch, while Pioneer Mill would finance it and use the water.”⁸³ Honokohau Ditch quickly deteriorated, so Honolua Ranch built a new one and named it Honolua Ditch.⁸⁴ This new ditch transported up to fifty million gallons of water per day, and in February 1914, it diverted over 790 million gallons of water.⁸⁵ “Honolua Ranch did not retain any water for its various agricultural ventures—all water went to Pioneer Mill.”⁸⁶ Then, like its predecessor, Honolua Ditch began to leak.⁸⁷ Pioneer Mill wanted to reline the new ditch (and increase its carrying capacity by twenty million gallons per day),⁸⁸ but it did not want to stop taking water.⁸⁹ To ensure uninterrupted flow, “the water was diverted into the previously abandoned 1904 Honokohau Ditch, a section at a time. Because the old ditch had to be renovated for this purpose,” Pioneer Mill worked on both ditches simultaneously.⁹⁰ Honolua Ditch was just one of several water collection systems Pioneer Mill used to take the “prodigious quantities of water” sugar cultivation demanded.⁹¹

A dwindling supply of surface water sent Pioneer Mill searching underground.⁹² In 1897, the plantation drilled two wells, Lahaina Shaft-Pump A and Lahaina Shaft-Pump B, that together could pump up to thirty million

⁸³ *Id.* at 126. Built in two years, Honokohau Ditch cost \$132,000 (roughly \$5,000,000 in 2024) and was nearly thirteen miles long. *Id.* at 126–27. The place name of Honokōhau includes a diacritical marking, but that is not reflected here because the underlying sources do not use the diacritic.

⁸⁴ *Id.* at 127. The final blueprints for Honolua Ditch “called for thirty-one contiguous tunnels. . . . Altogether there was 34,241 feet of tunnel, 726.3 feet of covered crossings, 1183 feet of inverted siphons, and only 427.3 feet of open ditch.” *Id.* Honolua Ditch cost \$239,841, nearly \$7,500,000 by 2024 standards. *Id.* at 130.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Engineers for Honolua Ranch had not fully sealed the ditch. *Id.* Honolua Ranch’s manager said, “Our only regret is that we did not make an absolutely permanent job by concreting the sides as well as the bottom.” *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 131; KLIEGER ET AL., *supra* note 31, at 114; TOM NANCE, REVIEW OF SOURCES OF IRRIGATION SUPPLY IN THE LAHAINA-KAPALUA AREA 20–22 (1999).

⁹² WILCOX, *supra* note 33, at 136 (“In the search for water, Pioneer Mill dug numerous development tunnels . . .”); *see also* NANCE, *supra* note 91 (identifying Pioneer Mill’s surface and groundwater sources including Honokohau Ditch and Lahaina Shaft-Pump A and -Pump B).

gallons of groundwater a day.⁹³ Pioneer Mill positioned these wells less than half a mile ma uka (inland) of Mokuhinia to “irrigate lower elevation fields in the Waihe[‘]e and Kaua[‘]ula areas.”⁹⁴ As a result, Mokuhinia stagnated within the year.⁹⁵ Plantation executives later filled in the ancient pond for “‘hygenic’ and developmental reasons.”⁹⁶ Then the county turned it into a park.⁹⁷ Pioneer Mill’s operations continued for another century until it was out-competed by “tourism, another high-water consumptive industry[,]” and luxury housing developments.⁹⁸ The plantation’s death knell sounded in 1999.⁹⁹

⁹³ “The A and B tunnel complex consists of some 1,300 feet of skimming tunnel delivering water to Pump A, the A verticals and Pump B. Pump A has a rated capacity of 9,030 gpm (13 MGD). The A verticals, of which two run normally, have a combined pumping capacity of about 5,400 gpm (7.8 MGD). Pump B has a nominal capacity of 7,000 gpm (10 MGD)[.]” Pub. Utils. Comm’n, Launiupoko Irrigation Co., Inc.’s Responses to Intervenors’ Mahanalua Nui Homeowners Association Inc. at 84, In re Application of Launiupoko Irrigation Co., Inc. (2021) (No. 2020-0089). These wells are now owned by Peter Martin’s Waihe[‘]e Land and Homes, LLC. COMM’N ON WATER RES. MGMT., SURFACE AND GROUND WATER MANAGEMENT AREA DESIGNATION: FINDINGS OF FACT REPORT 53 (June 8, 2022) [hereinafter CWRM LAHAINA DESIGNATION FOFs]; *see infra* notes 252–53 and accompanying text.

⁹⁴ NANCE, *supra* note 91, at 16, 22; LAUNIUPOKO IRRIGATION CO., LAUNIUPOKO IRRIGATION CO., INC.’S REPORT TO THE PUBLIC UTILITIES COMMISSION 21–22 (No. 2020-0089) (July 6, 2022) [hereinafter LIC REPORT TO PUC]. These two wells are also referred to as Lahaina Shaft-Pump A and -Pump B (“Lahaina Shafts A and B”), and they are less than 2,000 feet ma uka (inland) of Mokuhinia. Nā ‘Aikāne WUPA, *supra* note 2, Attachment A at 2, Attachment B at 2.

⁹⁵ *See* KLIEGER ET AL., *supra* note 31, at 115. A photograph of Loko ‘o Mokuhinia taken between 1897 and 1914 depicts overgrown reeds that “nearly completely cover the pond[,]” and obscure the “vegetation and architectural features on Moku‘ula.” *Id.*

⁹⁶ *Id.* “It was then a popular move to fill wetlands in Hawai‘i for ‘hygienic’ and development reasons (Waikīkī on O‘ahu was another example).” *Id.*

⁹⁷ *Id.*

⁹⁸ WILCOX, *supra* note 33, at 137. “A century ago, sugar plantations owned and operated a system of irrigation ditches and reservoirs on Maui that were loosely regulated. After the farms shut down, many of these systems were bought by private companies or real estate developers.” Corkery, Baker & Hubler, *supra* note 9.

⁹⁹ Cindy Schumacher, *Planning The Future: The Pioneer Mill Company Office Building*, LAHAINA NEWS (Apr. 9, 2021), <https://www.lahainanews.com/news/local-news/2021/04/09/planning-the-future-the-pioneer-mill-company-office-building/>.

Peter Martin, head of West Maui Land Company and Waive‘e Land and Homes,¹⁰⁰ seized this opportunity.¹⁰¹ He bought Pioneer Mill’s land and infrastructure, including its water diversion systems¹⁰² and the two wells that contributed to Mokuhinia’s dewatering over a century ago.¹⁰³ Martin conjured “a paradise of palatial homes and swimming pools” out of “hundreds of acres of plantation land”¹⁰⁴ His developments “draw their water from three private utility systems that [Martin] controls, siphoning underground aquifers and mountain streams to fill swimming pools and irrigate lawns.”¹⁰⁵

¹⁰⁰ Hofschneider & Bittle, *supra* note 6. Waive‘e Land and Homes owns and operates two skimming wells fewer than 2,000 feet ma uka (inland) of Mokuhinia and Moku‘ula. See *infra* notes 252–53 and accompanying text. Uncle Ke‘eaumoku and Auntie U‘ilani Kapu observed the water level in Mokuhinia’s ‘auwai fall when the wells were operational and rise when the August 2023 fires rendered the wells inactive. Nā ‘Aikāne WUPA, *supra* note 2, Attachment B, at 2, Attachment C, at 5. Martin also owns Launiupoko Irrigation Company and Launiupoko Water Company, both of which provide water for his developments. Hofschneider & Bittle, *supra* note 6. He is a major donor for the Grassroot Institute of Hawaii, “a libertarian think tank that has fought Native Hawaiian sovereignty.” *Id.*

¹⁰¹ Colleen Uechi, *Interview with Peter Martin: Developer Talks About His Start, Challenges Building Affordable Homes*, MAUI NEWS (July 18, 2019), <https://www.mauinews.com/news/local-news/2019/07/latest-peter-martin-projects-generate-familiar-opposition/> (“As sugar operations in Lahaina began winding to a close, Martin began focusing on [American Factors or Amfac], which ran Pioneer Mill. . . . In 1997, he . . . bought 458 acres in Launiupoko from Amfac for \$2.6 million.”).

¹⁰² Marina Starleaf Riker, ‘Ration Your Water’: A Plantation-Era Water System on Maui is Maxed Out, HONOLULU CIV. BEAT (April 22, 2022), <https://www.civilbeat.org/2022/04/ration-your-water-a-plantation-era-water-system-on-maui-is-maxed-out/> [hereinafter Riker, *Ration Your Water*] (“West Maui Land, the developer created its own drinking and irrigation water utilities and took control of the century-old irrigation ditch system. It diverted water from the stream to a series of pipes and reservoirs to irrigate its subdivision.”).

¹⁰³ See CWRM LAHAINA DESIGNATION FOFs, *supra* note 93; LIC REPORT TO PUC, *supra* note 92; KLIEGER ET AL., *supra* note 31, at 115; Hofschneider & Bittle, *supra* note 6.

¹⁰⁴ Hofschneider & Bittle, *supra* note 6.

¹⁰⁵ *Id.* An inordinate amount of water used by Martin’s developments goes to cosmetic landscaping. *Id.* The Launiupoko subdivision, for example, uses 1.5 million gallons a day to water lawns. *Id.* “Just over a quarter [of total water delivered] is used for drinking and cooking.” *Id.* “[E]ach residential customer in Launiupoko” uses twenty times more water than “the average American home.” *Id.* “The development has just a few hundred residents, but it uses almost half as much water as the public water system in Lāhainā, which serves 18,000 customers.” *Id.*

One of these utility systems, Launiupoko Irrigation Company (“LIC”), delivers water both to Martin’s luxury subdivisions and kuleana families¹⁰⁶ including Lauren Palakiko’s.¹⁰⁷ In 2018, the Water Commission penalized LIC up to \$5,000 per day for violating the Water Code because it routinely overtaxed the streams.¹⁰⁸ Instead of reducing the amount of water it withdrew, LIC implemented a blockade.¹⁰⁹ It stopped drawing “water to fill its reservoirs – and also stopped delivering water to the homes of other families living in the valley.”¹¹⁰ These families lost their only source of running water with no notice and no time to prepare.¹¹¹ Lauren was forced to bathe her baby “out of a bucket of river water”¹¹² because Martin and Tremble played God.¹¹³ Ironically, families like hers did not “even have enough water to fight fire[.]”¹¹⁴ A court had to order LIC to “restore water to the families and farmers . . . who rely on the stream.”¹¹⁵ For many, it is as if Pioneer Mill never left.¹¹⁶

¹⁰⁶ Kuleana families possess documentation establishing that the ‘āina they were awarded during the 1848 Māhele was in cultivation at that time, and as such, have access rights to wai for kalo cultivation and other traditional and customary Native Hawaiian rights practices. Riker, *Ration Your Water*, *supra* note 102.

¹⁰⁷ *Id.*; Lozano & Goggin, *supra* note 4; *infra* notes 340–44 and accompanying text.

¹⁰⁸ Riker, *Ration Your Water*, *supra* note 102; Marina Starleaf Riker, ‘We Cannot Afford to be Careless’: Lahaina Residents Want More Water Oversight, HONOLULU CIV. BEAT (April 28, 2022), <https://www.civilbeat.org/2022/04/we-cannot-afford-to-be-careless-lahaina-residents-want-more-water-oversight/> [hereinafter Riker, *Lahaina Residents Want More Water Oversight*].

¹⁰⁹ Riker, *Ration Your Water*, *supra* note 102; Riker, *Lahaina Residents Want More Water Oversight*, *supra* note 108.

¹¹⁰ Riker, *Lahaina Residents Want More Water Oversight*, *supra* note 108.

¹¹¹ Riker, *Ration Your Water*, *supra* note 102.

¹¹² Riker, *Lahaina Residents Want More Water Oversight*, *supra* note 108.

¹¹³ Lozano & Goggin, *supra* note 4.

¹¹⁴ Riker, *Ration Your Water*, *supra* note 102. It is ironic because West Maui Land executives and Governor Green carelessly and inaccurately accused kalo farmers like the Palakikos and Native Hawaiian water officials of “fighting against the release of water to fight fires[.]” Weir, *supra* note 7; Izadi & Murphy, *supra* note 7.

¹¹⁵ Riker, *Ration Your Water*, *supra* note 102.

¹¹⁶ *Id.* (“What’s happening now isn’t working, Kapu said. Five years ago, his family used to have enough water to farm nine taro patches that he used to supply food for weddings, funerals and other parties across the community. Now, he can barely keep up with two and a half.”); Hofschneider & Bittle, *supra* note 6 (detailing how one of Martin’s developments diverted nearly the same amount of stream water as Pioneer Mill before it shut down).

B. Maui Komohana’s Decades-Long Struggle for Water Management
Area Designation

Because of situations like Lauren’s, Maui Komohana’s kupa‘āina spent decades advocating for state management of wai.¹¹⁷ What happened to Lauren is not an isolated incident.¹¹⁸ Private water purveyors like Martin’s Launiupoko Water Company and Olowalu Water Company control seventy-seven percent of the area’s wai.¹¹⁹ Maui County controls a mere twenty-three percent.¹²⁰ Worse still, “the county has no jurisdiction over private companies, according to [Ayron] Strauch, [the Water Commission’s] hydrologist.”¹²¹ Nor is the county’s system integrated with the private purveyors’, leaving the county and everyone it serves¹²² “at the mercy of some of these other systems[.]”¹²³ All the while, increasingly frequent and destructive climate events imperil our families and communities.¹²⁴

¹¹⁷ *Under Landmark Decision, State Will Now Manage West Maui Water Resources*, MAUI NOW (June 14, 2022, 4:55 PM HST), <https://mauiNOW.com/2022/06/14/under-landmark-decision-state-will-now-manage-west-maui-water-resources/> [hereinafter MAUI NOW, *Landmark Decision*]; Land & People, *Water Expert Jonathan Scheuer on How the History of Land Use in Hawai‘i Is the Story of Water*, UNIV. HAW. MĀNOA COLL. TROPICAL AGRIC. & HUM. RES., at 00:42:30–43:20 (Oct. 13, 2023), <https://open.spotify.com/episode/4fk8g9iFd91Ew1FqMZwTWy?si=Cpd9m0gYSwWs-B7M5MzVKQ>.

¹¹⁸ See Riker, *Ration Your Water*, *supra* note 102; Riker, *Lahaina Residents Want More Water Oversight*, *supra* note 108.

¹¹⁹ Council for Native Hawaiian Advancement, *supra* note 10, at 00:30:00–31:48; MAUI NOW, *Landmark Decision*, *supra* note 117; Keahi Interview, *supra* note 11.

¹²⁰ Paula Dobbyn, *Maui Activists Urge Return of DLNR Water Official to Former Job*, HONOLULU CIV. BEAT (Sept. 19, 2023), <https://www.civilbeat.org/2023/09/maui-activists-urge-return-of-dlnr-water-official-to-former-job/> (“DLNR staff noted in a presentation before the public testimony that Maui County’s public water system accounts for less than 23% of total water use in the Lahaina area. The rest is controlled by private companies and designated for private use.”); Council for Native Hawaiian Advancement, *supra* note 10, at 00:30:00–31:48; MAUI NOW, *Landmark Decision*, *supra* note 117; Keahi Interview, *supra* note 11.

¹²¹ MAUI NOW, *Landmark Decision*, *supra* note 117.

¹²² “Most people in West Maui get water from the county’s public water system.” Hofschneider & Bittle, *supra* note 6; CWRM LAHAINA DESIGNATION FOFS, *supra* note 93, at 17.

¹²³ MAUI NOW, *Landmark Decision*, *supra* note 117. Uncle Kai Keahi describes how “when we fall short of water, especially during the summer months during drought times, we cannot even tap into their water when we don’t have any water. They keep it all for themselves, 100%, and we have no control over what they have.” Council for Native Hawaiian Advancement, *supra* note 10, at 00:30:00–31:48.

¹²⁴ E.g., Clay Trauernicht et al., *The Contemporary Scale and Context of Wildfire in Hawai‘i*, 69 PAC. SCI. 427, 436 (2015) (“Climate is a central determinant of wildfire occurrence and behavior and climate change has been linked to regionally specific increases

Researchers have long recognized that “competition for water ha[s] met the limits of the resource in Lahaina.”¹²⁵ Things have changed since the 1980s and 1990s but not for the better.¹²⁶ Sharp declines in rainfall do little to increase groundwater recharge and streamflow.¹²⁷ Perennial streams are becoming seasonal.¹²⁸ Couple the climate emergency with mounting demands for water and the Commission was effectively statutorily mandated to designate Maui Komohana as a water management area.¹²⁹

In truth, the State Water Code’s drafters believed the entire state would eventually be designated.¹³⁰ Yet Hawai‘i is still divided into two groups: areas that are designated and areas that are not.¹³¹ Water in designated areas benefits from an added layer of protection afforded by the Commission’s water use permitting system.¹³² In essence, this means no one can use surface water in a designated area without a permit from the Commission.¹³³ And to obtain a permit, applicants must demonstrate (among other things) that their

in fire activity. . . . [P]atterns suggest that wildfire occurrence may continue to increase across [Hawai‘i] with future warming and drying. . . .” (citations omitted)); Kevin Hamilton, *Hawaii’s Climate Future: Dry Regions Get Drier with Global Warming, Increasing Fire Risk*, CONVERSATION (Aug. 16, 2023, 8:26 AM EDT), <https://theconversation.com/hawaiiis-climate-future-dry-regions-get-drier-with-global-warming-increasing-fire-risk-211379> (“Hawai[‘i] has seen a generally rising trend in the amount of land that burns each year as the local climate warms. Climate change was one of several contributors to Maui’s wildfire catastrophe, and rising temperatures and associated rainfall changes are expected to increase the islands’ fire risk. These changing weather patterns will also affect Hawai[‘i]’s ecosystems and freshwater resources.”).

¹²⁵ WILCOX, *supra* note 33, at 137.

¹²⁶ Land & People, *supra* note 117, at 00:34:00–35:30.

¹²⁷ CWRM LAHAINA DESIGNATION FOFs, *supra* note 93, at 34.

¹²⁸ *Id.*

¹²⁹ The Water Code requires the Commission to “designate an area once a *reasonable determination* is made – based on scientific investigation and research – that water resources in an area are threatened by existing or proposed withdrawals or diversions of water. HAW. REV. STAT. § 174C-41; CWRM LAHAINA DESIGNATION FOFs, *supra* note 93, at 12.

¹³⁰ SCHEUER & ISAKI, *supra* note 14, at 15 (“The authors of the Water Code anticipated all areas of the state would eventually be designated [water management areas].”); REV. COMM’N ON THE STATE WATER CODE, *supra* note 60, at 2.

¹³¹ SCHEUER & ISAKI, *supra* note 14, at 15 (“[The Commission] manages Hawai‘i’s water under a bifurcated system of water management areas (WMAs) and non-WMAs.”).

¹³² *Id.*; see HAW. REV. STAT. § 174C-48(a) (prohibiting unpermitted withdrawals, diversions, impoundments, or other consumptive uses of water in designated water management areas).

¹³³ “No person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the [water] commission.” HAW. REV. STAT. § 174C-48(a). The exceptions to this general rule are outside the scope of this Article.

current or future uses of water are or will be “reasonable-beneficial”¹³⁴ and aligned with the public interest.¹³⁵ These additional safeguards are why Maui Komohana’s kupa‘āina advocated for designation—it places control of a public trust resource back into the public’s hands.¹³⁶

Large landowners, private water companies, developers, and counties oppose designation for this same reason. “In practice, . . . the management of West Maui’s water resources has turned on the[ir] directives.”¹³⁷ Hoping to rarify designation, they frame it as “an extraordinary event” despite the state’s intention that it be anything but.¹³⁸ They repeatedly resurrect the red

¹³⁴ The State Water Code defines “reasonable-beneficial use” as “the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.” HAW. REV. STAT. § 174C-3(9). In other words, the reasonable-beneficial use standard “incorporates the ‘best features of both reasonable use and beneficial use’” and requires “an examination of the purpose of the use, its economic value, its value to society *including consideration of possible harm to society through harm to the water body, and a balancing of any harm caused by the use against methods currently available to reduce or eliminate that harm.*” *In re Waiāhole Ditch Combined Contested Case Hearing (Waiāhole I)*, 94 Hawai‘i 97, 160–61, 9 P.3d 409, 472–73 (2000) (citations omitted) (emphasis in original). The Hawai‘i Supreme Court underscored that the “‘reasonable-beneficial use standard’ and the related criterion of ‘consistent with the public interest’ demand examination of the proposed use not only standing alone, but also in relation to other public and private uses and the particular water source in question.” *Id.* at 161, 9 P.3d at 473.

¹³⁵ HAW. REV. STAT. § 174C-49(a)(4). Hawai‘i water law unequivocally affirms that “underlying every private diversion and application there is, as there always has been, a superior public interest” in wai. *Robinson v. Ariyoshi*, 65 Haw. 641, 676, 658 P.2d 287, 312 (1982). The State Water Code guarantees sufficient wai for “objectives . . . declared to be in the public interest,” including “the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation.” HAW. REV. STAT. § 174C-2(c).

¹³⁶ Hawaii Commission on Water Resource Management, *June 14, 2022 Commission on Water Resource Management Meeting*, YOUTUBE (June 14, 2022), <https://www.youtube.com/watch?v=eNTZULELCdc> (recording of more than eight hours of testimony, largely from kupa‘āina of Maui Komohana urging the Commission to designate the Lahaina Aquifer Sector as both a ground and surface water management area); Council for Native Hawaiian Advancement, *supra* note 10 (Maui kupa‘āina calling on the Water Commission to take water out of private purveyor’s control and putting it back into public hands); Keahi Interview, *supra* note 11.

¹³⁷ SCHEUER & ISAKI, *supra* note 14, at 15.

¹³⁸ Compare Tremble Testimony in Opposition to Designation, *supra* note 14 (opposing designation because it would “subject existing uses to decades of delay” and would “halt any new uses” of water) with SCHEUER & ISAKI, *supra* note 14, at 15 (noting that the authors of the Water Code “anticipated all areas of the state would eventually be designated”).

herring that designation stymies affordable housing development,¹³⁹ a particularly powerful smokescreen given that local families often cannot find “safe, quality housing that is [] affordable given current wages in the state[.]”¹⁴⁰ They object to the procedural process water use permitting affords the public likely because their uses cannot stand up to scrutiny.¹⁴¹

As for Maui County, it claims designation “disregards county collaboration” and county-specific water management plans, even though it manages only twenty-three percent of Maui Komohana’s wai.¹⁴² Ayron Strauch, the Commission’s hydrologist, rebuffs the “argument that we should work just with the county” because it “doesn’t alleviate the problem that we have multiple systems that are not managed by the county[.]”¹⁴³

These tensions are compounded by a harsh reality: there simply is not enough water to meet demand.¹⁴⁴ Former Water Commissioner Mike Buck

¹³⁹ Tremble Testimony in Opposition to Designation, *supra* note 14 (testifying that designation would delay affordable housing projects); MAUI NOW, *Landmark Decision*, *supra* note 117 (reporting that opponents to designation argue designation would “hamper[]” affordable housing projects).

¹⁴⁰ Jonathan Likeke Scheuer, *IDEAS: How to Redefine the Housing Crisis in Hawaii*, HONOLULU CIV. BEAT (Dec. 13, 2020), <https://www.civilbeat.org/2020/12/how-to-redefine-the-housing-crisis-in-hawaii/>. Solving the affordable housing crisis is a common campaign platform among state politicians; e.g., *Issue: Affordable Housing*, JOSH GREEN FOR HAW., <https://joshgreenforhawaii.com/issues/affordable-housing/> (last visited Apr. 8, 2024) (noting Hawai‘i’s “housing crisis has reached a state of emergency” that then-gubernatorial candidate Josh Green sought to address in a ten point emergency plan that included “addressing water . . . requirements, all while maintaining environmental protections”); see Deja Ostrowski & Jonathan Likeke Scheuer, *5 Tools to Disarm the Weaponization of Affordable Housing*, HONOLULU CIV. BEAT (Mar. 7, 2023), <https://www.civilbeat.org/2023/03/5-tools-to-disarm-the-weaponization-of-affordable-housing/> (calling out the weaponization of the “‘affordable housing’ cry . . . as an all-encompassing justification for any development project, regardless of the actual merits of a proposal or even how affordability is defined”); Wayne Tanaka, *Governor Green’s Anti-Housing Proclamation Threatens ‘Āina, Culture, Kama‘āina, and the Future of Our Keiki*, SIERRA CLUB HAW. (Aug 2, 2023), <https://sierraclubhawaii.org/blog/housing-aug-2023> (discussing how Governor Green’s emergency housing plan is “[i]ronically . . . anti-housing,” especially for “those struggling with housing insecurity”).

¹⁴¹ SCHEUER & ISAKI, *supra* note 14, at 16 (“Most water users, particularly those seeking to use water for commercial uses such as private golf courses and hotel resort developments, have faced this litany of permitting criteria with trepidation. Amongst other reasons, when [the Commission] considers a water use permit application, it holds a public hearing and solicits input[.]”).

¹⁴² MAUI NOW, *Landmark Decision*, *supra* note 117.

¹⁴³ *Id.*

¹⁴⁴ Keahi Interview, *supra* note 11; Kaipo Kekona & Clay Trauernicht, Guest Speakers, Maoli Thursday, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawai‘i at Mānoa William S. Richardson School of Law: Maui Ola: E Ho‘oulu i ka Malu

is one of many who presaged this dilemma when he cautioned that Maui Komohana “‘is not the first of these issues that we’ll be facing’ ‘The water is over allocated, there is not enough water, and the historic expectations of the amount of water that was available is just not going to be there in the future.’”¹⁴⁵ What tools can help the Commission chart a path forward?

III. THE COMMISSION ON WATER RESOURCE MANAGEMENT’S PUBLIC TRUST DUTY TO RESTORE MOKU‘ULA AND MOKUHINIA

First, imagine a world in which Maui Komohana has enough water. Imagine that the Commission could grant all water requests without worrying that our mo‘opuna (grandchildren) seven generations from now will have to drink desalinated seawater to survive. In this world, the decision to grant Nā ‘Aikāne O Maui’s water use permit application to ho‘i ka nani i Moku‘ula a

‘Ulu o Lele (Apr. 4, 2024) [hereinafter Maoli Thursday with Kaipo Kekona & Clay Trauernicht]; Teresa Dawson, *Water Commission Learns of Threats to West Maui Ground, Surface Sources*, ENV’T HAW. (Feb. 5, 2022), <https://www.environment-hawaii.org/?p=14219> (explaining that current and authorized planned uses of water already exceed the sustainable yield of two aquifers in the Lahaina Aquifer Sector Area).

Under the state Water Code, designation must occur if there is “an increase in use or authorized planned use that may cause the maximum rate of withdrawal to reach 90 percent of the sustainable yield.”

According to commission staff, that trigger has already been exceeded for the Honokōwai and Launiupoko aquifer systems.

Launiupoko has a sustainable yield of 7 mgd. Current use, development tunnel discharge, authorized planned use, and other permitted well capacity together exceed 8 mgd.

For Honokōwai, with its sustainable yield of 6 mgd, it’s even worse. The same combination of uses and well capacity there exceeds 10 mgd.

Dawson, *supra*.

¹⁴⁵ Riker, *Ration Your Water*, *supra* note 102.

me Mokuhinia is a no-brainer.¹⁴⁶ Public trust uses¹⁴⁷—namely the maintenance of waters in their natural state and Native Hawaiian traditional and customary practices—are prioritized over private commercial uses.¹⁴⁸ The Commission could rely on the “black letter law” of the Water Code and Hawai‘i’s water jurisprudence to easily reach that result.¹⁴⁹

Such a world is possible. But even if this world is on her way, she is not here yet.¹⁵⁰ And when you are in the veritable maze that is Hawai‘i water law

¹⁴⁶ For example, restoring Mokuhinia such that it is a functioning loko i‘a kalo once more is a clear exercise of traditional and customary Native Hawaiian rights protected and prioritized by the public trust doctrine. See *In re Waiāhole Ditch Combined Contested Case Hearing (Waiāhole I)*, 94 Hawai‘i 97, 137, 9 P.3d 409, 449 (2000) (continuing “to uphold the exercise of Native Hawaiian and traditional and customary practices as a public trust purpose”). Mokuhinia’s restoration “will require both surface and groundwater flows to return to that place,” meaning that it will facilitate the “maintenance of waters in their natural state[,]” another recognized public trust purpose. Land & People, *supra* note 117, at 00:35:55–36:37; *Waiāhole I*, 94 Hawai‘i at 136, 9 P.3d at 448. Granting Nā ‘Aikāne’s application is in the public interest because loko i‘a like Mokuhinia are designed to nurture fish species. See HAW. REV. STAT. § 174C-2(c) (mandating “adequate protection” of “traditional and customary Hawaiian rights, [and] the protection and procreation of fish and wildlife”). The proper ecological balance will be struck when this ancient wetland is restored. See HAW. REV. STAT. § 174C-2(c); Nā ‘Aikāne WUPA, *supra* note 2, at 12–13. And by ensuring sufficient amounts of surface and groundwater flow to Mokuhinia, we will simultaneously recharge the aquifer and enhance Hawai‘i’s wai so that it may be used in other beneficial ways. Nā ‘Aikāne WUPA, *supra* note 2, at 12–13 (discussing how restoration of flow to Mokuhinia will serve as both Indigenous flood mitigation and a fire suppression system).

¹⁴⁷ Public trust uses of water include the (1) maintenance of waters in their natural state; (2) domestic water use; (3) exercise of traditional and customary Native Hawaiian rights; and (4) reservations of water by the Department of Hawaiian Home Lands. *Waiāhole I*, 94 Hawai‘i at 137–39, 9 P.3d at 449–51; *In re Wai‘ola o Moloka‘i, Inc. (Wai‘ola)*, 103 Hawai‘i 401, 431–32, 83 P.3d 664, 694–95 (2004).

¹⁴⁸ *Waiāhole I*, 94 Hawai‘i at 137–39, 9 P.3d at 449–51; *Wai‘ola*, 103 Hawai‘i at 431–32, 83 P.3d at 694–95. Critically, public trust uses may even “displace” existing uses if necessity calls for it. *Waiāhole I*, 94 Hawai‘i at 149, 9 P.3d at 461.

[E]xisting uses are not automatically “grandfathered” under the constitution and the Code, especially in relation to public trust uses. . . . [T]he public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes. . . . The clear implication of these provisions is that the Commission may reclaim instream values to the inevitable displacement of existing offstream uses.

Id.

¹⁴⁹ See Nā ‘Aikāne WUPA, *supra* note 2, for this application and analysis.

¹⁵⁰ Land & People, *supra* note 117, at 00:58:05–58:10. Dr. Scheuer quotes author Arundhati Roy: “Another world is not only possible, she is on her way. On a quiet day I can hear her breathing.” *Id.*; ARUNDHATI ROY, *THE END OF IMAGINATION* 252 (2016).

unable to see past the fog of formalist constraints, personal perspectives, and moral judgments, it is difficult to know which path will usher forth this new world.¹⁵¹ The Four Values of Restorative Justice for Native Peoples are what guide your way.¹⁵²

A. Hawai‘i’s Legal Duty to Aloha ‘Āina

Modern Hawai‘i water law’s ancient mo‘okū‘auhau (genealogy)¹⁵³ unequivocally safeguards and prioritizes traditional and customary Native

¹⁵¹ D. Kapua‘ala Sproat & MJ Palau-McDonald, *The Duty to Aloha ‘Āina: Indigenous Values as a Legal Foundation for Hawai‘i’s Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525, 550–51 (2022) [hereinafter Sproat & Palau-McDonald, *The Duty to Aloha ‘Āina*] (“[T]he new legal realists . . . have empirically demonstrated that decisionmakers are influenced by their own personal perspectives, as well as those of their peers.”). See generally BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2009) (offering “balanced realism” as an alternate perspective to legal formalism and realism, and recognizing that judges, though sometimes influenced by their personal biases, generally issue legally consistent decisions); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 972 (2003) (explaining that hard or ambiguous cases require “a controversial moral judgment”).

¹⁵² See *infra* Section III.B.

¹⁵³ D. Kapua‘ala Sproat, *From Wai to Kānāwai: Water Law in Hawai‘i*, in NATIVE HAWAIIAN LAW: A TREATISE 522, 525–29 (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter NATIVE HAWAIIAN LAW TREATISE]; Sproat & Palau-McDonald, *The Duty to Aloha ‘Āina*, *supra* note 151, at 534–36 (“Hawai‘i’s 1839 Kānāwai and 1840 Constitution exemplify how ali‘i inscribed Kānaka values and praxes, including aloha ‘āina, into law.”). The Kingdom of Hawai‘i’s 1839 Kānāwai, or “‘first formal body of written laws[.]’” codified the “‘reciprocal recognition’ that a functional and healthy Native Hawaiian society required all classes of people and the ‘āina to live and work in balance.’” Sproat & Palau-McDonald, *supra* note 151, at 534–35. Section thirteen of the 1839 Kānāwai, for example, mandated the equitable sharing of freshwater resources and their restoration when depleted. *Id.* at 535 (citing HE KUMU KANAWAI A ME KE KANAWAI HOOPONOPONO WAIWAI, NO KO HAWAII NEI PAE AINA NĀ KAMEHAMEHA III, at 120 (1839)). Kānaka ‘Ōiwi proactively and sustainably managed complex aquacultural systems to ensure everyone had the resources they all needed.

Laws and customs preceding Western contact and continuing through Hawai‘i’s independent kingdom . . . recogniz[ed] that water could not be owned in any sense, but instead must be proactively managed as a resource for generations to come. . . . These values were strictly enforced by lunawai (water stewards) who managed the flow of water within and between ahupua‘a to ensure, for example, that if water was taken from a stream for kalo cultivation, it was returned to the same stream so that downstream users had enough water to satisfy agricultural or other needs. These management practices respected the environment while also taking into account the competing needs of the larger community.

Hawaiian lifeways.¹⁵⁴ Hawai‘i’s public trust doctrine, for example, arises from Native Hawaiian custom and tradition, not English or Roman law,¹⁵⁵ and directs the state and its political subdivisions to conserve and protect Hawai‘i’s water resources for the benefit of present and future generations.¹⁵⁶ Delegates to the 1978 Constitutional Convention were “concerned about past

D. Kapua‘ala Sproat, *A Question of Wai: Seeking Justice Through Law for Hawai‘i’s Streams and Communities*, in *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* 199, 202 (Noelani Goodyear-Ka‘ōpua et al. eds., 2014) [hereinafter Sproat, *A Question of Wai*]. Moreover, ancient kingdom law declared that “[t]he springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple[.]” *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 192, 504 P.2d 1330, 1341–42 (1973). Hawai‘i’s supreme court justices have clearly articulated the lineal relationship between Kānaka ‘Ōiwi custom and tradition and modern water jurisprudence. *E.g.*, *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 539, 656 P.2d 57, 63 (1982) (“Our local system of water rights is ‘based upon and is an outgrowth of ancient Hawaii[a]n customs and methods of Hawaiians in dealing with the subject of water.’”) (citing *Territory v. Gay*, 31 Haw. 376, 395 (1930)).

¹⁵⁴ HAW. REV. STAT. § 174C-101(d) (“[The] traditional and customary rights assured in this section . . . shall not be unreasonably withheld, [and] shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.”); § 174C-2(c); § 174C-3 (defining the protection of traditional and customary Hawaiian rights as a beneficial “instream use”); § 174C-7(b) (requiring the Commission to have at least one member with “substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage[.]”); § 174C-31(q) (instructing the Commission and all the counties to “incorporate the current and foreseeable development and use needs of the department of Hawaiian home lands” in formulating state- and countywide water plans); CANDACE FUJIKANE, *MAPPING ABUNDANCE FOR A PLANETARY FUTURE: KANAKA MAOLI AND CRITICAL SETTLER CARTOGRAPHIES IN HAWAI‘I* 58 (2021); NATIVE HAWAIIAN LAW TREATISE, *supra* note 153, at 525.

¹⁵⁵ D. KAPUA‘ALA SPROAT, KA HULI AO CTR. FOR EXCELLENCE IN NATIVE HAWAIIAN L., *OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI‘I* 7 (2009) (“[C]ases and laws from the Kingdom of Hawai‘i, along with Hawaiian custom and tradition, firmly established the principle that natural resources, including water, were not private property but were held in trust by the government for the benefit of the people.”); HAW. REV. STAT. § 1-1 (codifying English common law “except as otherwise . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage[.]”).

¹⁵⁶ HAW. CONST. art. XI, § 1 (“For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.”); HAW. CONST. art. XI, § 7 (outlining the state’s specific obligation to protect and control Hawai‘i’s water resources to benefit the people); *In re Waiāhole Ditch Combined Contested Case Hearing (Waiāhole I)*, 94 Hawai‘i 97, 131–32, 9 P.3d 409, 443–44 (2000) (“We therefore hold that article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i.”).

and present actions by private landowners, large corporations, ranches, large estates, hotels and government entities . . . preclud[ing] native Hawaiians from following subsistence practices traditionally used by their ancestors[.]”¹⁵⁷ As a result, the state constitution reaffirms and “protect[s] all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes[.]”¹⁵⁸ Importantly, the State Water Code guarantees “adequate provision . . . for the protection of traditional and customary Hawaiian rights” and “the maintenance of proper ecological balance” as both are “in the public interest.”¹⁵⁹ This public trust duty, rearticulated as the “duty to aloha ‘āina,”¹⁶⁰ means that the Commission is legally required to allocate enough water so traditional and customary lifeways can thrive *before* it acquiesces to commercial and industrial demands.¹⁶¹

¹⁵⁷ Stand. Comm. Rep. No. 57, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 639 (1980) [hereinafter CONSTITUTIONAL CONVENTION PROCEEDINGS]. Delegates to the 1978 Constitutional Convention viewed “[c]onstitutional amendments . . . as a restorative [justice] tool ‘in preserving the small remaining vestiges of a quickly disappearing culture and in perpetuating a heritage that is unique and an integral part of our State.’” Sproat & Palau-McDonald, *supra* note 151, at 538 (quoting Stand. Comm. Rep. No. 57, in CONSTITUTIONAL CONVENTION PROCEEDINGS, *supra*, at 640).

¹⁵⁸ HAW. CONST. art. XII, § 7.

¹⁵⁹ HAW. REV. STAT. § 174C-2(c).

¹⁶⁰ The “State’s trust duties [to] us[e] ‘reasonable efforts’ to preserve trust property and to take a proactive role in the management and protection” of public trust resources was recharacterized as the State’s “duty to aloha ‘āina.” Ching v. Case, 145 Hawai‘i 148, 176, 449 P.3d 1146, 1174 (2019); Sproat & Palau-McDonald, *supra* note 151, at 564. *See generally* JAMAICA HEOLIMELEIKALANI OSORIO, REMEMBERING OUR INTIMACIES: MO‘OLELO, ALOHA ‘ĀINA, AND EA 9 (Robert Warrior ed., 2021) (“Aloha ‘āina . . . informs all Kanaka Maoli ontology and epistemology. It is the central and orienting framework for any attempt to understand what it means to be Kanaka Maoli.”); NOELANI GOODYEAR-KA‘ŌPUA, THE SEEDS WE PLANTED: PORTRAITS OF A NATIVE HAWAIIAN CHARTER SCHOOL 32 (2013) (“Aloha ‘āina expresses an unswerving dedication to the health of the natural world and a staunch commitment to political autonomy, as both are integral to a healthy existence.”); EMALANI CASE, EVERYTHING ANCIENT WAS ONCE NEW: INDIGENOUS PERSISTENCE FROM HAWAI‘I TO KAHIKI 11 (Noelani Goodyear-Ka‘ōpua & April K. Henderson eds., 2021) (“[Aloha ‘āina] expresses much more than a love for the land, but an unwavering commitment . . . to all that the ‘āina represents: our sources of sustenance, our health and well-being, our political freedom, our stories and histories, and, in short, our life and survival as a people and as a nation.”).

¹⁶¹ *See* HAW. REV. STAT. § 174C-2(c). A close read of the State Water Code’s policy declarations reveals that traditional and customary Hawaiian rights as well as the maintenance of proper ecological balance (or, aloha ‘āina) are prioritized above private water uses:

The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic

“Framed generally and with the potential to yield just results, much of the legal language [is therefore] favorable to both Hawai‘i’s Indigenous people and the larger community.”¹⁶² But generations of litigating “whether our fresh water is a public resource or private commodity”¹⁶³ casts doubt on “the effectiveness of rights-based frameworks[,]” namely Hawai‘i’s constitutional and statutory restorative justice schemas.¹⁶⁴ All too often, without a critical, contextual analytical framework rooted in Maoli restorative justice values, “[e]ven sympathetic decisionmakers” formalistically apply the law and “misconstrue ‘justice’ in complex cases[.]”¹⁶⁵ In other words, those unfamiliar with Hawai‘i’s concerted efforts to meaningfully address colonization’s ongoing harms incorrectly position traditional and customary Native Hawaiian rights as one factor among many to be balanced.¹⁶⁶ Or they misrecognize their legal obligations as charity.¹⁶⁷ Decisionmakers must understand that Kanaka ‘Ōiwi lifeways are the nuclei of the broader restorative justice regime (derived from international human

uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. *However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights*, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.

See id. (emphasis added).

¹⁶² *See* Sproat & Palau-McDonald, *The Duty to Aloha ‘Āina*, *supra* note 151, at 537.

¹⁶³ Sproat, *A Question of Wai*, *supra* note 153, at 199; *e.g.*, *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 187, 199, 504 P.2d 1330, 1339, 1345 (1973) (reaffirming the ancient precept that the “ownership of water in natural watercourses[,] streams[,] and rivers remained in the people of Hawai[‘i] for their common good[.]” and holding that sugar plantations do not possess a property right in the water itself); *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 539, 656 P.2d 57, 63 (1982) (“Although there is a belief that at some point [water] was transformed into a freely transferable private commodity, we do not find this to be so.”); *In re Waiāhole Ditch Combined Contested Case Hearing (Waiāhole I)*, 94 Hawai‘i 97, 139, 9 P.3d 409, 451 (2000) (“In this jurisdiction, the water resources trust also encompasses a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state. Post-Māhele water rights decisions ignored this duty, treating public water resources as a commodity reducible to absolute private ownership[.]”).

¹⁶⁴ Sproat, *A Question of Wai*, *supra* note 153, at 199.

¹⁶⁵ Sproat & Palau-McDonald, *supra* note 151, at 551.

¹⁶⁶ Zoom Interview by Elena Chang, Holly Doyle & Dru Hara with Eric Yamamoto, Fred T. Korematsu Professor of L. & Soc. Just., William S. Richardson Sch. of L., Univ. of Haw. at Mānoa (Oct. 12, 2023) [hereinafter Yamamoto Interview].

¹⁶⁷ Keahi Interview, *supra* note 11.

rights norms of self-determination) that animates our state constitution.¹⁶⁸ How, then, can justices or judges, law clerks, commissioners, and councilmembers properly center traditional and customary Native Hawaiian rights and practices so that they ‘auamo (carry) their kuleana ko‘iko‘i to aloha ‘āina?

B. *Four Values of Restorative Justice for Native Peoples Assist the State in Fulfilling Its Duty to Aloha ‘Āina*

Kanaka Maoli scholars D. Kapua‘ala Sproat and MJ Palau-McDonald set forth a “framework of contextual legal inquiry for Indigenous claims and adjudicatory decisions” to help decisionmakers “home in” on legal holdings that actualize our state’s restorative justice commitments to Native Hawaiians.¹⁶⁹ Intended to supplement (not supplant) the Hawai‘i Supreme Court’s existing rights-based frameworks,¹⁷⁰ Sproat and Palau-McDonald’s praxis urges decisionmakers to (1) consider the “enduring wounds of colonization, including land dispossession, cultural destruction, and the loss of political sovereignty[,]”¹⁷¹ and (2) craft fitting outcomes that “prioritize the restoration of self-governance, [the] reconstruction of suppressed culture, and [the] return of the natural and cultural resources upon which culture depends.”¹⁷²

In complex and politicized cases especially,¹⁷³ the framework’s four touchpoints—“mo‘omeheu (cultural integrity), ‘āina (land and natural resources), maui ola (social determinants of health and well-being), and ea

¹⁶⁸ Yamamoto Interview, *supra* note 166. *See generally* G.A. Res. 2200A (XXI), art. 1, ¶ 1 (Jan. 3, 1976) (recognizing that all Indigenous peoples have the right to self-determination).

¹⁶⁹ Sproat & Palau-McDonald, *supra* note 151, at 551, 567.

¹⁷⁰ *Id.* at 568; *Ka Pa‘akai O Ka‘Aina v. Land Use Comm’n*, 94 Hawai‘i 31, 46–47, 7 P.3d 1068, 1083–84 (2000) (articulating a three-part framework assessing the (1) scope of traditional and customary practices, (2) the impact of a given action on those practices, and (3) the feasible action the agency can take to mitigate adverse impacts) (“In order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable. In order for native Hawaiian rights to be enforceable, an appropriate analytical framework for enforcement is needed.”); *Kaua‘i Springs, Inc. v. Plan. Comm’n*, 133 Hawai‘i 141, 174, 324 P.3d 951, 984 (2014) (distilling a six-part framework for state agencies applying the public trust doctrine).

¹⁷¹ Sproat & Palau-McDonald, *supra* note 151, at 566–67.

¹⁷² *Id.* at 567.

¹⁷³ Decisionmakers’ personal values are more likely to shape their decisions in “uncertain or hard cases.” Sproat & Palau-McDonald, *supra* note 151, at 550. *See generally* TAMANAHA, *supra* note 151; Dorf, *supra* note 151.

(self-determination)[]”¹⁷⁴—marshal decisionmakers as they push “past formalism’s narrow confines and actualiz[e] restorative justice” for Kānaka ‘Ōiwi.¹⁷⁵ Each of the four values are realms that were “damaged by the forces of colonialism” and are “recognized by international human rights principles as salient dimensions of restorative justice.”¹⁷⁶ Put differently, decisions that serve these values help our state to follow its own laws.

Mo‘omeheu, the starting point, “examines whether a proposed action ‘support[s] and restore[s] cultural integrity as a partial remedy for past harms, or [if it] perpetuate[s] conditions that continue to undermine cultural survival.’”¹⁷⁷ Because Kānaka ‘Ōiwi are genealogically related to ‘āina,¹⁷⁸ the ‘āina¹⁷⁹ inquiry “interrogates whether an action ‘perpetuates the subjugation of ancestral lands, resources, and rights, or [if it] attempts to redress historical injustices in a significant way.’”¹⁸⁰ Maui ola asks “whether a ‘decision improves social welfare conditions or perpetuates the status quo of Natives bringing up the bottom of most, if not all, socio-economic

¹⁷⁴ Sproat & Palau-McDonald, *supra* note 151, at 567.

¹⁷⁵ *Id.* at 566.

¹⁷⁶ *Id.* at 567 (citing S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Towards a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 342–60 (1994)). See generally G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

¹⁷⁷ Sproat & Palau-McDonald, *supra* note 151, at 569–70 (citing D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 179 (2011) [hereinafter *Wai Through Kānāwai*]). The mo‘omeheu inquiry is a “necessary starting place for decisionmakers because Native Peoples are ‘in a constant struggle to maintain traditional lifestyles due to a myriad of factors, including colonization and other pressures of a quickly changing world.’” *Id.* at 569 (citing Sproat, *Wai Through Kānāwai*, *supra*).

¹⁷⁸ “[W]e are encouraged to remember the reciprocal pilina [(relationship, union, or connection)] between our ‘āina and our Kānaka—which both have the mana to transform and feed each other. It is this recognition of a reciprocal and genealogical relationship that distinguishes aloha ‘āina from other forms of nationhood and nationalism.” OSORIO, *supra* note 160, at 10 (citations omitted). Importantly, Kānaka ‘Ōiwi cannot understand who we are without ‘āina, and “understanding who we are—intimately, personally, and politically, in the face of continued removal—becomes more and more important, as Kānaka Maoli continue to struggle to regain and sustain any kind of personal and political self-determination in Hawai‘i.” *Id.* at 9.

¹⁷⁹ “Consistent with ‘Ōiwi understandings, [‘āina] refers here to all resources that sustain Native Hawaiians physically, culturally, [spiritually,] and politically, as well as the reciprocal relationship between Kānaka and the environment, embodied in the concepts of kuleana and aloha ‘āina.” Sproat & Palau-McDonald, *supra* note 151, at 570.

¹⁸⁰ *Id.* at 570 (citing Sproat, *Wai Through Kānāwai*, *supra* note 177, at 181).

indicators.”¹⁸¹ And ea questions whether “an action perpetuates historical conditions imposed by colonizers or [if it] attempt[s] to redress the loss of self-determination.”¹⁸² Importantly, while “each value entails a separate analysis, they are inextricably intertwined.”¹⁸³ Thus, decisions that benefit the health of the ‘āina, for example, help maintain mo‘omeheu and improve mauili ola.¹⁸⁴

The “great deal of water conflict on Maui”¹⁸⁵ is precisely the kind of complex and contentious case in which the Four Values of Restorative Justice for Native Peoples are needed.¹⁸⁶ Never before has Maui Komohana’s wai

¹⁸¹ *Id.* (citing Sproat, *Wai Through Kānāwai*, *supra* note 177, at 182–83). Today, Euro-American imperialism’s fallout is manifest in “contemporary Native Hawaiians representing a disproportionate share of Hawai‘i’s school dropouts, [incarcerated individuals], welfare recipients, [] unemployed[,]” and nearly half of the children touched by the child welfare system. OFF. OF HAWAIIAN AFFS., NATIVE HAWAIIAN DATA BOOK tbl.8.05 (2021); Holly K. Doyle, *Kala: Disentangling Kamehameha Schools from the 2022 Federal Indian Boarding School Initiative Investigative Report While Actualizing Social Healing Through Justice for Its Kānaka Maoli Students*, 46 U. HAW. L. REV. 2, 43 (2023). See generally David E. Stannard, *Disease and Infertility: A New Look at the Demographic Collapse of Native Populations in the Wake of Western Contact*, 24 J. AM. STUD. 325, 336 (1990) (documenting Native Hawaiian population collapse post-western contact).

¹⁸² Sproat & Palau-McDonald, *supra* note 151, at 570–71 (citing Sproat, *Wai Through Kānāwai*, *supra* note 177, at 185).

¹⁸³ *Id.* at 571.

“Culture cannot exist in a vacuum—its integrity is bound to ‘āina and other resources upon which Indigenous Peoples depend for physical and spiritual survival.” In turn, “Native communities’ social welfare is defined by cultural veracity and access to, and the health of, natural resources.” Finally, “cultural and political self-determination influence who will control Indigenous Peoples’ destinies—including the resources that define cultural integrity and social welfare—and whether that fate will be shaped internally or by outside forces, including colonial powers or their vestiges.”

Id. (citing D. Kapua‘ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV’T L.J. 197–98 (2016) [hereinafter Sproat, *Environmental Self-Determination*]).

¹⁸⁴ Sproat & Palau-McDonald, *supra* note 151, at 571; Sproat, *Environmental Self-Determination*, *supra* note 183.

¹⁸⁵ William Brangham, Maea Lenei Buhre & Sam Lane, *Maui Faces Water Rights Questions as Island Continues Wildfire Recovery*, PBS NEWSHOUR (Nov. 17, 2023, 6:25 PM EST), <https://www.pbs.org/newshour/show/maui-faces-water-rights-questions-as-island-continues-wildfire-recovery>; Lozano & Goggin, *supra* note 4.

¹⁸⁶ Sproat & Palau-McDonald, *supra* note 151, at 550; TAMANAHA, *supra* note 151; Dorf, *supra* note 151.

been so scarce and so coveted.¹⁸⁷ The climate emergency has exacerbated generational tensions between “a long parade of plantations, real estate developers, and luxury resorts” on the one hand and Native Hawaiian communities defending ecosystem health and exercising constitutionally protected water rights on the other.¹⁸⁸ If, as many suspect, Maui Komohana’s recently submitted water use permit applications endure a contested case hearing process (akin to an administrative trial), the Commission will have to make complicated, difficult decisions.¹⁸⁹ “Fight for the soul of Hawai‘i”¹⁹⁰ kinds of decisions.¹⁹¹ Not everyone will get what they want.¹⁹² But Maui Komohana’s kupa‘āina must get the wai they need to sustain their lifeways in their ‘āina hānau (birthplace). As Uncle Archie Kalepa¹⁹³ prophesied,

¹⁸⁷ Klein & Sproat, *supra* note 16.

¹⁸⁸ *Id.*

¹⁸⁹ See Riker, *Ration Your Water*, *supra* note 102; Dawson, *supra* note 144 (documenting formal complaints made to the Water Commission regarding low streamflow, waste by private diverters, inconsistent water delivery, and diversion management issues).

¹⁹⁰ Isaac Moriwake & Kekai Keahi, Guest Speakers, Maoli Thursday, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawai‘i at Mānoa William S. Richardson School: Maui Ola: E Ho‘i ka Nani: Pondering Maui Komohana’s Water Future (Nov. 2, 2023) [hereinafter Maoli Thursday with Moriwake & Keahi]; Brangham, Buhre & Lane, *supra* note 185.

¹⁹¹ Ku‘uwehi Hiraishi, *Regaining Public Trust Could Be an Uphill Battle for the State Water Commission*, HAW. PUB. RADIO (Sept. 21, 2023, 3:18 PM HST), <https://www.hawaiipublicradio.org/local-news/2023-09-21/regaining-public-trust-could-be-an-uphill-battle-for-the-state-water-commission> (“‘We’re making history right now. One way or another, we’re making history,’ Moriwake said. ‘This will be, speaking from experience, a historically defining moment for this commission. Where-were-you-when kind of history. Which-side-of-history-were-you-on kind of history.’”).

¹⁹² See Kaleimaile Garcia, Testimony before Senate Water and Land Committee, 00:16:45–17:31 (Feb. 7, 2024), https://www.youtube.com/live/Nglu_g0Utl8?si=AusQPtD-0oolHAz8&t=1005 (“Everybody has a right to water, but there’s a line where need becomes want and these [private] purveyors are constantly crossing the line of taking too much water. Streams are still being drained, our lo‘i are dry, and our people are exhausted.”).

¹⁹³ Uncle Archie Kalepa is a skilled waterman, retired lifeguard captain, and one of several well-known community leaders, including Uncle Ke‘eaumoku Kapu and Uncle Kai Keahi, who quickly established mutual aid hubs to aid Lahaina wildfire survivors. See Jack Dolan, *In the Ruins of Lahaina, a Surfing Legend Leads a Volunteer Army to Get Supplies to Survivors*, L.A. TIMES (Aug. 16, 2023, 3:00 AM PST), <https://www.latimes.com/california/story/2023-08-16/lahaina-maui-surfer-legend-archie-kalepa-volunteer-effort-supplies-survivors>. These three Lahaina uncles recently called on Governor Green to appoint a true loea (expert) to a soon-to-be-vacant Water Commission seat designated for someone with expertise in traditional and customary Native Hawaiian management resource practices. Kekai Keahi, Ke‘eaumoku Kapu & Archie Kalepa, *Column: Water Agency Needs Hawaiian Expert*, HONOLULU STAR-ADVERTISER (Feb. 18, 2024),

“[w]e have one chance of fixing this. . . . And, if we get it wrong, all of Hawaii[‘]i’s going to fail. Not just Lahaina.”¹⁹⁴

C. *The Commission Must Fully Grant Nā ‘Aikāne’s Water Use Permit Application and Proscribe All Water Withdrawals and Diversions That Dewater Moku‘uhinia.*

Restoring the glory to Moku‘ula—e ho‘i ka nani i Moku‘ula—will undoubtedly advance the state’s restorative justice commitment to right colonization’s wrongs by benefitting (1) mo‘omeheu, (2) ‘āina, (3) mauili ola, and (4) ea.¹⁹⁵ Returning the wai helps maintain mo‘omeheu because it was the wai that made Moku‘ula and Moku‘uhinia wahi pana (sacred, legendary places).¹⁹⁶ By restoring that which was taken, the Commission can facilitate the ‘āina’s healing and, in turn, improve our mauili ola.¹⁹⁷ Most importantly, Maui Komohana’s kupa‘āina have determined for themselves that resurrecting Moku‘ula and Moku‘uhinia is what is needed, now more than ever.¹⁹⁸ The Commission can strengthen ea by honoring its exercise.¹⁹⁹

1. *Mo‘omeheu*

Moku‘ula is a wahi pana and cultural piko for Polynesia generally and Kānaka ‘Ōiwi specifically.²⁰⁰ The people of Rapa Nui, for example, know Moku‘ula as Motu‘ura.²⁰¹ In their creation story, a mo‘o leapt across the Pacific from Motu‘ura and dropped its piko (umbilical cord) into the ocean.²⁰² An island formed where the mo‘o’s piko joined the kai (ocean), and

<https://www.staradvertiser.com/2024/02/18/editorial/island-voices/column-mayor-blangiardis-managerial-style-serving-him-well/>.

¹⁹⁴ Kormann, *supra* note 24.

¹⁹⁵ See discussion *supra* Section III.B.

¹⁹⁶ See discussion *infra* Section III.C.1. “The land is not sacred because the sites are there. The sites are there because the land is sacred!” *Waine‘e Maui*, KUMU PONO ASSOCS., <https://www.kumupono.com/wainee-maui/> (last visited Apr. 11, 2024).

¹⁹⁷ See discussion *infra* Sections III.C.2 and III.C.3.

¹⁹⁸ E.g., Keahi, Kapu & Kalepa, *supra* note 193 (“From the restoration of traditional ‘ulu forests to the return of freshwater to the wetlands of Moku‘ula and Moku‘uhinia, we can both see and know in our na‘au that we are on the right path to rebuilding Lahaina as local families hope to see it.”).

¹⁹⁹ See discussion *infra* Section III.C.4.

²⁰⁰ Nā ‘Aikāne WUPA, *supra* note 2, Attachment A at 11; *Akoni Akana’s History of Moku‘ula*, *supra* note 74.

²⁰¹ *Akoni Akana’s History of Moku‘ula*, *supra* note 74.

²⁰² *Id.*

the people of Rapa Nui called it, “Te Pito o Te Fenua,” the “umbilical cord of the Earth.”²⁰³

For Kānaka ‘Ōiwi, Moku‘ula specifically—and Lahaina generally—is the political and spiritual “piko, the umbilicus, to the world.”²⁰⁴ The island unification wars of the 1700s solidified Lahaina’s status as a “convenient port and strategic staging area along the sea lanes between Hawai‘i Island, Maui, Lāna‘i, Moloka‘i, O‘ahu and beyond.”²⁰⁵ That Kihawahine, a mo‘o akua wai associated with war and politics,²⁰⁶ resided in Mokuhinia imbued Lahaina with an even greater advantage.²⁰⁷ As a result, Kamehameha I deliberately harnessed Kihawahine’s mana (divine power) and protection by marrying

²⁰³ *Id.* In ‘ōlelo Hawai‘i (the Hawaiian language), the name for Rapa Nui is “Ka Piko o Ka Honua,” which shares the same translation as “Te Pito o Te Fenua,” the “umbilical cord of the Earth. *See id.*

²⁰⁴ Video: Kāko‘o Maui, *supra* note 32, at 11:15–11:24.

²⁰⁵ King Kamehameha III’s Royal Residential Complex, Nat’l Reg. of Historic Places Registration Form, at 10 (Apr. 8, 1997) [hereinafter Moku‘ula National Register of Historic Places]. Its “freshwater supplies, food, and other resources no doubt” factored into Kamehameha I’s decision to bivouac there “with his *peleleu* [(war canoe)] fleet for the planned invasion of Kaua‘i.” KLIEGER ET AL., *supra* note 31, at 16. “The more permanent chiefly residence, and one-time capital at Lahaina arose from this encampment.” *Id.*

²⁰⁶ BROWN, *supra* note 30, at 152–53. Marie Alohalani Brown articulates the connection between mo‘o and war and politics, illuminating additional reasons why Kamehameha I likely took both Lahaina and Keōpūolani—and, in turn, Kihawahine—for himself.

Because these mo‘o are akua wai, their association with war and politics probably has to do with the fact that they are guardians of freshwater sources. An ahupua‘a . . . has to have at least one major water source. Mo‘o akua have the power to increase water sources or dry them up completely.

Id. Cultural Anthropologist Paul Christiaan Klieger researched war tactics used in mid-eighteenth century Hawai‘i, revealing wai’s political power.

In the mid-eighteenth century, Alapa‘i-nui of Hawai‘i went to war against the O‘ahu Mō‘ī Peleioholani on Maui, and focused his energies on Lahaina. The tactics were somewhat unusual—Alapa‘i dried up the streams of Kaua‘ula, Kahana, and Kahoma (probably the sources of water for Mokuhinia), toppled the terraces and ‘auwai and destroyed the productive capabilities of the *lo‘i* system below.

KLIEGER ET AL., *supra* note 31, at 14.

²⁰⁷ Feiteira Interview, *supra* note 38; KLIEGER ET AL., *supra* note 31, at 23. “Ali‘i ‘ai aupuni [(supreme rulers)] believed that these mo‘o akua wahine could preserve their reigns, bring prosperity to the land over which they ruled, and help them expand their territories.” BROWN, *supra* note 30, at 152.

one of her descendants, Mō'īwahine (Queen) Keōpūolani.²⁰⁸ Kamehameha I's "worship of and associations with these sacred women of the royal Maui line" helped "consolidate and legitimize his authority[]" as he conquered and unified the islands.²⁰⁹ Later, Kamehameha III, son of Kamehameha I and Keōpūolani, resided at and ruled from Moku'ula between 1837 and 1845.²¹⁰ Pivotal exercises of ali'i agency²¹¹ occurred in Lahaina, the Kingdom of Hawai'i's former capital,²¹² including Kamehameha III's promulgation of the 1839 Kānāwai (Declaration of Rights) and 1840 Constitution.²¹³

Spiritually, Kalua o Kiha (The Den of Kiha), the region encompassing Loko 'o Mokuhinia, Moku'ula islet, and other surrounding fishponds and lo'i, is named after Mo'o Kihawahine.²¹⁴ So, too, is Mokuhinia, as it is

²⁰⁸ Ty P. Kāwika Tengan, *E Ho'i ka Nani*, 76 AM. Q. No. 3 (forthcoming 2024) (manuscript at 4) (on file with author). By joining their lineages, Kamehameha I's children with Keōpūolani "inherit[ed] the superior *kapu nī'aupi'o* [(highest rank)], and perhaps . . . Kihawahine [as an 'aumakua] through their mother." KLIEGER ET AL., *supra* note 31, at 23; *see also* Jill Engledow, *Resurrecting Moku'ula*, MAUI NŌ KA 'OI MAG. (Sept. 1, 2010), <https://www.mauimagazine.net/resurrecting-mokuula/>.

²⁰⁹ "Kamehameha I, who accomplished the unprecedented feat of uniting all the Hawaiian Islands under his rule, worshipped these mo'o wahine for their power to help him in his quest." BROWN, *supra* note 30, at 154; Feiteira Interview, *supra* note 38; KLIEGER ET AL., *supra* note 31, at 23.

²¹⁰ KLIEGER ET AL., *supra* note 31, at xvii–xviii; Experience Hawaii, *Story of Mokuula Island and Mokuhinia Pond in Lahaina, Maui*, YOUTUBE, <https://www.youtube.com/watch?v=lxjNtcBA1G8> (Dec. 19, 2016).

²¹¹ KAMANAMAICALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 106, 116 (2014).

²¹² *See* PUKUI, *supra* note 73, at 190.

Ke one 'ai ali'i o Kakuhihewa. *The chief-destroying sands of Kakuhihewa*. The island of O'ahu. When the priest Ka'opulupulu was put to death by the chief Kahānaha for warning him against cruelty to his subjects, he uttered a prophecy. He predicted that where his own corpse would lie in a *heiau* at Waikīkī, there would lie the chief's corpse as well. Furthermore, he said, the land would someday go to the sea—that is, to a people from across the sea. This was felt to be a curse. When Kamehameha III was persuaded by a missionary friend to move the capital from Lahaina to O'ahu, a *kahuna*, remembering the curse, warned him not to, lest the monarchy perish. The warning was ignored, and before the century had passed, the Kingdom of Hawai'i was no more.

Id.

²¹³ CMTY. PLAN., INC., PROPOSAL FOR THE HISTORICAL RESTORATION & PRESERVATION OF LAHAINA, ISLAND OF MAUI, STATE OF HAWAII 23 (1961); Engledow, *supra* note 208; *see* Sproat & Palau-McDonald, *supra* note 151, at 534–37; BEAMER, *supra* note 211, at 106, 116.

²¹⁴ KLIEGER ET AL., *supra* note 31, at 14, 26; Feiteira Interview, *supra* note 38; *supra* note 30 and accompanying text.

derived from the “full name for the pond’s famed mo‘o, Kihawahine Mōkuhinia Kalama‘ula Kalā‘aiheana.”²¹⁵ Kalā‘aiheana, Pi‘ilani’s²¹⁶ youngest daughter, became Kihawahine when she was “deified and made a mo‘o goddess upon her death[.]”²¹⁷ “Kamehameha [I] then transformed Kihawahine into a national deity when he united the islands and incorporated her into the group of akua who were carried around the island during the Makahiki festival circuit.”²¹⁸ Out of hundreds of mo‘o,²¹⁹ she was the only one to go with him.²²⁰ She is also the only mo‘o known to travel between islands and ponds, often through underground lava tubes.²²¹ Restoring Moku‘ula thus means restoring groundwater flows to Kihawahine’s

²¹⁵ CODY KAPUEOLA‘ĀKEANUI PATA, ‘OHU‘OHU NĀ MAUNA O ‘E‘EKA: PLACE NAMES OF MAUI KOMOHANA 73–74 (2022). Nā Kumu Hula Cody Kapueola‘ākeanui Pata and Akoni Akana translate “Mōkuhinia” as a “colloquially elided version of: mo‘o kuhinia—satiated lizard, or fat mo‘o land, or moku kuhinia—satiated islet[.]” *Id.* at 73; *Akoni Akana’s History of Moku‘ula*, *supra* note 74. Though typically translated literally as “red island, or, sacred island[.]” Kumu Akoni thought “Moku‘ula” might be another example of connected speech. PATA, *supra*, at 74; *Akoni Akana’s History of Moku‘ula*, *supra* note 74. He translated Moku‘ula as “mo‘o kū‘ula,” meaning “altar for the mo‘o.” *Akoni Akana’s History of Moku‘ula*, *supra* note 74. This tracks, given that a kū‘ula is a specific kind of heiau or altar typically near the sea for worshipping fish gods, and the Moku‘ula complex had several freshwater fishponds. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 187 (1986) [hereinafter HAWAIIAN DICTIONARY].

²¹⁶ Pi‘ilani was the first ruler of a unified Maui. Kalani Akana, *May the Name of Pi‘ilani Live*, KA WAI Ola (May 1, 2022), <https://kawaiola.news/columns/ka-naauao-o-nakupuna/may-the-name-of-piilani-live/>; Peter T. Young, *Nā Hono A Pi‘ilani*, IMAGES OF OLD HAW. (Oct. 31, 2019), <https://imagesofoldhawaii.com/na-hono-a-piilani/>.

²¹⁷ Feiteira Interview, *supra* note 38; Kalei Nu‘uhiwa, Makahiki—Nā Maka o Lono: Utilizing the Papakū Makawalu Method to Analyze Mele and Pule of Lono and the Makahiki 140 (2020) (Ph.D., Dissertation, University of Waikato) (on file with author); BROWN, *supra* note 30, at 160; *Akoni Akana’s History of Moku‘ula*, *supra* note 74; KLIEGER ET AL., *supra* note 31, at 21. “‘Aumākua are kūpuna that were so beloved by the people for their great works on Earth that they were deified. Our family recognizes Kīha as our mo‘o akua.” Feiteira Interview, *supra* note 38.

²¹⁸ BROWN, *supra* note 30, at 161; Nu‘uhiwa, *supra* note 217, at 170–71. Makahiki is an annual ceremony that celebrates the closing of one year and the opening of another. Nu‘uhiwa, *supra*, note 217, at xxv, 12–13. Ali‘i traveled around the island to collect tribute owed to them. *Id.* During Makahiki, warring, fighting, and killing were prohibited. *Id.* at 140–41.

²¹⁹ BROWN, *supra* note 30, at 178–97.

²²⁰ Feiteira Interview, *supra* note 38; Nu‘uhiwa, *supra* note 217, at 166 (“Kamehameha [I] added . . . Kihawahine . . . into his akua Makahiki entourage. In my summation, . . . Kihawahine represented those who were mo‘o, water practitioners . . .”); KLIEGER ET AL., *supra* note 31, at 24.

²²¹ Feiteira Interview, *supra* note 38; *Akoni Akana’s History of Moku‘ula*, *supra* note 74; Maoli Thursday with Moku‘ula Kahu, *supra* note 30; Keahi Interview, *supra* note 11.

subsurface freshwater pathways.²²² “Because no other source would enable water to flow along these traditional watercourses, there simply is no practicable alternative,” if the Commission is to maintain the cultural integrity of Moku‘ula and Mokuhinia.²²³

Kihawahine is integral to freshwater management because, culturally, it is her dominion as a mo‘o.²²⁴ “The mo‘o became known as the guardians who enforced conservation *kānāwai* (laws) to protect the springs, streams, and fishponds, ensuring that water was never taken for granted.”²²⁵ As a result, mo‘o were highly respected and feared—especially Kihawahine.²²⁶ And with good reason. Auntie Blossom Feiteira puts it plainly: Kihawahine is a fierce water protector, “not a benevolent goddess. She does not heal. She kills. . . . No mess with her or what belongs to her because she will come.”²²⁷ And “[o]ne thing is certain: the arrival of the mo‘o signals a historic moment when Kānaka Maoli [begin] to pay greater attention to the care and conservation of water[.]”²²⁸

Moku‘ula’s spiritual significance is also found in its status as a final resting place for generations of ali‘i including King Kamehameha III’s “mother, sister, children, and other members of the royal families of the Kamehameha and Pi‘ilani dynasties from 1837 to at least 1883.”²²⁹ Moreover, Moku‘ula’s “function as a sanctuary for *ali‘i*, a place of *kapu*, a place set apart, was maintained after the so-called downfall of the indigenous Hawaiian religion in 1819.”²³⁰ As Christian missionaries found footholds in the religious

²²² Nā ‘Aikāne WUPA, *supra* note 2, Attachment A at 8.

²²³ *Id.* at 9–10, 13.

²²⁴ FUJIKANE, *supra* note 154, at 2; Feiteira Interview, *supra* note 38 (“Kihawahine is a water god. She’s protecting the water. So that’s why I said [the fire] is her doing because look what happens to Lahaina when no more water, and get plenty water up mauka. It’s just not coming down because it’s being taken by others not doing the right thing with it.”).

²²⁵ FUJIKANE, *supra* note 154, at 2; Feiteira Interview, *supra* note 38.

²²⁶ Feiteira Interview, *supra* note 38; FUJIKANE, *supra* note 154, at 1 (“If mo‘o are depicted as elemental forms to be feared, it is also because they are the awe-inspiring protectors of water.”).

²²⁷ Feiteira Interview, *supra* note 38; 2 KEPĀ MALY & ONAONA MALY, MO‘OLELO ‘OHANA: A COLLECTION OF ORAL HISTORY INTERVIEWS WITH KAMA‘ĀINA OF THE KAUA‘ULA-LAHAINA REGION OF MAUI 67 (2007) [hereinafter 2 MALY & MALY] (“Even the old folks tell, ‘Nānā ‘oe i kēlā wahine, Kihawahine, nānā ‘oe. Noho nei no ma luna o ka pōhaku. ‘ . . . A‘ole kolohe. Otherwise she take you.”).

²²⁸ FUJIKANE, *supra* note 154, at 2.

²²⁹ Feiteira Interview, *supra* note 38; KLIEGER ET AL., *supra* note 31, at 2.

²³⁰ KLIEGER ET AL., *supra* note 31, at 1 (emphasis in original).

vacuum created by the Native Hawaiian population’s collapse,²³¹ “the old *kapu* held at Moku‘ula—the powers of the Christian mission, the foreign businessmen and transients, and those of the Christian *ali‘i* had little effect upon the king’s sanctuary.”²³² In this way, Moku‘ula was, and is, “an island of continuity.”²³³

Today, Maui Komohana’s kupa‘āina are up against the same forces just with newly fashioned names and faces.²³⁴ Haole (white) businessmen proselytizing luxury development as “God’s will” are “itching to build[,]” even though there is not enough water to support existing communities.²³⁵ Misguided assertions that water regulations slow affordable housing development “may find a more sympathetic audience as local officials seek to address [a pre- and] post-fire housing crisis.”²³⁶ And in the middle of it all, Moku‘ula waits. Kihawahine sits on the shoulders of the change-makers, reminding them of their kuleana to her.²³⁷ “And kuleana to [Kihawahine] means kuleana to Mokuhinia, to Moku‘ula, and to the families of that place.”²³⁸

The Water Commission is uniquely positioned to ensure Moku‘ula remains an “island of continuity”²³⁹ for existing and future generations of Kānaka ‘Ōiwi. As the decisionmakers shaping the course of Maui Komohana and Hawai‘i nei’s water future, the Commission can either advance

²³¹ Stannard, *supra* note 181; JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 22–23 (2008).

²³² KLIEGER ET AL., *supra* note 31, at 13 (emphasis in original).

²³³ *Id.* Mo‘o also “embody and symbolize continuity—‘the unbroken and consistent existence or operation of something over a period of time’ or ‘a state of stability and the absence of disruption.’” BROWN, *supra* note 30, at 153.

²³⁴ E.g., MACLENNAN, *supra* note 33; Kormann, *supra* note 24; Hiraishi, *Fires Reveal Ongoing Power Struggle for West Maui Water*, *supra* note 7 (“Fresh water began to be diverted in the late 1800s. First came the sugar plantations — then pineapples — and later resorts and other developments.”).

²³⁵ Hofschneider & Bittle, *supra* note 6. “Annual precipitation around Lāhainā declined by about 10 percent between 1990 and 2009, drying out the streams near Launiupoko, and now [Peter] Martin sometimes can’t provide water to all his customers during dry periods.” *Id.*

²³⁶ *Id.*; OFF. OF THE GOVERNOR, STATE OF HAW., PROCLAMATION RELATING TO HOUSING (July 17, 2023), <https://governor.hawaii.gov/wp-content/uploads/2023/07/2307072-1.pdf>; Tanaka, *supra* note 140; Ben Angarone, *Hawaii Lawmakers May Roll Back Development Rules To Speed Housing Projects*, HONOLULU CIV. BEAT (Mar. 5, 2024), <https://www.civilbeat.org/2024/03/hawaii-lawmakers-may-roll-back-development-rules-to-speed-housing-projects/>.

²³⁷ Feiteira Interview, *supra* note 38.

²³⁸ *Id.*

²³⁹ KLIEGER ET AL., *supra* note 31, at 13.

mo‘omeheu by restoring full flow to Moku‘uhinia’s water sources or it can obstruct the community’s efforts to restore this political, spiritual, cultural, and historical piko by acquiescing to the demands of the plantation’s progeny.²⁴⁰ Only one of these paths aligns with the Commission’s duty to aloha ‘āina.²⁴¹

2. ‘Āina

‘Āina—and the restoration of the Moku‘uhinia complex—is the point at which seemingly disparate interests converge.²⁴² Not only does returning wai to Moku‘uhinia repair past damage inflicted by the sugar industrial complex and territorial government, but it also bears the potential to mitigate future damage wrought by increasingly frequent, catastrophic climate events.²⁴³ This is because Moku‘uhinia was one of several natural and constructed fishponds dotting the once-coastal wetland of Lahaina.²⁴⁴

For thousands of years, underground pūnāwai (freshwater springs) bubbled up through lava tubes²⁴⁵ to create Loko ‘o Moku‘uhinia, a seventeen-acre, natural fishpond.²⁴⁶ Aunty Blossom Feiteira explains that it was not until Kānaka constructed ‘auwai ushering streamwater into the loko, however, that it sustained both i‘a (fish) and kalo.²⁴⁷

The minute the groundwater comes into Moku‘uhinia through the pūnāwai, it starts to get warm. You know kalo not going to grow good in hot water. So, the cold water from the flowing stream cools it down now making it an ideal environment to plant kalo. Also to grow fish and limu.²⁴⁸

²⁴⁰ See discussion *infra* Section III.C.2.

²⁴¹ See discussion *infra* Section III.C.2, III.C.3.

²⁴² Keahi Interview, *supra* note 11; see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–23 (1980) (observing that those with entrenched power usually recognize the rights of vulnerable groups only when doing so serves their interests).

²⁴³ E.g., Trauernicht et al., *supra* note 124; Hamilton, *supra* note 124; Leah L. Bremer et al., *Bringing Multiple Values to the Table: Assessing Future Land-Use and Climate Change in North Kona, Hawai‘i*, 23 ECOLOGY & SOC’Y 33 (2018) (“Landscape flammability . . . [is] lowest for native forest and agroforest restoration[.]”); Nā ‘Aikāne WUPA, *supra* note 2, Attachment A at 18.

²⁴⁴ CMTY. PLAN., INC., *supra* note 213, at 35.

²⁴⁵ Interview with Ayrton Strauch, Hydrologist, Comm’n on Water Res. Mgmt., in Wailuku, Maui, Haw. (Oct. 24, 2023) [hereinafter Strauch Interview].

²⁴⁶ KLIEGER ET AL., *supra* note 31, at xviii, 4.

²⁴⁷ See Feiteira Interview, *supra* note 38.

²⁴⁸ *Id.*

By redirecting wai from Kaua‘ula Stream and Kahoma Stream to the pond,²⁴⁹ kupa‘āina of generations past transformed Mokuhinia into a loko i‘a kalo, a uniquely ‘Ōiwi aquacultural system that cultivated i‘a and kalo in tandem.²⁵⁰

But beginning in the mid-nineteenth century, “sugarcane plantations began to dominate the mauka areas above Lahaina.”²⁵¹ Pioneer Mill, for example, grew “cane in the lower, more gently sloped areas” of Lahaina and appropriated water traditionally used for loko i‘a and lo‘i kalo cultivation.²⁵² In 1897, Pioneer Mill drilled two wells with a combined pumping capacity of thirty million gallons per day less than half a mile ma uka of Mokuhinia.²⁵³ The same year Pioneer Mill constructed the wells, Mokuhinia began to stagnate.²⁵⁴ Then, “[i]n 1913, businessmen of Lahaina, including

²⁴⁹ *Id.* Kahoma and Kaua‘ula Streams are the main water sources for Moku‘ula, “but Honokowai, Mahinahina, Kanahā, they all played a pivotal role in the agricultural work [in the area.]” *Id.* In *Horner v. Kumuli‘ili‘i*, a case in which Maui Komohana kalo farmers fought Pioneer Mill and won, the Supreme Court of the Republic of Hawai‘i acknowledged that Kaua‘ula Stream watered Mokuhinia. 10 Haw. 174, 181 (Haw. Rep. 1895); SCHEUER & ISAKI, *supra* note 14, at 9–12.

²⁵⁰ Nā ‘Aikāne WUPA, *supra* note 2, Attachment A at 14. “Aquaculture is an economic activity at which ‘Ōiwi excel. . . . ‘As far as is known, fishponds existed nowhere else in the Pacific in types and numbers as in prehistoric Hawai[‘i].” BROWN, *supra* note 30, at 145. Kānaka ‘Ōiwi alone utilized “‘practically every body of water, from the seashore to the upland forests, as a source of food, either agriculturally or aquaculturally.” *Id.* 145–46. As a result, “[h]istorical accounts of Moku‘ula and Loko ‘o Mokuhinia confirm that both lo‘i kalo and loko i‘a kalo were present at Moku‘ula, and that kalo was cultivated in the area from time immemorial until well into the nineteenth century.” Nā ‘Aikāne WUPA, *supra* note 2, Attachment A at 16–17.

²⁵¹ KLIEGER ET AL., *supra* note 31, at 114.

²⁵² SCHEUER & ISAKI, *supra* note 14, at 9–12. The Lahaina “side of West Maui was perfect for growing sugar cane because it was fertile and sunny, but water was scarce.” WILCOX, *supra* note 33, at 126. As a result, “Pioneer Mill obtained water by reaching back into the valleys with eight separate collection systems: Honokohau Ditch . . . plus seven small systems[.] By 1931, Pioneer Mill received from 50 to 60 mgd from these sources and an additional 40 mgd was supplied by pumping groundwater.” *Id.* “Pioneer Mill’s other six ditch systems . . . were named the Kahoma, Kanah[ā], Kaua[‘]ula, Launiupoko, Olowalu, and Ukumehame, after the streams they tapped or areas they served.” *Id.* at 134.

²⁵³ NANCE, *supra* note 91, at 16, 20, 22; Pub. Utils. Comm’n, Launiupoko Irrigation Co., Inc.’s Responses to Intervenor’s Mahanalua Nui Homeowners Association Inc. at 56, In re Application of Launiupoko Irrigation Co., Inc. (2021) (No. 2020-0089); *see supra* note 94 and accompanying text. These two wells are also referred to as Lahaina Shaft-Pump A and -Pump B (“Lahaina Shafts A and B”), and they are less than 2,000 feet ma uka of Mokuhinia. Nā ‘Aikāne WUPA, *supra* note 2, Attachment A at 2, Attachment B at 2.

²⁵⁴ *See* KLIEGER ET AL., *supra* note 31, at 115. A photograph of Loko ‘o Mokuhinia taken between 1897 and 1914 depicts overgrown reeds that “nearly completely cover the pond[.]” and obscure the “vegetation and architectural features on Moku‘ula.” *Id.*

[executives] of Pioneer Mill . . . initiated a public project of filling in the stagnant waters of Loko [‘]o Mokuhingia . . . for ‘hygienic’ and developmental reasons.”²⁵⁵ Five years later, the territorial government “turned over the newly filled pond for the construction of Malu‘ulu o Lele County Park.”²⁵⁶ Today, an abandoned baseball diamond and parking lot entomb Moku‘ula.²⁵⁷

Aunt Blossom Feiteira’s kūpuna always said that “they buried Moku‘ula to bury the history of our people.”²⁵⁸ “If we take away a wahi pana and turn it into something else, our memories of it become dim. Part of our kuleana going forward is to bring those memories back. The only way to do that is to restore Moku‘ula and Mokuhingia and everything surrounding it.”²⁵⁹

Community leaders and cultural practitioners Uncle Kai Keahi, Kaipo Kekona,²⁶⁰ and Hōkūao Pellegrino²⁶¹ are answering the kāhea (call) to restore “everything surrounding” Moku‘ula and Mokuhingia by advocating for the replanting of Lahaina’s “old food forest system, Ka Malu ‘Ulu o Lele.”²⁶² “E

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Maoli Thursday with Moku‘ula Kahu, *supra* note 30.

²⁵⁹ *Id.*

²⁶⁰ Kaipo Kekona is a kupa‘āina of Lahaina. *Kaipo Kekona*, FEEDING HAWAII <https://www.feedinghawaii.org/talkstory/kaipo-kekona> (last visited Apr. 10, 2024). He manages Ku‘ia Agricultural Education Center, which reclaims “space as a native historical food property” and teaches community members about traditional agricultural practices that create healthier food systems and soils. *Id.* As Po‘o of Aha Moku Ka‘anapali Council, Kekona “advocate[s] for generational resource management practices.” *Id.* He is a prominent voice championing the restoration of Ka Malu ‘Ulu o Lele. Walter Chihara, *Ka Malu Ulu O Lele seeks to restore the historical breadbasket of Lahaina*, LAHAINA NEWS (July 2, 2021), <https://www.lahainanews.com/news/local-news/2021/07/02/ka-malu-ulu-o-lele-seeks-to-restore-the-historical-breadbasket-of-lahaina/>.

²⁶¹ Hōkūao Pellegrino is a farmer-activist and president of Hui o Nā Wai ‘Ehā, an ‘Ōiwi-led water rights community organization. Michele Bigley, *Who Owns the Water in Hawai‘i?*, SIERRA (Apr. 27, 2023), <https://www.sierraclub.org/sierra/1-spring/treehugger/who-owns-water-hawai-i>; *About*, HUI O NĀ WAI ‘EHĀ, <https://www.huionawaieha.org/about> (last visited Apr. 10, 2024). For decades, Pellegrino has advanced a “regenerative approach to the land,” and is currently working to restore ancient ‘auwai systems so that local communities looking to grow kalo can reduce their dependence on private water purveyors. Bigley, *supra*.

²⁶² Keahi Interview, *supra* note 11; Kanaeokana (@kanaeokana), INSTAGRAM (Sept. 26, 2023), <https://www.instagram.com/reel/CxqZhgoRZsd/> [hereinafter Kanaeokana Video]; Ed Komenda & Audrey McAvoy, *After Lahaina Fire, There’s a Chance to Restore Ulu Trees*, MAUI NEWS (Oct. 28, 2023), <https://www.mauinews.com/news/local-news/2023/10/after-lahaina-fire-theres-a-chance-to-restore-ulu-trees/>. Maui Komohana’s southern shores were “a favorable locality for breadfruit culture. Brigham wrote that ‘at Lahaina on Maui, were as fine trees forty years ago as any I have seen in Samoa or Fiji.’ Lahaina is referred to in chants as

ho‘i ka nani means the restoration of Lahaina’s streams and waters, but also the return of the malu, the shade,”²⁶³ cast by the thousands of ‘ulu trees that once grew there.²⁶⁴ Allocating sufficient wai to replant the ‘ulu band advances both restorative justice values of ‘āina and mo‘omeheu.²⁶⁵ For without the malu, Kihawahine cannot permanently return home.²⁶⁶ Uncle Kai explains that “Kiha and the malu go hand in hand. In order for Kiha to be returned, the malu must be returned. Right now in the dry season, she cannot stay because no water. If the malu comes back, get plenty water and she can stay year-round.”²⁶⁷

The ‘ulu trees and their malu contributed to the abundance of wai in Lahaina by harvesting water.²⁶⁸ The tree canopy caught the rains, mists, and fog drip, and its malu held the water in the ground.²⁶⁹ In other words, it was the malu that made the adage describing Lahaina as the “Venice of the Pacific” possible.²⁷⁰ By the late nineteenth century, however, “many of those

Ka malu ‘ulu o Lele, ‘The breadfruit-shade of Lele.’” E.S. CRAIGHILL HANDY, ELIZABETH GREEN HANDY & MARY KAWENA PUKUI, *NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, & ENVIRONMENT* 108 (rev. ed. 1991).

²⁶³ Keahi Interview, *supra* note 11.

²⁶⁴ Komenda & McAvoy, *supra* note 263 (“Before colonialism, commercial agriculture and tourism, thousands of breadfruit trees dotted Lahaina; the fire charred all but two of the dozen or so that remained.”); Interview with Clay Trauernicht, Program Lead and Assoc. Specialist, NREM Wildland Fire Program at the Univ. of Haw. at Mānoa, in Mānoa, Haw. (Feb. 12, 2024) (on file with author) [hereinafter Trauernicht Interview].

²⁶⁵ Keahi Interview, *supra* note 11; Wang, *supra* note 21 (“To prevent more fires from engulfing communities, Pellegrino said, it’s not enough to merely return water to streams. Maui needs to resurrect the wetlands and ecosystems that, for centuries, provided not only sustenance but also a natural buffer against disasters.”); see Sproat & Palau-McDonald, *supra* note 151; Strauch Interview, *supra* note 245 (“Any time you get more vegetation that’s gonna shade, that’s gonna capture fog drip, that’s gonna hold back sediment and increase infiltration, I think is gonna benefit the hydrologic cycle. In terms of improving recharge, it may be more critical to restore the forest.”).

²⁶⁶ Keahi Interview, *supra* note 11.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See *id.*; 2 MALY & MALY, *supra* note 227, at 10, 256 (“Well you know, there’s talk in the missionary books that Lāhaina was the Venice of the Pacific. Water ways that stretched for nine miles in some areas. There were man made water ways, it was all constructed by stone.”). Even the tourist industry acknowledges the history of water abundance in Maui Komohana, though it perversely claims to honor that tradition by sucking the ‘āina dry to fill recreational water features. See Kaanapali Beach Resort Assoc., *Kaanapali, Maui, Just Might Be the World’s Greatest Water Park*, KAA NAPALI BEACH RESORT, <https://kaanapaliresort.com/kaanapali-maui-worlds-greatest-water-par/> (last visited Dec. 5, 2023).

trees had been burned to make way for sugar plantations. Fresh water sources at streams and canals were diverted. Development transformed the landscape into a tourism destination with far fewer trees.”²⁷¹ Experts across disciplines attest that the destruction of this ‘Ōiwi ecology contributed to the arid conditions fueling the August 2023 inferno.²⁷²

The climate emergency threatens increasingly frequent extreme weather events, including wildfires and flooding.²⁷³ A restored Moku‘uhinia can protect Lahaina’s present and future generations from both.²⁷⁴ In 2019, wetland conservation and wildfire management researchers concluded that “humble wetlands can also play a heroic part” in “fighting the destruction of wildfires[,]” but “only if we protect those that remain and bring back the ones we humans have already damaged and destroyed.”²⁷⁵ If wetlands are not restored, then “the opposite is true[.]”²⁷⁶

During the 1790s British captain George Vancouver visited this part of Maui and called it ‘the Venice of the Pacific.’ The coastal areas were running with water that was channeled into canals and irrigation ditches and flowing taro fields. . . . Historically speaking, Kaanapali is keeping alive the tradition of luxuriant water in this low and sunny coastal region of West Maui.

Id.

²⁷¹ Komenda & McAvoy, *supra* note 262.

²⁷² Wang, *supra* note 21. Tellingly, the August 2023 wildfires burned through the footprint of what was once Ka Malu ‘Ulu o Lele. Komenda & McAvoy, *supra* note 262; Kanaeokana Video, *supra* note 262; Trauernicht Interview, *supra* note 264 (“[Lahaina] was a working landscape. This whole place was cared for. It wouldn’t have burned. Like just guaranteed it would not have, that’s why it never did.”).

²⁷³ Roz Pidcock & Robert McSweeney, *Mapped: How Climate Change Affects Extreme Weather Around the World*, CARBON BRIEF (Aug. 4, 2022, 4:30 PM), <https://www.carbonbrief.org/mapped-how-climate-change-affects-extreme-weather-around-the-world/>.

²⁷⁴ See, e.g., Nisse Goldberg & Russell L. Watkins, *Spatial Comparisons in Wetland Loss, Mitigation, and Food Hazards Among Watersheds in the Lower St. Johns River Basin, Northeastern Florida, USA*, 109 NAT’L HAZARDS 1743, 1744 (2021) (“Wetlands contribute valuable ecosystem services to moderate surge and flooding associated with extreme storm events, seasonal high tides, and sea level rise. In particular, wetlands help to decelerate runoff, increase water infiltration and attenuate floodwaters.”).

²⁷⁵ Mike Waddington & Sophie Wilkinson, *How to Fight Wildfires and Climate Change with Wetlands*, CONVERSATION (July 4, 2019, 4:12 PM EDT), <https://theconversation.com/how-to-fight-wildfires-and-climate-change-with-wetlands-117356>.

²⁷⁶ See *id.* For example, “a dried or degraded peatland,” a type of wetland, “can accelerate, magnify and prolong the threat of fire.” *Id.* Worse still, because wetlands are carbon sinks, they release centuries worth of carbon and other pollutants that they previously trapped when

Moreover, a restored Mokuhinia can mitigate pollution.²⁷⁷ “Mokuhinia fish pond was actually the old settl[ing] basin for Lāhaina. . . . The county should help Moku‘ula into bringing this area back, the *loko* back, because it’s suited, it serves [its] purpose as a settl[ing] basin[.]”²⁷⁸ Settling basins collect and retain water, giving pollutants time to separate and settle.²⁷⁹ After settling, the remaining water contains lower “concentrations of total nitrogen, total phosphorous, and biochemical oxygen”²⁸⁰ Wetlands serve this same function.²⁸¹ A litany of other environmental and economic benefits—made more essential as climate change worsens—flow from wetland restoration.²⁸² In addition to sequestering carbon and filtering pollutants,²⁸³ wetlands recharge aquifers,²⁸⁴ protect shorelines,²⁸⁵ and increase undevelopable greenspaces necessary for overall watershed, ecosystem, and community health.²⁸⁶

they burn. *Id.*; Peter I. Macreadie et al., *Carbon Sequestration by Australian Tidal Marshes*, 7 SCI. REPS. 1–2 (2017). “In other words, a healthy, wet peatland is a boon. A dried or degraded peatland is a threat.” Waddington & Wilkinson, *supra* note 275.

²⁷⁷ 2 MALY & MALY, *supra* note 227, at 76–77.

²⁷⁸ *Id.* at 77.

²⁷⁹ AUBURN UNIV. & USDA/NAT. RES. CONSERVATION SERV., ALABAMA AQUACULTURE BEST MANAGEMENT PRACTICE (BMP): SETTLING BASINS & WETLANDS 1, <https://efotg.sc.egov.usda.gov/references/public/AL/G06SettlingBasinsandWetlands.pdf>.

²⁸⁰ *Id.*

²⁸¹ *Id.*; Robert H. Kadlec, *Constructed Marshes for Nitrate Removal*, 42 CRITICAL REVS. ENV’T SCI. & TECH. 934, 985 (2012) (“Generally, wetlands may be regarded as a source for GHG [greenhouse gas emissions] if evaluated on a short time scale (decades), but as a sink for GHG if evaluated over longer time scales[.]”).

²⁸² *Id.* at 934, 979, 989.

²⁸³ Macreadie et al., *supra* note 276.

²⁸⁴ Masaki Hayashi & Donald O. Rosenberry, *Effects of Ground Water Exchange on the Hydrology and Ecology of Surface Water*, 40 GROUND WATER 309, 309 (2002).

²⁸⁵ See generally Brian Silliman et al., *Field Experiments and Meta-Analysis Reveal Wetland Vegetation as a Crucial Element in the Coastal Protection Paradigm*, 29 CURRENT BIOLOGY 1800–06 (2019) (assessing the benefits of coastal marsh habitat restoration to shoreline protection efforts); K.R. Hall, P. Tschirky & D.J. Turcke, *Coastal Wetland Stability and Shore Protection*, 26 J. COASTAL RSCH. 96–101 (1998) (exploring constructed wetlands as a solution to shoreline erosion and advocating for wetland protection and restoration).

²⁸⁶ Keahi Interview, *supra* note 11; Strauch Interview, *supra* note 245; ALOHA+ CHALLENGE, *Smart Sustainable Communities 06: Open, Public, & Green Spaces*, <https://alohachallenge.hawaii.gov/pages/ssc-06-open-public-green-spaces> (last visited Feb. 22, 2024); see also Jo Barton & Mike Rogerson, *The Importance of Greenspace for Mental Health*, 14 BJPSYCH INT’L 79, 82 (2017) (describing how greenspaces offer simultaneous environmental, socioeconomic, and mental health benefits).

Governor Green is right about one thing: “We’d have to be idiots not to focus on global warming and mitigation of these strong storms.”²⁸⁷ But in the spirit of having “a much more honest discussion about water[,]” trashing hard-fought water use regulations to ostensibly combat fires is not the mitigation we need.²⁸⁸ The mitigation we need is simple. E ho‘i ka nani i Moku‘ula. E ho‘i ka nani i Moku‘uhinia. E ho‘i ka nani i ka Malu‘ulu o Lele.

The Water Commission now has the opportunity (or rather, obligation) to make things right for past, present, and future generations.²⁸⁹ Restoring Moku‘uhinia and full flow to its water sources, namely Kaua‘ula Stream, Kahoma Stream, and the underground pūnāwai, helps repair the physical and cultural damage inflicted by Moku‘ula’s literal subjugation and Kihawahine’s subsequent displacement.²⁹⁰ For generations, plantations and land developers have dewatered and deforested Lahaina.²⁹¹ The Commission can redress that historical injustice in a significant way by putting the water back, enabling reforestation, and defending constitutionally protected Native Hawaiian traditional and customary water rights.²⁹² Arguably, the Commission *must* do those things if it is to fulfill its legal duty to aloha ‘āina.

3. Maui Ola

No shortage of ‘ōlelo no‘eau (proverbs) teach us that ‘āina is a “critical component in Native Hawaiian health, spirituality, and well-being.”²⁹³ “*Ka maui o ka ‘āina a he maui kānaka,*” the life of the land is the life of the people.”²⁹⁴ “Ola ka ‘āina, ola ke kānaka!” (A healthy land makes for healthy

²⁸⁷ Shelby Lin Erdman, *Exclusive: Hawaii Gov. Josh Green Talks Climate Change, Maui Fires*, SCRIPPS NEWS (Sept. 21, 2023, 6:23 PM), <https://scrippsnews.com/stories/exclusive-hawaii-gov-josh-green-talks-climate-change-maui-fires/>.

²⁸⁸ Corkery, Baker & Hubler, *supra* note 9.

²⁸⁹ See Maoli Thursday with Kaipō Kekona & Clay Trauernicht, *supra* note 144.

²⁹⁰ See discussion *supra* Section III.B. for a distillation of the Four Values of Restoration Justice framework’s ‘āina inquiry. The ‘āina touchpoint of the framework “interrogates whether an action ‘perpetuates the subjugation of ancestral lands, resources, and rights, or [if it] attempts to redress historical injustices in a significant way.’” Sproat & Palau-McDonald, *supra* note 151, at 570 (citing Sproat, *Wai Through Kānāwai*, *supra* note 177, at 181).

²⁹¹ Keahi Interview, *supra* note 11; see *supra* notes 69–82 (describing how Kānaka ‘Ōiwi engineered Ka Malu ‘Ulu o Lele to produce abundant wai and how plantations disrupted this hydrologic cycle when they destroyed the malu and diverted water).

²⁹² See Sproat & Palau-McDonald, *supra* note 151, at 570.

²⁹³ 3 OFF. OF HAWAIIAN AFFS., NATIVE HAWAIIAN HEALTH FACT SHEET 2015: SOCIAL DETERMINANTS OF HEALTH 6 (2015). Here, ‘āina refers to both land and water. *Id.* at 2, 6.

²⁹⁴ *Id.* at 6.

people!)”²⁹⁵ “[W]ithout the land, we are nothing.”²⁹⁶ Modern research affirms these traditional teachings: our physical environment shapes our health.²⁹⁷ In fact, ‘āina is one of the most prevalent social determinants of Native Hawaiian well-being.²⁹⁸ If the Commission is to meaningfully fulfill its duty to aloha ‘āina, it must render a decision that will benefit mauli ola.²⁹⁹ This necessarily requires decisionmaking that “elevates wai itself as something that requires our protection.”³⁰⁰ Protecting wai improves not only the health of the land but our health, too.³⁰¹

‘Āina is “central to Native Hawaiian health, spirituality, and well-being because the land provides sustenance, spiritual strength, and political empowerment.”³⁰² “The clearest connection between the physical environment and health is the use of natural elements for food[.]”³⁰³ In 1867, for example, a committee tasked with investigating famine in Lahaina linked the restoration of ‘āina to the restoration of mauli ola, or the health and well-being, of the people.³⁰⁴ D. Kahaulelio, a member of the committee, published its findings and recommendations in the newspaper, *Ka Nupepa Kuokoa*.³⁰⁵ He traced the “steady changes in the Hawaiian condition and health” to the burgeoning sugar industry, which took all the water; dried up longstanding lo‘i kalo; cut down ‘ulu groves for sugar mill fuel; and incentivized people

²⁹⁵ *Lāhainā: An Overview of Native History*, KUMU PONO ASSOCS., <https://www.kumupono.com/lahaina/> (last visited Dec. 5, 2023); see COMM’N ON WATER RES. MGMT, INSTREAM FLOW STANDARD ASSESSMENT REPORT: ISLAND OF MAUI, HYDROLOGIC UNIT 6054, OHIA 61 (2009).

²⁹⁶ Noa Emmett Aluli & Davianna Pomaika‘i McGregor, *‘Aina: Ke Ola O Na Kanaka ‘Oīwi*, NAT’L LIBR. MED. 1, 3 (2007).

²⁹⁷ 3 OFF. OF HAWAIIAN AFFS., *supra* note 293.

²⁹⁸ *Id.* at 3. Our physical environment is a key social determinant of health. *Id.* at 6. “Childhood experiences, educational attainment, employment, income, housing, culture, public policy, social and familial support networks, built and physical environments, and access to health care and social services are some of the most commonly cited social determinants of health.” *Id.* at 3.

²⁹⁹ Sproat & Palau-McDonald, *supra* note 151, at 567, 570.

³⁰⁰ M. Kaleo Manuel, Former Deputy Dir., Comm’n on Water Res. Mgmt., Guest Speaker for the University of Hawai‘i at Mānoa William S. Richardson School of Law’s Emerging Hawai‘i Water Issues Course (Nov. 16, 2023) [hereinafter *Emerging Hawai‘i Water Issues Course*].

³⁰¹ See 3 OFF. OF HAWAIIAN AFFS., *supra* note 293, at 6, 9.

³⁰² *Id.* at 6; Aluli & McGregor, *supra* note 296.

³⁰³ 3 OFF. OF HAWAIIAN AFFS., *supra* note 293.

³⁰⁴ D. Kahaulelio, *No Ka Wi*, KA NUPEPA KUOKOA 4 (Aperila 13, 1867); *Lāhainā: An Overview of Native History*, *supra* note 295; SCHEUER & ISAKI, *supra* note 14, at 7–8.

³⁰⁵ Kahaulelio, *supra* note 304.

to abandon subsistence farming with the promise of “quick payments[.]”³⁰⁶ Kahaulelio made quick work of the (recently resurrected) assertion that the crisis was God’s will.³⁰⁷ “Aole no ke Akua keia nele, aole no ka ua ole—aka, no ka noonoo ole o ke kanaka.”³⁰⁸ “God is not the reason for this lack, nor is it because there is a lack of rain—instead it is the lack of thought by men.”³⁰⁹

“So,” wrote Kahaulelio, “there only remains the means of ending these famines.”³¹⁰ Though our crises differ, the solutions Kahaulelio and the committee proposed are the same ones that Uncle Kai Keahi, Kaipo Kekona, and Hōkūao Pellegrino advance today.³¹¹ Restore Lahaina’s wai.³¹² Restore Lahaina’s food forest.³¹³ “Before the building of the sugar mills in Lahaina, water was seen flowing through the streams of Kaua[‘]ula, Kanah[ā], and Kahoma.”³¹⁴ This wai “sustained biodiverse forests providing abundant food and medicines[.]”³¹⁵ “I cannot forget,” Kahaulelio said, “what it was like to live in Lahaina at that time. By my recollections, Lahaina was not a town, it was the food garden for the island of Maui. . . . If Lahaina should once again be like that . . . then the famines of these days would end.”³¹⁶

Similarly, if Lahaina’s streams flowed ma uka to ma kai once more, the “riparian corridors” created by them would cool “that whole area,” and “we

³⁰⁶ *Id.*; *Lāhainā: An Overview of Native History*, *supra* note 295.

³⁰⁷ See Kahaulelio, *supra* note 304; see also discussion *supra* Part I and Section III.C.1.

³⁰⁸ Kahaulelio, *supra* note 304.

³⁰⁹ *Id.*; *Lāhainā: An Overview of Native History*, *supra* note 295.

³¹⁰ Kahaulelio, *supra* note 304; *Lāhainā: An Overview of Native History*, *supra* note 295.

³¹¹ See Kahaulelio, *supra* note 304; *Lāhainā: An Overview of Native History*, *supra* note 295; Keahi Interview, *supra* note 11; Wang, *supra* note 21.

³¹² See Kahaulelio, *supra* note 304; *Lāhainā: An Overview of Native History*, *supra* note 295; Keahi Interview, *supra* note 11; Wang, *supra* note 21.

³¹³ See Kahaulelio, *supra* note 304; *Lāhainā: An Overview of Native History*, *supra* note 295; Keahi Interview, *supra* note 11; Wang, *supra* note 21; Trauernicht Interview, *supra* note 264.

³¹⁴ Kahaulelio, *supra* note 304; *Lāhainā: An Overview of Native History*, *supra* note 295.

³¹⁵ Nina Lakhani, *The Farmers Restoring Hawaii’s Ancient Food Forests That Once Fed an Island*, GUARDIAN (June 17, 2022, 5:00 AM EDT), <https://www.theguardian.com/environment/2022/jun/17/hawaii-traditional-farming-methods-ancient-food-forests>. “Taro was seen growing abundantly, and on the terrace banks, there was growing cabbage, bananas and such. . . . Thus it is right that the people of Lahaina plant these foods, that they may end these famines.” Kahaulelio, *supra* note 304; *Lāhainā: An Overview of Native History*, *supra* note 295.

³¹⁶ See Kahaulelio, *supra* note 304; *Lāhainā: An Overview of Native History*, *supra* note 295.

wouldn’t have had the wildfires to the extent that we did[.]”³¹⁷ If kalo, ‘uala (sweet potato), mai‘a (banana), and uhi (yam) once again blanketed the ‘āina³¹⁸ instead of “tinder-dry invasive grasses that just go up in an instant,”³¹⁹ we could “meet the climate and food challenges facing Hawaii in the 21st century.”³²⁰ Hawai‘i spends three billion dollars a year importing up to ninety percent of its food.³²¹ That is three billion dollars that could be invested elsewhere if the “days of abundance and food sovereignty” were no longer a thing of the past.³²²

Maui Komohana’s collective request to restore Mokuhinia’s wai presents the Commission with an opportunity to restore the biocultural landscape of Mokuhinia specifically and Lahaina more broadly.³²³ A decision by the Commission to ho‘i ka nani is one that undoubtedly enhances maui ola because “Native communities’ social welfare is defined by cultural veracity and access to, and the health of, natural resources.”³²⁴ We must understand, however, that a decision to ho‘i ka nani improves everyone’s health, not just

³¹⁷ Hiraishi, *Fires Reveal Power Struggle for West Maui Water*, *supra* note 7; Trauernicht Interview, *supra* note 264 (“The fire science world is like, ‘we can’t deal with fire through suppression. Like that’s non-viable. We don’t have the funding, we don’t have the resources, we never will.’ And so how do we adapt to the landscapes to better withstand the fire impacts, reduce the risk of catastrophic fires. . . . The use of water is central to that, right? Whether that’s riparian restoration and making these like, you know, these streams flow, that’s going to create like biophysical barriers for the movement of fire across those lands, but it’s also going to get people back on these lands, presumably through kalo farming for things like this, it’s going to provide resources to do other practices as well.”).

³¹⁸ Kahaulelio, *supra* note 304; *Lāhainā: An Overview of Native History*, *supra* note 295.

³¹⁹ Kormann, *supra* note 24.

³²⁰ Lakhani, *supra* note 315.

³²¹ Wang, *supra* note 21; Brittany Lyte, *How Hawaii Squandered Its Food Security—And What It Will Take to Get it Back*, HONOLULU CIV. BEAT (Apr. 23, 2021), <https://www.civilbeat.org/2021/04/how-hawaii-squandered-its-food-security-and-what-it-will-take-to-get-it-back/> (“Nearly 2,500 miles from the nearest continent, Hawaii spends up to \$3 billion a year importing more than 80% of its food”); OFF. OF PLAN. DEP’T. OF BUS. ECON. DEV. & TOURISM, INCREASED FOOD SECURITY AND FOOD SELF-SUFFICIENCY STRATEGY 2 (2012).

³²² See Lakhani, *supra* note 315.

³²³ See discussion *supra* Section III.C.2 for an analysis of Professor Sproat’s ‘āina touchpoint. Some, including Kaipo Kekona, dislike the characterization of this moment in time as an opportunity for the Commission to restore Mokuhinia and Ka Malu ‘Ulu o Lele, and instead view it as an obligation. Maoli Thursday with Kaipo Kekona & Clay Trauernicht, *supra* note 144.

³²⁴ Sproat & Palau-McDonald, *supra* note 151, at 571 (quoting Sproat, *Environmental Self-Determination*, *supra* note 183).

the health of Kānaka ‘Ōiwi.³²⁵ Though the analysis of this piece is largely ‘Ōiwi-centered, the impact of a restored Moku‘uhinia “on cultural integrity, natural resources, health, and self-determination will benefit all of Hawai‘i’s communities[.]”³²⁶ Despite assertions to the contrary,³²⁷ Kānaka Maoli communities time and again affirm their commitment to sharing life-giving resources.³²⁸ “[W]e gotta share the water, we gotta protect everybody[.]” says Kaua‘ula kalo farmer Charlie Palakiko.³²⁹ “But eh, when it’s time and everything is green, we gotta put the water back. We gotta put ‘em back in the stream where it belong because that was one long battle[.]”³³⁰ In two sentences, Palakiko presents a vision for the future; a future in which the Commission facilitates Native Hawaiians’ exercise of ea.³³¹

4. *Ea*

Ea is perhaps the most critical restorative justice value because it concerns Indigenous peoples’ ability to chart their own futures.³³² Of particular relevance to Lahaina is the idea that “[f]ire resilient landscapes need to be defined by the communities” that live there.³³³ Will ‘Ōiwi decide for themselves how best to manage the ‘āina integral to mo‘omeheu and mauili ola, or will external, neocolonialist powers continue to shape their fate?³³⁴ Importantly, exercising *ea* is not a zero-sum game.³³⁵ Existing institutions

³²⁵ *Id.* at 569. Contrast the beneficial effects of ‘Ōiwi and wai-centered resource management with Peter Martin’s claim that “he can mitigate West Maui’s fire risk and its housing crises by getting rid of the barriers that prevent developers like himself from building more houses with irrigated farms and green lawns.” Hofschneider & Bittle, *supra* note 6. In other words, developers like Martin assert that luxury swimming pools and lawns are equally effective at preventing and mitigating wildfires. *See id.* But as wildfire researcher Clay Trauernicht points out, Martin’s luxury developments and their swimming pools and lawns were not strategically placed to protect the rest of the community. Trauernicht Interview, *supra* note 264. Those specific houses may be protected, but their infinity pools and tropical landscaping do little for everyone else. *Id.* There is “a really strong framework from the wildfire management and science community to say that the priority needs to be long-term changes in the ways in which we support . . . land care, land management, water and vegetation management.” *Id.*

³²⁶ *See id.*

³²⁷ *E.g.*, Lozano & Goggin, *supra* note 4.

³²⁸ *E.g.*, Hiraishi, *Fires Reveal Power Struggle for West Maui Water*, *supra* note 7.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *See id.*

³³² *See* Sproat, *Environmental Self-Determination*, *supra* note 183, at 198.

³³³ Trauernicht Interview, *supra* note 264.

³³⁴ *Id.*

³³⁵ *See id.*

(i.e., state government) can continue to operate because Kānaka Maoli can exercise ea within them while also carving out their own “spheres of governmental or administrative autonomy[.]”³³⁶ Maui Komohana’s organizing efforts to secure water management area designation exemplify this.³³⁷

In her written testimony to the Water Commission on the eve of its decision to designate, Aunty U‘ilani Kapu, a “lineal Descendant of the Lahaina Aquifer Sector” voiced her strong support for designating Maui Komohana as a water management area.³³⁸ “I have 4 children and 14 grandchildren who all live in Kaua‘ula Valley who are also in favor of this Designation. W[e] have been [a part] of this process from 2011[.]” she wrote.³³⁹ David Kahiwa Dizon, “a lineal descendant of the Na[‘]kaikua[‘]jana ‘Ohana” articulated precisely what was at stake:

The process of designation and the permitting requirements that accompany it are critical to address . . . water availability issues brought on by climate change and rampant mismanagement. If you (we) don’t get a handle on this now and proactively manage the water to its fullest capacity then there will be no water for anyone. . . . Right now this decision by [the Commission] is one of the most

³³⁶ Sproat & Palau-McDonald, *supra* note 151, at 571 (quoting S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Towards a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 355 (1994)).

³³⁷ See Keahi Interview, *supra* note 11. Water management area designation is a tool housed within the state’s Water Code and enacted by a state agency. HAW. REV. STAT. § 174C-41. Hawai‘i’s community-based subsistence fishing areas (“CBSFAs”) are emblematic of the latter because it is the community that devises management plans, and the agency that helps with implementation and monitoring. Brittany Lyte, *Hawaii Spent Decades Developing Community-Managed Fishing Areas. Lawmakers May Undo That*, HONOLULU CIV. BEAT (Feb. 24, 2023), <https://www.civilbeat.org/2023/02/hawaii-spent-decades-developing-community-managed-fishing-areas-lawmakers-may-undo-that/>. “DLNR Chair Dawn Chang said . . . that making CBSFA designations temporary may discourage communities from wanting to collaborate with the agency to managing nearshore resources – a collaboration that she described as crucial to making good management decisions.” *Id.* “That’s our role at DLNR to assist them with those tools for monitoring and management, but it’s really up to the community to utilize the practices that that community has used over generations. It’s really to try to respect that.” *Id.*

³³⁸ Written Testimony in Support of Designation from U‘ilani Kapu, to RaeAnn P. Hyatt, Sec’y, Comm’n on Water Res. Mgmt. (June 13, 2022).

³³⁹ *Id.*

crucial decision it would ever make. Because this vote will
decide the true future of Lahaina.³⁴⁰

Hundreds more testimonies like theirs sent a clear message: the community
had determined for itself that designation was in its—and the resource’s—
best interest.³⁴¹

Now, Maui Komohana’s kupa‘āina have renewed the 161-year-old
clarion call: E ho‘i ka nani i Moku‘ula! They wish to restore and maintain
Moku‘ula as an “island of continuity.”³⁴² A place where ‘Ōiwi can once again
exercise ea, just as their ali‘i did.³⁴³ A place where they can find refuge from
neocolonial forces.³⁴⁴ Aunty Blossom Feiteira and others “get the feeling that
Kihawahine wants to come home. But she’s not going to want to if there’s
no water. We also take the kuleanas that we have to make her hale ready for
her. If we try to bring her home before her hale is ready,” you can guess what
will “hit the fan spiritually.”³⁴⁵ For Hōkūao Pellegrino, “[s]tream restoration
needs to be coupled with Native Hawaiians having access to those lands so
they can rebuild the food forest that once was.”³⁴⁶ The community’s vision
for Moku‘ula and Mokuhinia is clear.³⁴⁷ Aunty Blossom sums it up best:
“The conversation really needs to be around water. And full restoration of
Mokuhinia requires full flow from both streams.”³⁴⁸

Will the Commission listen?³⁴⁹ Will it help to partially redress Kānaka
‘Ōiwi’s loss of self-determination by enabling its exercise? It did it before

³⁴⁰ Written Testimony in Support of Designation from David Kahiwa Dizon, to RaeAnn
P. Hyatt, Sec’y, Comm’n on Water Res. Mgmt. (June 13, 2022).

³⁴¹ See Written Testimony on Agenda Item B2, Update on Water Resources in the
Lahaina Aquifer Sector from Karyn Kanekoa, to Iwalani Ka‘a‘a, Sec’y, Comm’n on Water
Res. Mgmt. (Oct. 23, 2023).

³⁴² See *supra* note 233.

³⁴³ See *supra* notes 211–13.

³⁴⁴ See *supra* note 230.

³⁴⁵ Feiteira Interview, *supra* note 38.

³⁴⁶ Wang, *supra* note 21.

³⁴⁷ Maoli Thursday with Moku‘ula Kahu, *supra* note 30. Aunty U‘ilani Kapu said the
“conversation is wide. It has blown up so big that everyone wants to see Moku‘ula and
Mokuhinia come back.” *Id.*

³⁴⁸ Feiteira Interview, *supra* note 38.

³⁴⁹ *Hundreds Turn Out at Water Planning Meeting to Demand Natural Streams Be
Restored*, HAW. NEWS NOW (Oct. 24, 2023, 9:57 PM HST), <https://www.hawaiinewsnow.com/2023/10/25/hundreds-turn-out-water-commission-meeting-demand-natural-streams-be-restored/> (“Can you hear us at all? Can you listen to us, kanaka? . . . Without water, there is
no Hawaii; without kanaka, there is no Hawaii.”).

with designation. It can do it again now. That is how it will fulfill its kuleana ko‘iko‘i.

IV. CONCLUDING THOUGHTS: “THINK OF THE LITTLE GUY, THE GUY
DOWNSTREAM.”³⁵⁰

As I consider how best to conclude this piece, I choose to deviate from the standard formula of summarizing the preceding sections so that busy professionals may glean the piece’s gist from a quick skim. I choose, instead, to discuss the legal tradition undergirding Hawai‘i’s only law school because it explains the lens through which I view this issue. It explains why the Commission must elevate kalo farmers, Native Hawaiian cultural practitioners, and wai itself in its decisionmaking.³⁵¹

The jurisprudence of Chief Justice William S. Richardson, our law school’s founder and namesake, centered “the small and ordinary people who lack money and power[.]”³⁵² He measured “the righteousness of legal doctrine by what it did for the least among us.”³⁵³ He charged us to “[t]hink of the little guy, the guy downstream.”³⁵⁴ I write this piece, albeit afraid of the consequences both known and unknown, for the streams, the hīhīwai, o‘opu, and ‘ōpae, who, unlike humans, cannot desalinate or recycle water when the streams run dry.³⁵⁵ I write it for the Native Hawaiian cultural practitioners who were wrongfully scapegoated and lambasted in national news media for literally doing what Chief Justice Richardson prescribed.³⁵⁶ And I write it for the kalo farmers downstream who for too long have been at the mercy of developers playing God.³⁵⁷

On a personal level, I write it out of gratitude for this ‘āina that gave me a way forward when I was back at square one. I write it because my third great-grandfather was a sugar planter. I do not write it out of guilt, but because my na‘au tells me I am here to make that right. I write it for his Native Hawaiian granddaughter, my great-grandma, who left this ‘āina when she was young. I write it to learn about the lifeways she never got to know. I write it because

³⁵⁰ Matsuda, *supra* note 55.

³⁵¹ See discussion *supra* Section III.C.3.

³⁵² Matsuda, *supra* note 55, at 68.

³⁵³ *Id.*

³⁵⁴ *Id.* at 67.

³⁵⁵ See Emerging Hawai‘i Water Issues Course, *supra* note 300.

³⁵⁶ See discussion *supra* Part I.

³⁵⁷ See Lozano & Goggin, *supra* note 4.

aloha ‘āina’s “magnetic force” compels me to.³⁵⁸ In other words, I write it out of love.

I will soon be a “Richardson lawyer” and Richardson lawyers are supposed to “help make Hawai‘i a better place for those living downstream.”³⁵⁹ Richardson alumna Mari Matsuda advises us that “[i]n the end, there is judgment, whether cosmic or just personal, when you look in the mirror and ask: what did I do in my time on this planet?”³⁶⁰ I will answer: I fought for the soul of Hawai‘i nei.³⁶¹

E ho‘i mai ka nani i Moku‘ula
I ka wai kapu o Kaluaokiha
Ia wai ‘alaneo lani ali‘i
Wai hiwahiwa o Moku‘uhinia
Wai hiwahiwa o Moku‘uhinia

*May glory return to Moku‘ula
To the sacred water of Kaluaokiha
Those pristine waters belonging
to the high chiefs
Beloved water of Moku‘uhinia
Beloved water of Moku‘uhinia*³⁶²

³⁵⁸ OSORIO, *supra* note 160, at 12–13. “[A]loha ‘āina articulates a magnetic force that not only draws the individual Kanaka to our ‘āina but also creates and maintains a pilina between all Kānaka and ‘āina.” *Id.*

³⁵⁹ Matsuda, *supra* note 55, at 68.

³⁶⁰ *Id.* at 69.

³⁶¹ See Brangham, Buhre & Lane, *supra* note 185.

³⁶² LEI NĀHONOAPI‘ILANI, *supra* note 1.

Wai Ea: Restoring Hawai‘i’s Public Trust and Reclaiming Lahaina’s Water Future

Elena Chang*

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*J.D., William S. Richardson School of Law, University of Hawai‘i at Mānoa, 2024. I wrote this Article inspired by the resilient people of Maui Komohana who I had the honor and privilege to work with. Mahalo piha to Professors Kapua Sproat, MJ Palau-McDonald, and U‘i Tanigawa Lum for your brilliance and mana‘o on earlier drafts. Mahalo nunui to Hanna Taum and Kalei Akau for your unwavering support with research, editing, and so much more. Mahalo nui to Kawaiuluhonua Scanlan, Holly Doyle, and Dru Hara for deepening my resolve to go into the world to serve “the little guy downstream.” E ola i ka wai!

V. CONCLUSION 431

* * *

I. INTRODUCTION

A few days after the August 2023 fires raged through the beloved town of Lahaina, freshwater steadily emerged within the Pahumanamana ‘Auwai,¹ protruding across the burn zone as it flowed makai² for the first time in years.³ The fires damaged four plantation-era skimming wells⁴ that had been pumping groundwater out of the Lahaina aquifer periodically over the last

¹ The Pahumanamana ‘Auwai fronts the area where Nā ‘Aikāne o Maui Cultural Center stood until the devastating wildfires of August 8, 2023. Before the fires, the Cultural Center was a gathering place where community members and their ‘ohana could conduct research using reference books and archival records – including old documents, maps, genealogy, and books signed by kings – or observe priceless artifacts that had been stewarded by the kia‘i and kahu (guardians, caretakers) of Moku‘ula. See Jonaki Mehta, *Priceless Connections to Hawaii's Ancient Past Were Lost When Cultural Center Burned*, NAT’L PUB. RADIO (Aug. 18, 2023, 5:01 AM ET), <https://www.npr.org/2023/08/18/1194500944/priceless-connections-to-hawaiis-ancient-past-were-lost-when-cultural-center-bur>.

² Makai means “toward the ocean.” MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 217 (rev. and enlarged ed. 1986) [hereinafter HAWAIIAN DICTIONARY].

³ Kanaeokana, *Ke ‘eaumoku Kapu Keynote | 22nd Annual Native Hawaiian Convention*, YOUTUBE (Nov. 22, 2023), <https://www.youtube.com/watch?v=0I5E8T9FBcs> [hereinafter Kanaeokana, *Ke ‘eaumoku Kapu Keynote*].

⁴ HAW. COMM’N ON WATER RES. MGMT., UPDATE ON WATER RESOURCES IN THE LAHAINA AQUIFER SECTOR AREA (2023), <https://files.hawaii.gov/dlnr/cwrmm/submittal/2023/sb20231024B2a.pdf> [hereinafter CWRM, UPDATE ON WATER RESOURCES IN LAHAINA AQUIFER]. Skimming wells are mine-like shafts to the basal water table that extract freshwater from the underlying saltwater. HAW. COMM’N ON WATER RES. MGMT., SURFACE AND GROUND WATER MANAGEMENT AREA DESIGNATION FINDINGS OF FACT REPORT 67 (2022), https://files.hawaii.gov/dlnr/cwrmm/gwma/lahaina/20220608_Lahaina_FinalFOF.pdf [hereinafter CWRM, SURFACE AND GROUND WATER MANAGEMENT AREA DESIGNATION FINDINGS OF FACT REPORT].

century.⁵ Wai,⁶ freshwater that historically saturated the wahi pana,⁷ is now returning to its natural course.⁸

There was nothing natural, however, about the arid landscape left by plantation agribusiness and its colonizing forces.⁹ Beginning in 1850, American and European capitalists rapidly exploited the land and water policies of the Hawaiian Kingdom to maximize sugarcane production throughout Hawai‘i.¹⁰ Western sugar barons expanded the industry’s productive capacity through land acquisition and massive water diversions, significantly altering Hawai‘i’s landscape through the late 1800s and early

⁵ CWRM, SURFACE AND GROUND WATER MANAGEMENT AREA DESIGNATION FINDINGS OF FACT REPORT, *supra* note 4, at 67–68.

⁶ HAWAIIAN DICTIONARY, *supra* note 2, at 377. Since time immemorial, Kānaka Maoli have revered wai as the source of all life in Hawai‘i. *Infra* Section II.A. Kānaka Maoli are the Indigenous Peoples of Hawai‘i. This Article uses “Kānaka Maoli” interchangeably with “Native Hawaiians” and “Kānaka” with no reference to blood quantum.

⁷ Wahi pana refers to a “legendary place.” HAWAIIAN DICTIONARY, *supra* note 2, at 377.

⁸ Kanaeokana, *Ke ‘eaumoku Kapu Keynote*, *supra* note 3 (“When they talk about Lahaina being the Venice of the Pacific, where is that? Not until we found out after the fire when those four wells burnt, everything came back. The fishponds up Kalua‘ehu is now flowing again. The ‘auwai of Pahumanamana is now flowing again. Sometimes bad things have to happen in order to see the bountiful beauty of our ‘āina protrude forward, naturally.”).

⁹ Maui Reefs, *Fire and the History and Future of Land Care in Hawai‘i* by Clay Trauernicht, PhD, YOUTUBE, at 32:15 (Aug. 30, 2023), <https://www.youtube.com/watch?v=5tI1vQuaTWk>. Fire scientist, Dr. Clay Trauernicht, connected the recent devastation in Lahaina to its colonial past:

This fire in Lahaina is a direct consequence of this imposition of an economic system that shifted focus away from human well-being . . . and shifted towards wealth as a function of commodity agricultural production. Instead of a system that values human well-being, health of the land, which is equal to health of the community, we get this huge shift into commodity – extraction – from the land. This is very uncreative. This is the same pattern we have seen across the world, through the colonial history.

Id.; *We’re Living the Climate Emergency*, DEMOCRACY NOW! (Aug. 11, 2023), https://www.democracynow.org/2023/8/11/maui_fires.

¹⁰ See generally CAROL A. MACLENNAN, SOVEREIGN SUGAR: INDUSTRY AND ENVIRONMENT IN HAWAI‘I 249–74 (2014) (explaining how the sugar industry created conditions for its access to natural resources) [hereinafter MACLENNAN, SOVEREIGN SUGAR]; Carol MacLennan, *The Mark of Sugar. Hawai‘i’s Eco-Industrial Heritage*, 29 HIST. SOC. RSCH. 37, 37 (2004) [hereinafter MacLennan, *Mark of Sugar*] (describing how plantation agriculture drew heavily from global technological advances of the 19th century to maximize sugarcane production and increase industrial control over Hawai‘i’s landscapes).

1900s.¹¹ In 1893, a committee of merchants and planters, aided by U.S. Marines, organized the overthrow of the sovereign Hawaiian Kingdom to protect their investments in sugar plantations across Hawai'i pae 'āina.¹² Over the intervening century, plantations and their corporate successors¹³ drained Lahaina of its natural water.¹⁴

By August 8, 2023, Lahaina was a tinderbox.¹⁵ Lahaina's arid landscape ignited overnight¹⁶ into one of the deadliest wildfires recorded in U.S.

¹¹ MacLennan, *Mark of Sugar*, *supra* note 10, at 46–47. (“First, beginning in the 1860s and for another sixty years, acreage of cane cultivation soared from about 10,000 acres in 1867 to 236,000 acres in 1920. . . . The second trend appears after 1920 when cane acreage stabilizes around 225,000 and the yield of cane per acre expands from 41 to 83 tons per acre.”).

¹² Pae 'āina refers to the entire Hawaiian island archipelago. See HAWAIIAN DICTIONARY, *supra* note 2, at 298; D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, in NATIVE HAWAIIAN LAW: A TREATISE 521, 530 (Melody Kapilialoha MacKenzie et al. eds., 2015) (2015) [hereinafter Sproat, *Water Law in Hawai'i*] (quoting E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT 63 (rev. ed. 1991)). Kānaka Maoli's relationship to fresh water was not merely physical, but spiritual as well:

Water was also revered as a physical manifestation of Kāne, one of the Kānaka Maoli pantheon's four principal akua (gods, ancestors). . . . Native Hawaiian mo'olelo (oral histories) explain that Kāne brought fresh water to the earth and traveled throughout the archipelago with Kanaloa creating springs and streams, many of which continue to flow today.

Sproat, *Water Law in Hawai'i*, *supra*, at 526.

¹³ See generally GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII 35–123 (1985) (detailing how public-private ties in land development dominated Hawai'i's political landscape from the mid-1950s to the mid-1980s and describing how the governing group bought title to large tracts, controlled development rights to an even larger acreage, and ultimately, profited from it).

¹⁴ See *infra* Section II.A.

¹⁵ Claire Wang, *How 19th-Century Pineapple Plantations Turned Maui Into a Tinderbox*, GUARDIAN (Aug. 27, 2023), <https://www.theguardian.com/environment/2023/aug/27/maui-wildfire-water-plantations-ecology>. See generally *infra* Part II.

¹⁶ A series of wildfires broke out in Lahaina, Kula, and Kihei on August 8, 2023. Nicholas Bogel-Burroughs, et al., *How Fire Turned Lahaina Into a Death Trap*, N.Y. TIMES (Aug. 15, 2023), <https://www.nytimes.com/2023/08/15/us/hawaii-maui-lahaina-fire.html>. Hurricane winds fueled the fire in Lahaina, which grew both in size and intensity as it prompted evacuations, caused widespread damage, and ultimately, claimed the lives of over 100 people. *Id.*

history¹⁷ – a history that only compounds the tragedy.¹⁸ As communities across Hawai‘i and the world came together to support Lahaina’s wildfire survivors, corporate water diverters and government officials forged ahead in a coordinated effort to roll back constitutional water protections.¹⁹ On August 9, 2023, the Attorney General falsely claimed that stream protections in Maui Hikina (East Maui) left the island without enough water to battle the fires.²⁰ Two days after the fires ravaged Lahaina, Glenn Tremble, an executive at the West Maui Land Company (“WML”),²¹ falsely claimed that the company needed more water to fight the fires.²² Tremble demanded

¹⁷ See, e.g., Adam Gabbatt & Dani Anguiano, *Hawaii Wildfires: Deadliest US Blaze in a Century Kills At Least 93 People*, GUARDIAN (Aug. 13, 2023, 4:55 PM), <https://www.theguardian.com/us-news/2023/aug/13/hawaii-wildfires-at-least-89-confirmed-killed-after-deadliest-us-blaze-in-100-years>; Rachel Treisman, *Maui’s Wildfires Are Among the Deadliest on Record in the U.S.*, NAT’L PUBLIC RADIO (Aug. 15, 2023, 10:31 PM ET), <https://www.npr.org/2023/08/15/1193710165/maui-wildfires-deadliest-us-history>; *Maui Conflagration Becomes Deadliest U.S. Wildfire in a Century*, HONOLULU STAR ADVERTISER (Aug. 12, 2023), <https://www.staradvertiser.com/2023/08/12/breaking-news/maps-show-extent-of-fire-damage-in-lahaina-and-kula>.

¹⁸ Naomi Klein & Kapua‘ala Sproat, *Why Was There No Water to Fight the Fire in Maui?*, GUARDIAN (Aug. 17, 2023, 4:02 PM ET), <https://www.theguardian.com/commentisfree/2023/aug/17/hawaii-fires-maui-water-rights-disaster-capitalism>.

¹⁹ Wayne Tanaka, *State-Aided Disaster Capitalism?*, KA WAI OLA (Oct. 1, 2023), <https://kawaiola.news/aina/state-aided-disaster-capitalism/>.

²⁰ Petition for Writ of Mandamus and Writ of Prohibition and Immediate Stay of Underlying Order at 1, Bd. of Land & Nat. Res. v. Crabtree, No. SPCW-23-0000471 (Haw. Aug. 18, 2023) (“Central Maui has no water for fire reserve because the Respondent Judge substituted his judgment for that of the agency. As a result, there was not enough permitted water to the battle the wildfires on Maui this morning”); Declaration of Mariana Löwy-Gerstmar, Bd. of Land & Nat. Res. v. Crabtree, No. SPCW-23-0000471 (Haw. Aug. 18, 2023) (“While not all the data regarding the Department of Water Supply’s reservoirs availability to battle the fires and all the sources of water used by Maui County Fire Department is yet available, the water allocated originally by [Board of Land and Natural Resources], and subsequently by Judge Crabtree in his ruling in the Underlying Order, has been sufficient to combat the fires located Upcountry.”); see Michelle Broder Van Dyke, *Hawaii Supreme Court Denies Petition Claiming There Was Not Enough Water to Battle Maui Fires*, HAW. SPECTRUM NEWS (Aug. 24, 2023), <https://spectrumlocalnews.com/hi/hawaii/environment/2023/08/24/hawaii-supreme-court-denies-petition-claiming-there-was-not-enough-water-to-battle-maui-fires>.

²¹ West Maui Land Company (“WML”) manages agricultural and residential subdivisions in Maui Komohana, as well as private water companies near Lahaina, including Launiupoko Irrigation Co, Launiupoko Water Co., Olowalu Water Co., and Ha‘iku Town Water Association. WEST MAUI LAND CO., INC., <https://www.westmauland.com> (last visited March 7, 2024).

²² Ku‘uwehi Hiraishi, *Lāhainā Fires Reveal Ongoing Power Struggle for West Maui Water Rights*, HAW. PUB. RADIO (Aug. 17, 2023, 5:50 PM), <https://www.hawaiipublicradio.org/local-news/2023-08-17/lahaina-fires-reveal-ongoing-power-struggle-for-west-maui-water-rights> [hereinafter Hiraishi, *Lāhainā Fires Reveal Ongoing Power Struggle*].

approval from the Commission on Water Resource Management (“Water Commission”) to divert more water from nearby streams to company reservoirs, and insinuated that the Water Commission’s then Deputy Director, Kaleo Manuel, was to blame for the lack of water to fight the fires.²³ Even after the company’s claims were swiftly disproven,²⁴ Hawai‘i Governor Josh Green signaled to the media that recurrent water conflicts involving Native Hawaiian kalo farmers jeopardized the release of water to help fight the fires on Maui.²⁵ Within the week, the Green administration suspended

²³ Media coverage of West Maui Land Company’s complaint echoed Glenn Tremble’s insinuation that the Water Commission’s deputy director, Kaleo Manuel, was to blame for the destructive fire. *See, e.g.,* Isabelle Chapman & Curt Devine, *Hawaii Delayed Diverting Water That Could Have Helped Maui wildfires, letters obtained by CNN allege*, CNN (Aug. 18, 2023, 5:54 ET), <https://www.cnn.com/2023/08/18/us/hawaii-diverting-water-delay-maui-fires/index.html> (“A state agency delayed a water management company’s request to make more water available to fight the devastating wildfires on Maui earlier this month, according to letters obtained by CNN.”); Timothy Hurley, *Request Was Made to Divert Water to Fight Maui Fire*, HONOLULU STAR ADVERTISER (Aug. 16, 2023), <https://www.staradvertiser.com/2023/08/16/hawaii-news/request-was-made-to-divert-water-to-fight-maui-fire/> (“A delay in state permission to use West Maui stream water may have led to hampering firefighters in their battle to save Lahaina town from last week’s horrific wildfire.”); Stewart Yerton, *The Lahaina Fire Could Prompt the State to Change How It Manages Water on Maui*, HONOLULU CIV. BEAT (Aug. 16, 2023), <https://www.civilbeat.org/2023/08/the-lahaina-fire-could-prompt-the-state-to-change-how-it-manages-water-on-maui/> [hereinafter Yerton, *The Lahaina Fire*] (“A dispute over whether DLNR balked at releasing water to land owners played out in an exchange of angry letters in the days after the fire.”); Stewart Yerton, *A State Official Refused to Release Water for West Maui Fires*, HONOLULU CIV. BEAT (Aug. 15, 2023), <https://www.civilbeat.org/2023/08/a-state-official-refused-to-release-water-for-west-maui-fires-until-it-was-too-late/> (“With wildfires ravaging West Maui on Aug. 8, a state water official delayed the release of water that landowners wanted to help protect their property from fires. The water standoff played out over much of the day and the water didn’t come until too late.”).

²⁴ Alicia Victoria Lozano & Ben Goggin, *Maui Residents Say Water Official Removed After Wildfires Was Unfairly Targeted*, NBC NEWS (Aug. 25, 2023, 12:30 AM), <https://www.nbcnews.com/news/us-news/maui-fire-kaleo-manuel-water-official-removed-unfairly-rcna100974>.

²⁵ *See* Governor Josh Green, *Live Press Conference – Update on Wildfire Response*, FACEBOOK (Aug. 14, 2023), <https://www.facebook.com/GovJoshGreen/videos/594963809511259>. In an August 14, 2023 live press conference with other county, state, and federal officials responding to the fire emergency, Governor Green encouraged the media to report on why there may have been limited water to fight the wildfires. *Id.* The governor noted, “There has been a great deal of water conflict on Maui for many years. . . . People have been fighting against the release of water to fight fires. I’ll leave that to you to explore.” *Id.* at 43:53–44:10.

stream water protections²⁶ long opposed by the developer community,²⁷ and unilaterally “redeployed” Deputy Director Manuel,²⁸ the state official who played a critical role in strengthening the Water Commission’s management of Maui’s aquifers.²⁹

As WML and the Green administration leveraged the conflicts to frame Native Hawaiian water rights as antithetical to disaster preparedness efforts,³⁰ others aptly characterized the crisis as “plantation disaster capitalism at its worst.”³¹ Developer-led demands to increase the availability of stream water for firefighting have only underscored a cruel irony: though water in Hawai‘i is a public trust resource, the state’s deep-rooted deference to development interests enable corporations to set forth “disaster-preparedness rhetoric to justify diverting more water than necessary while obscuring their pursuit of profit.”³²

As the demand for stream water intensifies in the aftermath of Maui’s fires, state and county agencies must critically reexamine alternative sources of water to preserve Lahaina’s water future.³³ Carcinogenic chemical benzene

²⁶ OFF. OF THE GOVERNOR, STATE OF HAW., THIRD PROCLAMATION RELATING TO WILDFIRES (Aug. 9, 2023), <https://governor.hawaii.gov/wp-content/uploads/2023/08/2307210.pdf> [hereinafter THIRD PROCLAMATION RELATING TO WILDFIRES].

²⁷ See Elahe Izadi & Zoeann Murphy, *Lahaina’s Deadly Fire Has Intensified Maui’s Fight Over Water Rights*, WASH. POST (Aug. 23, 2023, 1:00 PM EDT), <https://www.washingtonpost.com/climate-environment/2023/08/23/maui-water-rights-fires-lahaina/>. In April 2022, WML called upon over four hundred of its Launiupoko area customers to testify before the Water Commission and demand that the interim instream flow standard (“IIFS”) be suspended entirely so that WML’s subsidiary, the Launiupoko Irrigation Company (“LIC”), could continue to purvey as much stream water as possible. *Call to Action: CWRM Hearing for Temporary Relief [Ins]tream Flow Standards for Select Users*, WEST MAUI LAND COMPANY, INC. (Apr. 19, 2022), <https://westmauiwater.com/updates>. For further discussion on how Maui Komohana residents petitioned the Water Commission to establish minimum levels of stream flow to address overexploitation of streams, see *infra* note 145 and accompanying text.

²⁸ Ku‘uwehi Hiraishi, *Unilateral Transfer of Water Deputy Sparks Serious Concerns from Commissioners and Residents*, HAW. PUB. RADIO (Aug. 22, 2023, 11:20 AM), <https://www.hawaiipublicradio.org/local-news/2023-08-22/unilateral-transfer-of-water-deputy-sparks-serious-concerns-from-commissioners-and-residents>.

²⁹ Tanaka, *supra* note 19.

³⁰ Hiraishi, *Lāhainā Fires Reveal Ongoing Power Struggle*, *supra* note 22 (noting that Governor Green, in a press conference days after the fires, was quick to cast blame on Native Hawaiian kalo farmers in Kaua‘ula valley).

³¹ *Id.*; Klein & Sproat, *supra* note 18.

³² Note, *Kānāwai from Ahi: Revitalizing the Hawai‘i Water Code in the Wake of the Maui Wildfires*, 137 HARV. L. REV. 1999, 2003 (2024); see Klein & Sproat, *supra* note 18.

³³ The Water Code charges the Water Commission with investigating uses of water from alternative sources as part of its duty to protect instream uses. HAW. REV. STAT. §§ 174C-

released from the fire's widespread destruction accentuates mounting concerns³⁴ about Lahaina's legacy pollutants from nitrate fertilizers, which fueled the growth of sugarcane for over 150 years, and accelerated the degradation of Lahaina's coral reefs.³⁵ Many also see this as a time for *hulihia*,³⁶ an opportunity to "return to the natural cycle that has been deeply disturbed" and "build new expectations for the future."³⁷ Even as the Lahaina

5.5(2), -71(1)(E). The Water Code also provides a water resource management fund to research programs and activities concerning water conservation and investigation of alternative sources of water. *Id.*

³⁴ See, e.g., Jeff Tollefson & Nature Magazine, *Maui Fires Could Contaminate the Island's Waters*, SCI. AM. (Aug. 31, 2023), <https://www.scientificamerican.com/article/maui-fires-could-contaminate-the-islands-waters>; Brittany Peterson, *After Maui Wildfires, Thousands Brace for Long Process of Restoring Safe Water*, ASSOC. PRESS (Sept. 1, 2023, 5:15 AM HST), <https://apnews.com/article/hawaii-maui-lahaina-wildfires-drinking-water-f6f386419ebf091a5a08133a0268041d>.

³⁵ See, e.g., CHARLES D. HUNT, JR. & SARAH N. ROSA, U.S. GEOLOGICAL SURVEY SCIENTIFIC INVESTIGATIONS REPORT 2009–5253: A MULTITRACER APPROACH TO DETECTING WASTEWATER PLUMES FROM MUNICIPAL INJECTION WELLS IN NEARSHORE MARINE WATERS AT KIHAI AND LAHAINA, MAUI, HAWAII 50, 54 (2009) [hereinafter HUNT & ROSA, U.S. GEOLOGICAL SURVEY] (documenting the large fertilizer nitrogen contribution at Lahaina from former plantation agriculture); Meghan L. Dailer et al., *Using Delta-N-15 Values in Algal Tissue to Map Locations and Potential Sources of Anthropogenic Nutrient Inputs on the Island of Maui, Hawai'i, USA*, 60 MARINE POLLUTION BULL. 655, 669 (2010); HAW. DIV. AQUATIC RES., STATUS OF MAUI'S CORAL REEFS (2008).

³⁶ *Hulihia* is to overturn or completely change. HAWAIIAN DICTIONARY, *supra* note 2, at 89. Often, *hulihia* refers to massive upheavals that change the landscape or overturn the status quo. Noelani Goodyear-Ka'ōpua, *Ku'i'oko'a: Independence*, in THE VALUE OF HAWAII 3: HULIHIA, THE TURNING (Goodyear-Ka'ōpua, et al., eds., 2021).

³⁷ See, e.g., Denby Fawcett, *Show Respect for Lahaina by Restoring Its Once Lush Wetlands*, HONOLULU CIV. BEAT (Aug. 22, 2023), <https://www.civilbeat.org/2023/08/denby-fawcett-show-respect-for-lahaina-by-restoring-its-once-lush-wetlands/> ("Hawaiian scholars say the need for a wiser allocation of the water is obvious to face the future challenges posed by climate change. They see the aftermath of the fire as a time of *hulihia* – defined as a turning, a change to return to the natural cycle that has been deeply disturbed – to build new expectations for the future."); Marisa Peñaloza & Claire Harbage, *Hawaii's Spirit of Aloha Helps Restore a Wildfire-Damaged Community*, NAT'L PUB. RADIO (Sept. 16, 2023, 5:00 AM EST), <https://www.npr.org/2023/09/16/1198651637/hawaii-spirit-aloha-restore-wildfire-damaged-community> (describing how for many Native Hawaiians, Lahaina's trauma can be seen as a time for *hulihia* and an opportunity to embrace the real meaning of aloha). 'Ōlelo Hawai'i advocate and curriculum designer Kaliko Kaauamo shared with reporters:

Aloha is the guy whose home burned down, who has no clothes, finds his slippers, puts them on and immediately finds someone else to help without expecting anything in return. . . . We are at a turning point right now to change the branding of aloha from this commercialized version.

Peñaloza & Harbage, *supra*.

community continues to reckon with the trauma wrought by the fires, the focus is shifting toward rebuilding a different future.³⁸

This Article probes the fundamental struggles over water, land, and power in Maui Komohana.³⁹ Rather than “conceptualizing the legal process as the inevitable march toward justice,” this Article recognizes that the “law, as it intersects with politics, can be both subordinating and, at times, an opening towards restoration and self-determination.”⁴⁰ To start, this Article frames the injustice in Lahaina by examining the brutal tactic of using the public’s disorientation following a collective shock to push through radical, pro-corporate measures that benefit a small elite.⁴¹ Then, this Article provides a contextual history of Hawai‘i’s water law regime and its restorative justice goals.⁴² Finally, this Article deploys a restorative environmental justice framework to highlight the potential for recovery efforts to redress the consequences of colonization, including the water crisis in Lahaina.⁴³

Section II.A uplifts the cultural and historical significance of wai in Hawai‘i, and Lahaina in particular. It then delves into the role of plantations in depleting Hawai‘i’s streams and soils, and ultimately, facilitating the rise of capitalism across the pae ‘āina. Section II.B bridges Lahaina’s plantation legacy to modern struggles over water and power. It explains the legal process for establishing Water Management Area designation, a key legal

³⁸ See Ku‘uwehi Hiraishi, *Lāhainā Group Demands Time to Heal and a Voice in Rebuilding from the Fire*, HAW. PUB. RADIO (Aug. 21, 2023, 11:00 AM), <https://www.hawaii.publicradio.org/local-news/2023-08-21/lahaina-group-demands-time-to-heal-and-a-voice-in-rebuilding-their-town>.

³⁹ Maui Komohana literally translates to “West Maui.” CODY KAPUEOLA ‘ĀKEANUI PATA, ‘OHU‘OHU NĀ MAUNA O ‘E‘EKA: PLACE NAMES OF MAUI KOMOHANA 7 (2022). Maui Komohana is used throughout this Article to refer to “the lands of the entire moku of Lahaina, and the western portion of the moku of Kā‘anapali to the ahupua‘a of Honokōhau.” *Id.* Traditionally, however, the term Maui Komohana was used to describe the three moku surrounding nā mauna o ‘E‘eka (the West Maui mountains): Lahaina, Kā‘anapali, and Wailuku. *Id.* at 2, 7.

⁴⁰ D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 136 (2011) [hereinafter Sproat, *Wai Through Kānāwai*].

⁴¹ Naomi Klein, *Naomi Klein: How Power Profits from Disaster*, GUARDIAN (July 6, 2017), <https://www.theguardian.com/us-news/2017/jul/06/naomi-klein-how-power-profits-from-disaster>; Klein & Sproat, *supra* note 18.

⁴² Sproat, *Wai Through Kānāwai*, *supra* note 40, at 137.

⁴³ *Id.* at 172. The framework embraces unique features that include “restoring self-governance, rebuilding suppressed culture, and returning natural and cultural resources upon which culture depends to enable renewed spiritual and other connections to the natural environment through traditional practices.” *Id.*

tool that flips the script⁴⁴ on deeply rooted power dynamics by requiring the prioritization of recognized public trust uses, including resource protection and traditional and customary Native Hawaiian rights and practices. It then describes the state-aided attempt to dismantle hard-won stream protections in order to stage a water grab in the immediate aftermath of the Lahaina fires.

Section III.A examines Hawai'i's public trust doctrine as one dimension of the state's restorative justice commitment to Native Hawaiians. This section also expounds on the state's struggle to effectuate the law's restorative mandate, often under the guise of its duty to "balance," with a particular focus on the struggle over water rights in Lahaina. Section III.B applies international human rights principle of self-determination to envision the full potential of Hawai'i's public trust doctrine in Lahaina.

Section IV.A sets forth the Four Values of Restorative Justice analytical framework to conceptualize self-determination for Indigenous Peoples and Kānaka Maoli in particular. Section IV.B deploys this framework to center community-led efforts to reclaim Lahaina's wastewater and plantation-era infrastructure as a way to minimize further degradation of the nearshore reef, offset demands for stream water, regenerate a resource for community resiliency, preempt further commodification of wai to the detriment of Kānaka Maoli communities, and ultimately, satisfy the state's public trust mandate.⁴⁵

II. THE LEGACY OF PLANTATION DISASTER CAPITALISM IN LAHAINA

Author and journalist Naomi Klein's "shock doctrine" offers a powerful paradigm for understanding how the sugar industry's centuries-old public-private ties with the state were perfected over the years to protect and advance

⁴⁴ Designation establishes the Water Commission's administrative control over existing and proposed withdrawals or diversions of water in a Water Management Area to ensure "reasonable-beneficial use of the water resources in the public interest." HAW. REV. STAT. § 174C-41(a); see *Ko'olau Agric. Co., Ltd. v. Comm'n on Water Res. Mgmt.*, 83 Hawai'i 484, 491, 927 P.2d 1367, 1374 (1996) (holding that permitting provisions of the state Water Code prevail in water management areas, whereas water rights in non-designated areas are governed by the common law).

⁴⁵ HAW. CONST. art. XI, §§ 1, 7. The Hawai'i Supreme Court first interpreted Hawai'i's Public Trust Doctrine under article XI, sections 1 and 7 in concert with the state Water Code in *Waiāhole. In re Water Use Permit Applications (Waiāhole I)*, 94 Hawai'i 97, 9 P.3d 409 (2000). There, the court articulated the trustee's duty as a process mandate, declaring that a decisionmaker must not relegate itself to the role of a "mere 'umpire passively calling balls and strikes for adversaries appearing before it," but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *Id.* at 143, 9 P.3d at 455 (citation omitted).

the interests of large land owners⁴⁶ – and to ultimately exploit Hawai‘i’s natural resources for profit.⁴⁷ According to Klein, contemporary capitalism relies on a core tactical nostrum: “waiting for a major crisis, then selling off pieces of the state to private players while citizens [are] still reeling from the shock, then quickly making the ‘reforms’ permanent.”⁴⁸ This paradigm exposes a similarly cruel dynamic evident in Hawai‘i’s legacy of plantation agribusiness: orchestrated raids on public trust resources in the wake of catastrophic events to achieve what could not otherwise have been achieved legally.⁴⁹

This Part traces the rise of disaster capitalism in Maui Komohana and uses critical inquiry to expose the plantation interests that drove this dynamic for over a century.⁵⁰ Soon after American and European sugar magnates assumed power within Hawai‘i’s government,⁵¹ the industry’s irrigation ditches and wells drained Lahaina’s streams and aquifers of their natural abundance.⁵² Today, the plantation industry’s corporate successors continue to use legacy infrastructure to hoard significant amounts of stream water,⁵³ sell the water to luxury developments,⁵⁴ and finally, dispose of the resulting wastewater via injections into Lahaina’s nearshore reefs.⁵⁵ This Part also describes how the water crisis⁵⁶ deepens tensions over freshwater by worsening droughts,

⁴⁶ MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 52–102 (describing the missionary and merchant-led plantation stronghold over economic and political power in Hawai‘i in the late nineteenth and early twentieth century); COOPER & DAWS, *supra* note 13, at 208–35. *See generally* NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM (2008) (exposing a pattern of radical privatization driven by corporate interests in the wake of cataclysmic events).

⁴⁷ *See* Klein & Sproat, *supra* note 18.

⁴⁸ KLEIN, *supra* note 46, at 6. As one example, Klein describes an “educational land grab” that diverted millions of dollars allocated for victims of Hurricane Katrina to replace New Orleans’ public schools with “charter schools” – publicly funded institutions run by private entities. *Id.* at 3–6. In the nineteen months following Hurricane Katrina’s devastating floods, right-wing think tanks, backed by the Bush administration, used the tragedy to justify radical reform and privatization of New Orleans’ public school system, subsidized by the state. *Id.* at 3–6.

⁴⁹ *See* Klein & Sproat, *supra* note 18.

⁵⁰ *See, e.g.,* Sproat, *Wai Through Kānāwai*, *supra* note 40, at 136.

⁵¹ *See infra* Section II.A.

⁵² *See infra* Section II.B.

⁵³ *See infra* notes 173–76 and accompanying text.

⁵⁴ *See infra* notes 373–76 and accompanying text (describing water diversions for luxury developments in and around Lahaina).

⁵⁵ *See infra* Section IV.B.

⁵⁶ State climatologists explain how shifting climate patterns threaten Hawai‘i’s freshwater supplies. Li Cohen, *Hawaii Is “On the Verge of a Greater Catastrophe,” Locals Say, As Water Crisis Continues*, CBS NEWS (Apr. 11, 2024), <https://www.cbsnews.com/>

creating conditions ripe for wildfires, and threatening the very survival of native stream ecosystems as well as the communities that rely on them.⁵⁷

A. The Dewatering of Lahaina's Abundant Landscape

Ma ka noho ana a kanaka, ua kapa ia he aina ke inoa.

It is because people live and interact with a place, that it is called 'āina.

—David Malo, 19th Century 'Ōiwi Scholar⁵⁸

The 'ōlelo no'ēau "ola i ka wai," or "water is life,"⁵⁹ is emblematic of the historical and cultural significance of freshwater throughout Hawai'i and for Kānaka Maoli in particular.⁶⁰ Since time immemorial, Native Hawaiians have revered wai as the source of all life.⁶¹ Traditional 'Ōiwi agriculture and

news/hawaii-water-crisis-climate-change/. Rising sea levels, coupled with surface water extraction and groundwater pumping, is making saltwater intrusion worse in coastal areas. Holly Michael, *What Is Seawater Intrusion? A Hydrogeologist Explains the Shifting Balance Between Fresh and Salt Water at the Coast*, CONVERSATION (Oct. 11, 2023, 8:30 AM EDT), <https://theconversation.com/what-is-seawater-intrusion-a-hydrogeologist-explains-the-shifting-balance-between-fresh-and-salt-water-at-the-coast-214620>. Saltwater will infiltrate the islands' freshwater aquifers, wells, and other parts of the water supply system as sea levels rise. See Cohen, *supra*.

⁵⁷ See Hiraishi, *Lāhainā Fires Reveal Ongoing Power Struggle*, *supra* note 22 (describing how Native Hawaiian communities in Maui Komohana often remain cut off from stream water for their basic needs); Chelsea Davis, *More Transparency Sought in Effort to Ensure Maui Wildfire Survivors Have Water Access*, HAW. NEWS NOW (Feb. 20, 2024, 6:59 PM), <https://www.hawaiinewsnow.com/2024/02/21/public-demands-more-transparency-regarding-water-temporary-housing-maui-fire-survivors>.

⁵⁸ Beamer et al., *Island and Indigenous Systems of Circularity: How Hawai'i Can Inform the Development of Universal Circular Economy Policy Goals*, 28 ECOLOGY & SOC'Y, no. 1, 2023, at 1, 3 [hereinafter Beamer et al., *Indigenous Systems of Circularity*] ("The Hawaiian understanding of land, and the relationship between land and people, can be understood through renowned 19th century 'Ōiwi scholar, David Malo, who stated, 'ma ka noho ana a kanaka, ua kapa ia he aina ka inoa.' This translates roughly to 'it is because people live and interact with a place, that it is called 'āina.'") (citation omitted).

⁵⁹ MARY KAWENA PUKUI, 'ŌLELO NO'EAU HAWAIIAN PROVERBS & POETICAL SAYINGS 271 (1983).

⁶⁰ OLA I KA WAI, <https://olaikawai.org/about/> (last visited April 10, 2024) ("Ola i ka wai (Water is Life) is an enduring affirmation of the sacred value of water in Hawaiian culture. It is a rallying cry across the pae 'āina to safeguard these resources for future generations.").

⁶¹ Sproat, *Water Law in Hawai'i*, *supra* note 12.

aquaculture relied upon consistent ma uka to ma kai⁶² flow of freshwater.⁶³ Streams in particular were, and continue to be, the lifeblood of Kānaka communities throughout the pae 'āina.⁶⁴

Across Maui Komohana, abundant streams and springs from the valleys of Mauna Kahālāwai (literally, “holding house of water”)⁶⁵ supplied water to hundreds of acres of lo'i kalo (taro fields)⁶⁶ and extensive groves of 'ulu⁶⁷ and other trees.⁶⁸ However, most of the streams in Maui Komohana were perennial only in their headlands.⁶⁹ Kānaka therefore relied on an intricate system of 'auwai⁷⁰ to divert streams for the flow-through cultivation of kalo and loko i'a⁷¹ and return water from flooded fields to the streams of origin.⁷² Lahaina's natural wetlands and biodiverse food forests fed Kānaka Maoli for generations.⁷³

⁶² “Ma uka to ma kai” refers to continuous stream flow from the upper reaches of the mountains until that stream flows into the ocean. D. Kapua'ala Sproat, *Water*, in THE VALUE OF HAWAII: KNOWING THE PAST, SHAPING THE FUTURE, 187, 188 (Craig Howes & Jonathan Kay Kamakawiwo'ole Osorio eds., 2010).

⁶³ Water use and management, especially for wetland kalo (taro) cultivation, were site specific and dependent on a number of factors such as water temperature, elevation, and crop type. Freshwater flows would keep the lo'i (wetland kalo patches) cool, thereby preventing rot and other diseases. Kānaka Maoli designed complex 'auwai (irrigation ditch) systems to allow fresh water to flow through the lo'i. Any water beyond that needed for irrigation would return to the stream to support other beneficial instream uses. See Sproat, *Water Law in Hawai'i*, *supra* note 12, at 530–32.

⁶⁴ E.g., D. Kapua'ala Sproat, *A Question of Wai: Seeking Justice Through Law for Hawai'i's Streams*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 199 (Noelani Goodyear-Ka'ōpua et al., eds., 2014) [hereinafter Sproat, *A Question of Wai*].

⁶⁵ Mauna Kahālāwai is one name for the West Maui Mountains. JONATHAN L. SCHEUER & BIANCA K. ISAKI, WATER AND POWER IN WEST MAUI 1 (2021). Mauna Kahālāwai is where the twin waters of life meet: rain from Wākea (Heavens) and springs from Haumea-Papa (Earth). MICHELLE ANDERSON, THE STORIED PLACES OF WEST MAUI: HISTORY, LEGENDS, AND PLACE NAMES OF THE SUNSET SIDE OF MAUI 5 (2016).

⁶⁶ Lo'i kalo are taro fields. HAWAIIAN DICTIONARY, *supra* note 2, at 209.

⁶⁷ 'Ulu is breadfruit. *Id.* at 369.

⁶⁸ Adam Keawe Manalo-Camp, *How the Verdant Lands of Lele Became Arid Lahaina*, KA WAI OLA (Oct. 1, 2023), <https://kawaiola.news/moomeheu/moolelo/o-ka-malu-ulu-o-lele>. (“Kānaka Maoli planted 'ulu (breadfruit) and other trees to cover the landscape to create a cooler and more temperate microclimate. This tree cover helped to capture rainwater and condensation, control heat from the surface, and mitigate soil erosion and the effects of Lele's powerful Kaua'ula wind.”).

⁶⁹ CAROL WILCOX, SUGAR WATER: HAWAII'S PLANTATION DITCHES 126 (1996) [hereinafter WILCOX, SUGAR WATER].

⁷⁰ 'Auwai is a “ditch” or “canal.” HAWAIIAN DICTIONARY, *supra* note 2, at 33.

⁷¹ Loko i'a are fishponds. *Id.* at 210.

⁷² SCHEUER & ISAKI, *supra* note 65, at 2.

⁷³ Lahaina was the capital of the Hawaiian Kingdom from 1820 to 1845. See Manalo-Camp, *supra* note 68. Lahaina's abundance of water and food supplies also made it an

Beginning in the late eighteenth century, the introduction of capitalism in Hawai'i radically replaced the "indigenous Hawaiian subsistence economy [with] one driven by industrial export agriculture."⁷⁴ Following the imposition of private land ownership, the sugar industry's strategic land acquisition and massive water diversions⁷⁵ significantly altered Hawai'i's political, economic, and ecological landscape in just a few decades.⁷⁶ Resource privatization generated shock waves in traditional Native Hawaiian land tenure systems and marked the beginning of opportunistic reforms that were detrimental to 'Ōiwi sovereignty and lifeways.⁷⁷ "Within just a century, the new Hawaiian nation became an American industrial colony devoted to production of sugarcane for the western US market."⁷⁸

In 1848, the Māhele (division or share)⁷⁹ dramatically changed understandings of land and property in Hawai'i.⁸⁰ To preserve a land base for all Hawaiian people,⁸¹ Kamehameha III (King Kamehameha III) transitioned the Hawaiian nation to a private property regime in response to "interrelated pressures from missionaries-turned-capitalists, imperialism in the Pacific, and the rapid decline of the 'Ōiwi population."⁸² But, by the end of the

important whaling center and trading port. Western accounts of Lahaina described its lushness and abundance throughout the 1850s. *Id.*

⁷⁴ MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 3.

⁷⁵ Sproat, *A Question of Wai*, *supra* note 64, at 202.

⁷⁶ MacLennan, *Mark of Sugar*, *supra* note 10, at 46–47.

⁷⁷ E.g., Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources* 21 NAT. RES. & ENV'T 37 (2007) [hereinafter MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*]; D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STANFORD ENV'T L.J. 157, 170 (2016) [hereinafter Sproat, *Environmental Self-Determination*].

⁷⁸ MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 4.

⁷⁹ HAWAIIAN DICTIONARY, *supra* note 2, at 219.

⁸⁰ See Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 499–504 (2017).

⁸¹ See KAMANAMAICALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 116–53, 214–23 (2014) [hereinafter BEAMER, NO MĀKOU KA MANA].

⁸² MJ Palau-McDonald, *Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands*, 57 HARV. C.R.-C.L. L. REV. 393, 403 n.88–90 (2022); see LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 289 (1992) ("In 1848, however, Kamehameha III was faced with unrelenting depopulation and was surrounded by aggressive foreigners demanding Hawaiian 'Āina and sovereignty."); Kamanamaikalani Beamer, *'Ōiwi Leadership and 'Āina*, in I ULU I KA 'ĀINA 55, 59 (Jonathan K. Osorio ed., 2014) ("Certainly the depopulation of our people from an estimated high of eight hundred thousand in the late 1700s to forty thousand in the 1890s represented the most devastating severance of our people's connection to 'āina.").

nineteenth century, Kānaka owned little land.⁸³ Although Kauikeaouli intended the Māhele to reinforce Kānaka rights in the land⁸⁴ and to guarantee the rights of kalo farmers to water,⁸⁵ the creation of private land ownership instead enabled Americans and Europeans to amass large tracts of land for plantations.⁸⁶ Almost all the usable lands were in the hands of plantations that held title to three of every four privately-owned acres by the end of the nineteenth century.⁸⁷

As the sale of the large tracts of land slowed, long-term, low-rent government leases became the primary means for plantations to make capital investments in mills, equipment, animals, worker housing, and irrigation.⁸⁸ To wrest control of leasing policy away from the Hawaiian government, sugar planters pressured King Kālākaua to adopt the Bayonet Constitution in 1877, which granted foreigners the right to vote if they owned land.⁸⁹ In 1893, a committee of merchants and planters, aided by U.S. Marines, organized the overthrow of the Hawaiian government and deposed Queen Lili'uokalani to protect their investments in sugar throughout the islands, paving the way for the United States to annex Hawai'i five years later.⁹⁰ The overthrow further enabled the U.S. military to develop Pearl Harbor, without interference or

⁸³ Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE 5, 18 (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter MacKenzie, *Historical Background*]. At the end of the Māhele process, land awards to maka'āinana (people of the land or "commoners") amounted to 28,658 acres, less than one percent of the total acreage of land in Hawai'i. KAME'ELEIHIWA, *supra* note 82, at 295; HAWAIIAN DICTIONARY, *supra* note 2, at 224 (defining "maka'āinana" as "commoner" or "citizen").

⁸⁴ MacKenzie & Sproat, *supra* note 80, at 481, 499–504 (refuting Judge Burns' assertion that "Kamehameha III's 'primary goal' throughout the Māhele process was to selfishly secure his personal lands" and uplifting how King Kamehameha III "married Native Hawaiian tradition with western legal precepts to create a private property system to respect and protect the rights of the hoā'āina, the native people of the land.").

⁸⁵ See Peck v. Bailey, 8 Haw. 658 (Haw. Kingdom 1867) (declaring that the rights to water for kuleana used to grow kalo and other crops at the time of the Māhele were "appurtenant" water rights, meaning that the rights attached to the kalo land that was awarded in the Māhele).

⁸⁶ MacKenzie, *Historical Background*, *supra* note 83, at 5.

⁸⁷ *Id.* at 18. Large profits from sugar cultivation enabled plantations to aggregate capital in large amounts for the purchase or leasing of vast tracts of sugar lands. See Arnold L. Lum & Stephanie M. Chen, *Doctrine of Adverse Possession*, in NATIVE HAWAIIAN LAW: A TREATISE 461, 465 n.38 (Melody Kapilialoha MacKenzie et al. eds. 2015). A report prepared in 1898 noted that, as a result, "the many thousands of acres of the most fertile lands in the world have. . . become unattainable by ordinary citizens." *Id.* (citing HAWAIIAN COMM'N, REPORT, S. Doc. No. 55–16, at 139 (3d Sess. 1898), cited in 3 RALPH KUYKENDALL, THE HAWAIIAN KINGDOM 1874–1893: THE KALAKAUA DYNASTY 659 n.13 (1967)).

⁸⁸ MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 47–48, 159; MacKenzie, *Historical Background*, *supra* note 83.

⁸⁹ MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 47–48.

⁹⁰ *Id.* at 48; MacKenzie, *Historical Background*, *supra* note 83, at 18–22.

oversight from the Hawaiian Kingdom government.⁹¹ Significantly, “[t]he overthrow itself was possible only through a process that was *unlawful*: its agents conspired with representatives of the United States, thereby breaking international treaties and disregarding the law of nations.”⁹²

The 1895 Land Act “became the mechanism for achieving land security of sugar planters”⁹³ as it repealed the land policies of the Hawaiian Kingdom and eliminated protections for crown lands, severing them from Hawaiian ali‘i.⁹⁴ The Act merged the crown lands with government lands into “public lands” that could either be leased or sold.⁹⁵ Following annexation in 1900, the Hawaiian Sugar Planters’ Association (“HSPA”),⁹⁶ along with the governor’s staff, further secured plantation land holdings by urging Congress to adopt the view that restrictions on land ownership and leases would cripple the industry.⁹⁷

⁹¹ BEAMER, NO MĀKOU KA MANA, *supra* note 81, at 194–96.

⁹² *Id.* at 197. “It was not Hawaiian acceptance of law that led to the overthrow; rather, it was the oligarchy’s conspiring against the law.” *Id.*

⁹³ MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 260–61. Sanford B. Dole, president of the recently organized republic, proposed the 1895 Land Act under the guise of a major land policy revolution that would open up public lands for settlers to build small agricultural estates. Michelle Kawēlauokealoha S. Wright, Huluhia Nā Kānāwai ‘Āina: The Effects of Post-1893 Land Law Changes on Native Hawaiians – Population Demographics Supplement or Supplant? 35 (July 7, 2023) (Ph.D. dissertation, University of Hawai‘i at Mānoa) (ProQuest).

⁹⁴ *Id.* Ali‘i refer to chiefs, chiefesses, and later the monarchy during the Hawaiian Kingdom. HAWAIIAN DICTIONARY, *supra* note 2, at 20.

⁹⁵ MacKenzie, *Historical Background*, *supra* note 83, at 14; JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII 40–42 (2009); *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 725 (1864); BEAMER, NO MĀKOU KA MANA, *supra* note 81, at 145; An Act to Relieve the Royal Domain from Encumbrances, and to Render the Same Inalienable (1865), *reprinted in* LAWS OF HIS MAJESTY KAMEHAMEHA V, KING OF THE HAWAIIAN ISLANDS 69 (1864–65).

⁹⁶ See MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 45. MacLennan describes the role of the HSPA in expanding the industry’s influence within Hawai‘i’s public institutions:

The HSPA became a permanent organization, fueling the rapid expansion of the industry after annexation. Under its umbrella, planters attended annual meetings and a small staff published proceedings and convened committees to study all aspects of plantation work and machinery. It built an experiment station, hired a chemist and entomologist, and published scientific papers to help plantations with cultivation, pests, water management, and mill technology. It also centralized labor management on all the plantations under the watchful eye of the HSPA trustees, who were the corporate officers of the Honolulu agencies.

Id.

⁹⁷ *Id.* at 263–64.

The dispossession of land from Hawaiian control paved the way for sugar planters to radically transform Hawai'i's natural resource policies.⁹⁸ Sugar capitalists created an unprecedented demand for water for irrigation.⁹⁹ Thus, as American and European sugar barons ascended to positions of power in Hawai'i, sugar plantations strategically located themselves in regions with fertile soil, level topography, and mild climate with little annual variation.¹⁰⁰ The industry's growing emphasis on maximum crop yield, imported labor, and increased global trade for plantation profit effectively commodified water for private use and uprooted the Kānaka Maoli biocultural resource management system.¹⁰¹ Miles of massive concrete-lined ditches diverted stream water outside of ahupua'a, devastating the native ecosystems and Kānaka Maoli communities that relied upon free-flowing streams.¹⁰² Extensive land clearing for sugarcane cultivation permanently removed native plant cover and drove many of Hawai'i's endemic species to

⁹⁸ SCHEUER & ISAKI, *supra* note 65, at 6–9; MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 52–102.

⁹⁹ CAROL WILCOX, SUGAR WATER, *supra* note 69, at 1. Sugar is a thirsty crop. Approximately 500 gallons of water are required to produce a single pound of refined sugar. *Id.*

¹⁰⁰ *Id.* at 15.

¹⁰¹ Hawaiian land concepts are key to understanding the complex political structures that governed society prior to the arrival of Europeans. BEAMER, NO MĀKOU KA MANA, *supra* note 81, at 104. Recent scholarship reconceptualizes and expands traditional resource management system beyond ahupua'a, which translates as “a land division usually extending from the uplands to the sea, so called because the boundary was marked by an ahu (heap) of stones surmounted by an image of a pig (pua'a), or because a pig or other tribute was laid on the altar as a tax to the chief; name of one of the smaller divisions of a country, made up of several 'ili, and under the care of a head man.” Ahupua'a, WEHEWEHE WIKIWIKI, <https://hilo.hawaii.edu/wehe>. Ahupua'a-based resource management was once considered “self sustaining,” and “equated with watersheds, and described as being in alignment with Western scientific management approaches such as ‘ridge to reef,’ and ecosystem-based management,” but new conceptualizations of “the moku system,” for example, describe the Hawaiian biocultural resource management system, which divided large islands into social-ecological zones and further into interrelated social-ecological communities. Kawika B. Winter et al., *The Moku System: Managing Biocultural Resources for Abundance within Social-Ecological Regions in Hawai'i*, 10 SUSTAINABILITY 1, 2 (2018); see Kawika B. Winter et al., *Empowering Indigenous Agency Through Community-Driven Collaborative Management to Achieve Effective Conservation: Hawai'i as an Example*, 27 PAC. CONSERVATION BIOLOGY 337, 337–44 (2021) [hereinafter Winter et al., *Empowering Indigenous Agency*] (explaining how the integration of Indigenous knowledge can lead to more effective stewardship of biocultural resources in Hawai'i).

¹⁰² See Sproat, *Wai Through Kānāwai*, *supra* note 40, at 128; Lu'ukia Nakanelua, *Nā Mo'ō o Ko'olau: The Water Guardians of Ko'olau: Weaving and Wielding Collective Memory in the War for East Maui Water*, 41 U. HAW. L. REV. 189, 191–93 (2018).

extinction;¹⁰³ meanwhile, ranches above the plantations converted large tracts of upland forests into pasture, enabling alien grasses to proliferate.¹⁰⁴

The steady and massive spread of cane cultivation, fueled by the application of new technologies to the fields, significantly transformed Hawai'i's landscape.¹⁰⁵ Sugarcane rapidly depleted Hawai'i's rich volcanic soils of necessary nitrogen, necessitating the early use of natural and commercial fertilizers.¹⁰⁶ Soil erosion accelerated nutrient loss from agricultural fields.¹⁰⁷ Dry pastures and fields on the leeward sides of the islands – like Lahaina – were particularly vulnerable to erosion from wind and water.¹⁰⁸ In an effort to address this existential threat to the industry, the HSPA commissioned the first systematic plantation soil study in 1895.¹⁰⁹ Soon thereafter, the HSPA appealed to the U.S. government for assistance to expand its soil studies, and over the next thirty years, “[w]hat started with soils eventually became a chemical and biological program to manage the environmental parameters affecting sugar cultivation.”¹¹⁰

Over the next few decades, plantations began doubling sugarcane yields per acre through new cane varieties, concrete-lined irrigation ditches, mechanized harvesting, pesticide application, and fertilizer amendments.¹¹¹

¹⁰³ MacLennan, *Mark of Sugar*, *supra* note 10, at 62 (“The most extensive land clearing for sugar plantations occurred in the last decades of the nineteenth century and the early twentieth century, permanently removing all native plant cover. Ranches above the plantations converted large tracts of upland forests into pasture and spread alien grasses. Land clearing has recently been identified as the cause of the high rate of extinction of Hawai'i's endemic species. Two-thirds of native bird species, more than 50% of endemic land snails, and 10% of native plants are extinct. 40-50% of remaining endemic plants are threatened. Most native vegetation and remaining animal species are now located in the high-rainfall regions that are protected by the forest reserve system.”).

¹⁰⁴ *Id.*; see Cassie Ordonio, *How Invasive Grasses Could Have Contributed to the Magnitude of Maui's Fires*, HAW. PUB. RADIO (Sept. 11, 2023, 4:35 PM HST), <https://www.hawaiipublicradio.org/local-news/2023-09-11/invasive-grasses-could-have-contributed-to-the-magnitude-of-mauis-fires>; Wang, *supra* note 15.

¹⁰⁵ The area burned each year by wildfire in Hawai'i has increased 300% over the past several decades. Maui Reefs, *supra* note 9, at 30:30 (explaining that the significant increase in area burned each year by wildfire can be attributed to significant declines in agricultural production).

¹⁰⁶ MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 42; Teresa Dawson, *Continuing Neglect of Soil Threatens Productive Agriculture Lands in Hawai'i*, ENV'T HAW. (Oct. 29, 2014), <https://www.environment-hawaii.org/?p=3363>.

¹⁰⁷ MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 42.

¹⁰⁸ *See id.* at 214.

¹⁰⁹ *Id.* at 243–44.

¹¹⁰ *Id.* at 23–45.

¹¹¹ MacLennan, *Mark of Sugar*, *supra* note 10, at 46–47; MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 245 (“Cultivation, irrigation, insect pests, machinery, transportation, and fertilizers were all put under the microscope of scientific analysis.”).

By the time Hawai'i entered the Union in 1959, Hawai'i's sugar industry had transformed the Hawaiian landscape and secured the highest yield per acre production in the world.¹¹²

By 1894, Pioneer Mill owned nearly all the land in the gently sloped areas of Lahaina,¹¹³ which was used to cultivate sugarcane. As Pioneer Mill secured ownership over land and management over water, its large-scale sugar production displaced kalo farming, causing a famine.¹¹⁴ For the first time in Lahaina's history, food had to be imported from Waipi'o Valley on Hawai'i Island.¹¹⁵

Kānaka Maoli kalo farmers who owned kuleana lands in Kaua'ula and other small valleys in Maui Komohana, however, resisted the corporation's imposition of a new management regime that effectively cut off their supply of water.¹¹⁶ In response, in 1895, Pioneer Mill sued sixty Kānaka Maoli in one of several water rights cases in the 1890s pitting plantations against kalo farmers.¹¹⁷ In *Horner v. Kumuli'ili'i*¹¹⁸ Pioneer Mill claimed a "customary" right to use water from Kaua'ula valley and alleged damages caused by the kalo farmers for "taking" the water.¹¹⁹ The Hawai'i Supreme Court noted that lo'i kalo in Lahaina and nearby ahupua'a were being abandoned due to the lack of reliable water, and in an unusual departure from plantation water politics of the time, the court recognized the rights of native tenants to use

¹¹² MacLennan, *Mark of Sugar*, *supra* note 10, at 46–49; MacLennan, *SOVEREIGN SUGAR*, *supra* note 10, at 247–48.

Hawai'i was admired around the sugar producing world for its research, which had created the highest yields per acre on the same footprint of acreage utilized since 1920. Soil exhaustion, insect pests, cane diseases – the banes of monocrop sugarcane production – were the objects of continuous research. The basic biology of the cane plant and Hawaiian soils and waters were manipulated and molded to serve the purposes of the higher yield.

MacLennan, *SOVEREIGN SUGAR*, *supra* note 10, at 248.

¹¹³ Scheuer & Isaki, *supra* note 65, at 9.

¹¹⁴ Manalo-Camp, *supra* note 68; Kepā Maly & Onaona Maly, 2 HE WAHI MO'OLELO NO KAUA'ULA A ME KEKĀHI 'ĀINA O LAHAINA I MAUI: A COLLECTION OF TRADITIONS AND HISTORICAL ACCOUNTS OF KAUA'ULA AND OTHER LANDS OF LAHAINA, MAUI 930–31 (2007) ("In March 1867, a committee made up of D. Kahalelio, S.W. Nailiili, M. Ihihi, and D. Baldwin, was appointed to investigate and report on the causes of diminishing food supplies in Lahaina. The committee's report attributes the food problem, as well as others, to the growing development of sugar plantations, which were fostering the abandonment of traditional subsistence practices of the native residents of Lahaina.").

¹¹⁵ Manalo-Camp, *supra* note 68.

¹¹⁶ Scheuer & Isaki, *supra* note 65, at 9.

¹¹⁷ Manalo-Camp, *supra* note 68; *Horner v. Kumuli'ili'i*, 10 Haw. 174 (Haw. Rep. 1895).

¹¹⁸ *Horner v. Kumuli'ili'i*, 10 Haw. 174 (Haw. Rep. 1895).

¹¹⁹ Scheuer & Isaki, *supra* note 65, at 6–12.

the water for irrigation, in accordance with methods of division used in “ancient times.”¹²⁰

By the 1900s, Pioneer Mill’s massive ditch systems enabled out-of-watershed diversions, undercutting native tenants’ rights to grow kalo on kuleana lands.¹²¹ Low-rent, long-term leases subsidized the industry’s heavy investments in large surface water engineering projects, with advanced tunneling and ditch-lining technologies, as well as artesian wells to supply groundwater to cane fields.¹²² Skimming wells constructed by Pioneer Mill in the 1890s dewatered Moku‘ula and Mokuhinia.¹²³ In 1914, at the behest of the Pioneer Mill Company, the Moku‘ula royal complex was buried under coral and soil fill, along with most of Lahaina’s loko i‘a and wetlands.¹²⁴ By the 1930s, Pioneer Mill was extracting 50 to 60 million gallons per day (“mgd”) of surface water and pumping an additional 40 mgd of ground water¹²⁵ to irrigate the 10,000 acres it controlled in Maui Komohana.¹²⁶

B. State-Aided Disaster Capitalism

The closing of Pioneer Mill in 1999 due to rising labor costs and operating losses was one of several closures that marked the end of the plantation heyday in Hawai‘i.¹²⁷ In the intervening decades, large landed interests, including the West Maui Land Company, amassed kuleana parcels from displaced Kānaka families often through quiet title actions¹²⁸ and adverse

¹²⁰ Manalo-Camp, *supra* note 68; Horner, 10 Haw. at 178–79.

¹²¹ See WILCOX, SUGAR WATER, *supra* note 69, at 126–27.

¹²² MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 149.

¹²³ See *supra* notes 4–5 and accompanying text. Several centuries ago in Lahaina, underground pūnāwai (freshwater springs) and aboveground streams fed the royal islet of Moku‘ula and its surrounding seventeen-acre spring-fed pond, Loko ‘o Mokuhinia – a place of tremendous historical and cultural significance to Kānaka Maoli specifically and Polynesia generally. Maui Filmworks, *The History of Moku‘ula as told by Akoni Akana in 1999*, YOUTUBE (June 14, 2017), <https://www.youtube.com/watch?v=Gm4I4VggmOg>; PAUL CHRISTIAAN KLIENER ET AL., MOKU‘ULA: HISTORY AND ARCHAEOLOGICAL EXCAVATIONS AT THE PRIVATE PALACE OF KING KAMEHAMEHA III IN LAHAINA, MAUI 12, 14 (Paul Christiaan Klieger ed., 1995). Situated near the shoreline in Kua‘ula valley, Moku‘ula was once the seat of political power on Maui and the piko (center) of ka pae ‘āina o Hawai‘i. *Id.*

¹²⁴ Manalo-Camp, *supra* note 68.

¹²⁵ WILCOX, SUGAR WATER, *supra* note 69, at 126–137.

¹²⁶ Manalo-Camp, *supra* note 68.

¹²⁷ See, e.g., Sproat, *Wai Through Kānāwai*, *supra* note 40, at 128–30; Molly Solomon, *The Final Days of Hawaiian Sugar*, NAT’L PUB. RADIO (Dec. 17, 2016, 9:00 AM ET), <https://www.npr.org/sections/thesalt/2016/12/17/505861855/the-final-days-of-hawaiian-sugar> (describing how mechanization of mills on the mainland and rising labor costs shut down sugar mills in Hawai‘i).

¹²⁸ In 1959, the Hawai‘i legislature amended the quiet title statute to permit an adverse possession claimant to bring quiet title action and serve unknown defendants by publication.

possession¹²⁹ – two judicial methods for settling title to land. Developers seized the opportunity to purchase large tracts of former plantation fields, assuming control of the plantations' century-old irrigation ditches, reservoirs, and diverted water to service luxury subdivisions, equipped with “emerald golf courses and glittering pools.”¹³⁰

The state's efforts to fast track development first evolved under the guise of responding to an affordable housing crisis.¹³¹ Since setting out on his gubernatorial campaign, Governor Green has been instrumental in “removing barriers” for the construction industry.¹³²

HAW. REV. STAT. § 669-3 (notice by publication or registered mail in quiet title and adverse possession actions). This major change enabled courts to presume that all parties with potential or actual interests in the property had received notice of the pending quiet title action. Arnold L. Lum & Stephanie M. Chen, *Judicial Methods for Securing Land Title*, in NATIVE HAWAIIAN LAW: A TREATISE 426, 431 (Melody Kapilialoha MacKenzie et al. eds. 2015). Any failure to respond was presumed to be intentional, and courts were thereby allowed to adjudicate all claims and interests relating to the property. *Id.*

¹²⁹ Adverse possession was so pervasive in Hawai'i that voters ratified a constitutional amendment in 1978, restricting adverse possession claim to “five acres or less” and “not more than once in twenty years.” See HAW. CONST. art. XVI, § 12; Chief Justice William S. Richardson, *Chief Justice Challenges Conference*, 1 THE NATIVE HAWAIIAN (Alu Like Native Hawaiian Program, Honolulu, Haw.), July 1977, at 1, 6 (recognizing that the adverse possession doctrine in Hawai'i conflicts with the Hawaiian system of land use, which was based upon respect for the use rights of others); Michael Anthony Town & William Wai Lim Yuen, *Public Access to Beaches in Hawaii: “A Social Necessity,”* 10 HAW. B. J. 21 (Spring 1973) (noting that powerful interests have historically wielded adverse possession against the poor); see, e.g., Marina Starleaf Riker, *How One Hawaiian Family Battled in Court for 20 Years to Reclaim Ancestral Land*, HONOLULU CIV. BEAT (Dec. 30, 2022), <https://www.civilbeat.org/2022/12/how-one-hawaiian-family-battled-in-court-for-20-years-to-reclaim-ancestral-land>.

¹³⁰ See Wang, *supra* note 15.

¹³¹ See Stewart Yerton, *Hawaii Gov Takes Dramatic Action to Solve Housing Crisis. But Is He Going Too Far?*, HONOLULU CIV. BEAT (July 17, 2023), <https://www.civilbeat.org/2023/07/hawaii-gov-takes-dramatic-action-to-solve-housing-crisis-but-is-he-going-too-far/> [hereinafter Yerton, *Hawaii Gov Takes Dramatic Action*].

¹³² See M. Nolan Gray, *Can Hawaii Solve Its Housing Emergency?*, BLOOMBERG (July 31, 2023), <https://www.bloomberg.com/news/articles/2023-07-31/hawaii-s-plan-to-build-more-housing-could-be-national-model>. In 2018, a super PAC created by the Hawaii Regional Council of Carpenters – the largest construction union in the state – contributed \$1.03 million to Green's campaign for lieutenant governor. See Stewart Yerton, *Carpenters Union Makes Josh Green A Million-Dollar Candidate For LG*, HONOLULU CIV. BEAT (Aug. 3, 2018), <https://www.civilbeat.org/2018/08/carpenters-union-makes-josh-green-a-million-dollar-candidate-for-lg/>. As lieutenant governor, Green appointed the union's former political and education director Brooke Wilson as his chief of staff. Audrey McAvoy, *Former Carpenters' Union Official Is Green's Chief of Staff*, MAUI NEWS (Dec. 6, 2018), <https://www.mauinews.com/uncategorized/2018/12/former-carpenters-union-official-is-greens-chief-of-staff/>. In 2022, the union announced its endorsement of Green for governor, citing Green's role in popularizing the phrase “housing is healthcare” and his understanding of “the importance of building more affordable housing for working families across our state.”

On July 7, 2023, Green vetoed two key water protection bills¹³³ that would have increased penalties for violations to the state Water Code and enabled the Water Commission to take timely action in an emergency.¹³⁴ Weeks later, on July 17, 2023, Green issued an Emergency Proclamation on Housing¹³⁵ that immediately suspended key environmental review processes¹³⁶ and established the Build Beyond Barriers Working Group, funded¹³⁷ in part by the landowner and developer advocacy organization, the Land Use Research Foundation (“LURF”).¹³⁸ Developer-backed organizations like LURF have

Hawaii Regional Council of Carpenters Endorse Dr. Josh Green for Governor, GREEN FOR GOVERNOR (Apr. 7, 2022), <https://joshgreenforhawaii.com/hawaii-regional-council-of-carpenters-endorse-dr-josh-green-for-governor/>.

¹³³ Christina Jedra, *Environmental Groups To Governor: Don't Veto Water Protection Bills*, HONOLULU CIV. BEAT (July 5, 2024), <https://www.civilbeat.org/beat/environmental-groups-to-governor-dont-veto-water-protection-bills/>; H.B. 513, 32d Leg., Reg. Sess. (Haw. 2023); H.B. 1088, 32d Leg., Reg. Sess. (Haw. 2023).

¹³⁴ Jedra, *supra* note 133.

¹³⁵ OFF. OF THE GOVERNOR, STATE OF HAW., PROCLAMATION RELATING TO HOUSING (July 17, 2023), <https://governor.hawaii.gov/wp-content/uploads/2023/07/2307072-1.pdf> [hereinafter PROCLAMATION RELATING TO HOUSING].

¹³⁶ Green's emergency proclamation suspended key public review processes “to the extent necessary to expedite the provisions of approved housing projects.” *Id.* Notably, the proclamation suspended state laws requiring public hearings, assessment of environmental impacts, and protections for Native Hawaiian burials. *See id.* Chapter 6E establishes a statewide process for historic preservation review. HAW. REV. STAT. § 6E (Historic Preservation). Chapter 343 establishes an environmental review process to ensure environmental concerns are given appropriate consideration in decisionmaking along with economic and technical considerations. HAW. REV. STAT. § 343 (Environmental Impact Statements). The emergency proclamation also suspended required land use approvals pursuant to section 201H-38(a)(3), which requires approval of the legislative body of the county in which the housing project is situated, as well as sections 205-3.1(a) and 205-4(a), which require certain land use district boundary amendments to be processed by the land use commission. PROCLAMATION RELATING TO HOUSING, *supra* note 135; HAW. REV. STAT. §§ 201H-38(a)(3), 205-3.1(a), 205-4(a).

¹³⁷ Loopholes in Hawai'i's pay-to-play laws allow campaign contributions from company owners, officers, and their immediate family members. Blaze Lovell, et al., *Inside the Late-Night Parties Where Hawaii Politicians Raked In Money*, N.Y. TIMES (Apr. 17, 2024), <https://www.nytimes.com/2024/04/17/us/hawaii-contractors-campaign-donations.html>. A recent analysis of hundreds of thousands of campaign contributions and more than 70,000 state contracts revealed that individuals tied to government contractors have provided a remarkable percentage of the money fueling state and local politics. *Id.*

¹³⁸ Formed in 1979, LURF is a research and trade association whose members include major Hawai'i landowners, developers, and a utility company. LAND USE RESEARCH FOUNDATION OF HAWAII, <https://www.lurf.org> (last visited Mar. 5, 2024); Yerton, *Hawaii Gov Takes Dramatic Action*, *supra* note 131.

exploited Hawai‘i’s housing crisis¹³⁹ by advocating for bills that reduce restrictions on development in violation of state lobbying laws.¹⁴⁰ Green’s emergency proclamation drew considerable criticism for suspending a wide range of state laws intended to ensure public participation in decisions related to new construction as it also “cit[ed] the hardship many local working families, especially Native Hawaiians, face due to insufficient stocks of affordable housing in Hawai‘i, while doing nothing to require that the new construction it authorized would be affordable or available to local families.”¹⁴¹ On September 15, 2023, Green revised his proclamation in response to a community-led legal challenge that “successfully mov[ed] Governor Josh Green to concede that legal protections designed to protect natural and cultural resources and ensure public transparency in government decision-making are not the root causes of unaffordable housing in Hawai‘i.”¹⁴²

To address the ongoing overexploitation of stream water by private water purveyors, including many subsidiaries of WML,¹⁴³ Maui Komohana

¹³⁹ Hawai‘i’s housing crisis can be traced to historic land grabs. See Julian Aguon, *Native Hawaiians and International Law*, in NATIVE HAWAIIAN LAW: A TREATISE 352, 357 (Melody Kapilialoha MacKenzie et al., eds., 2015) (“By the latter part of the century, foreigners, mostly American, owned more than a million acres and leased another three-quarters of a million acres of land.”). The overthrow of the Hawaiian Kingdom ultimately resulted in land reforms that dispossessed Kānaka of their ancestral land. For further discussion on how western capitalists disproportionately benefitted from government land sales, see Donovan C. Preza, *The Empirical Writes Back: Re-examining Hawaiian Dispossession Resulting from the Māhele of 1848* at 138–43 (May 2010) (unpublished M.A. thesis, Univ. of Hawai‘i at Mānoa) (on file with author). See also Jessica Terrell, *Hawaii Has Been Facing a Housing Crisis for Generations*, HONOLULU CIV. BEAT (Sept. 17, 2023), <https://www.civilbeat.org/2023/09/hawaii-has-been-facing-a-housing-crisis-for-generations> (explaining that Hawai‘i’s housing crisis “seems to only get worse” despite decades of government reforms).

¹⁴⁰ In 2015, the State Ethics Commission levied fines against LURF and the foundation’s executive director for failing to file lobbying expenditures and contributions reports between 2008 and 2014. HAW. STATE ETHICS COMM’N, RESOLUTION OF INVESTIGATIONS 14-00090 AND 14-00091 (2015), available at <https://files.hawaii.gov/ethics/advice/ROI2015-1.pdf>; Ian Lind, *Hawaii Monitor: The Case of a Wayward Land Use Lobbyist*, HONOLULU CIV. BEAT (Feb. 11, 2015), <https://www.civilbeat.org/2015/02/hawaii-monitor-the-case-of-a-wayward-land-use-lobbyist>.

¹⁴¹ *Governor Green Reinstates Legal Protections After Community Groups Challenge Emergency Proclamation on Housing*, EARTHJUSTICE (Oct. 24, 2023), <https://earthjustice.org/press/2023/governor-green-reinstates-legal-protections-after-community-groups-challenge-emergency-proclamation-on-housing>.

¹⁴² *Id.*

¹⁴³ According to a 2020 report from Maui County’s board of water supply, 16 of the top 20 potable water consumers are resorts, timeshares, and short-term condominium rentals. Kehaulani Cerizo, *County Could Consider Higher Rates for Top Water Users*, MAUI NEWS

residents petitioned the Water Commission to set meaningful interim instream flow standards (“IIFS”).¹⁴⁴ Despite its clear mandate to establish IIFS “on a stream-by-stream basis whenever necessary to protect the public interest,”¹⁴⁵ the Water Commission struggled to enforce flagrant violations of the IIFS in streams across Maui Komohana.¹⁴⁶ As properties in WML’s largest development continued to use forty times as much water as the

(July 24, 2021), <https://www.mauinews.com/news/local-news/2021/07/county-could-consider-higher-rates-for-top-water-users>; *About: Water Service Management*, WEST MAUI LAND CO., <https://westmauiwater.com/about#:~:text=West%20Maui%20Land%20Company%2C%20Inc,are%20considered%20public%20water%20systems> (last visited Apr. 14, 2024) (“West Maui Land Company, Inc (WML) provides the water system and customer service management for Olowalu Water Company (OWC), Launiupoko Irrigation Company (LIC), Launiupoko Water Company (LWC)[.]”); see *supra* note 27 and accompanying text.

¹⁴⁴ “‘Instream flow standard’ means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.” HAW. REV. STAT. § 174C-3 (1987) (Definitions). “‘Interim instream flow standard’ means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.” *Id.* IIFSs are established by the Water Commission on a stream-by-stream basis pursuant to the Water Code. *Id.* § 174C-71 (Protection of Instream Uses). IIFSs are necessary to restore stream flow and protect public trust uses of water, particularly as the state’s rainfall deficit and decline in groundwater recharge continues. *Cf. Hydrologists Explain That Interim Instream Flow Standards Are Aimed at Equitable Use of Water*, MAUI NEWS (Oct. 23, 2023, 9:47 AM), <https://mauiinews.com/2023/10/23/hydrologists-explain-that-interim-instream-flow-standards-are-aimed-at-equitable-use-of-water/>. Water Commission hydrologist, Dr. Aryon Strauch, explained that IIFSs are aimed at restoring balance in water use in accordance with Hawai‘i’s water laws, “Essentially IIFS[s] reduce the use of water for non-instream uses, particularly under low-flow conditions. We really seek to prioritize public trust uses over non-public trust uses and IIFS are one tool that helps us do that.” *Id.*; Melissa Tanji, *Water Returned to Some Kaua‘ula Valley Families, Farms*, MAUI NEWS (Apr. 22, 2022), <https://www.mauinews.com/news/local-news/2022/04/water-returned-to-some-kaua-ula-valley-families-farms/>.

¹⁴⁵ HAW. REV. STAT. § 174C-71 (1987) (protection of instream uses); HAW. COMM’N WATER RES. MGMT., NOTICE OF ALLEGED VIOLATION INTERIM INSTREAM FLOW STANDARD KAUA‘ULA STREAM, LAHAINA, MAUI (Mar. 31, 2022), https://files.hawaii.gov/dlnr/cwrm/gwma/lahaina/20220412_Lahaina_AppH.pdf.

¹⁴⁶ See, e.g., HAW. COMM’N ON WATER RES. MGMT., NOTICE OF ALLEGED VIOLATION INTERIM INSTREAM FLOW STANDARD KAUA‘ULA STREAM, LAHAINA, MAUI (Mar. 31, 2022), https://files.hawaii.gov/dlnr/cwrm/gwma/lahaina/20220412_Lahaina_AppH.pdf.

average American home,¹⁴⁷ Kānaka families who lived downstream were left with little to no water for their daily needs.¹⁴⁸

In June 2022, despite predictable opposition from the development and hotel industries,¹⁴⁹ the community and the Water Commission, under the leadership of Deputy Director Manuel, prevailed in instituting a unified permitting system¹⁵⁰ that the community hoped would restore public control over water.¹⁵¹ Recognizing that “[c]urrent and authorized planned uses of the Honokōwai and Launiupoko aquifer systems either exceed or approach 90% of sustainable yield,” the Water Commission voted unanimously to designate Maui Komohana as a Water Management Area.¹⁵²

Under Hawai'i Revised Statutes chapter 174C, the Water Code, designation invokes the Water Commission's permitting authority¹⁵³ to

¹⁴⁷ Anita Hofschneider & Jake Bittle, *The Libertarian Developer Looming over West Maui's Water Conflict*, GRIST (Nov. 27, 2023), <https://grist.org/indigenous/developer-peter-martin-west-maui-water-wildfire>.

¹⁴⁸ In June 2022, Lauren Palakiko, whose family has resided in Kaua'ula for centuries and has priority water rights under the law, testified at a state water commission hearing that she had to bathe her baby in a bucket because not enough water reached her home. HAW. COMM'N ON WATER RES. MGMT., *Public Testimony on Designating the Lahaina Aquifer Sector A Water Management Area* (Apr. 14, 2022), https://files.hawaii.gov/dlnr/cwrm/gwma/lahaina/20220426_PublicTestimony.pdf.

¹⁴⁹ Several real estate development corporations and their affiliated water companies – including West Maui Land Co. (Launiupoko Irrigation Co., Launiupoko Water Co., Inc. and Olowalu Water Co.) and Maui Land & Pineapple Co. – synchronously opposed designation, which would have heightened scrutiny on the companies' use of water. In an apparent effort to polarize designation, developers claimed that the permitting process would jeopardize jobs and affordable housing. *See, e.g.*, Written Testimony in Opposition to Designation from Glenn E. Tremble, Treasurer/Secretary, Launiupoko Irrigation Co., Launiupoko Water Co., Inc. and Olowalu Water Co., to M. Kaleo Manuel, Deputy Dir., Comm'n on Water Res. Mgmt. (June 13, 2022) (“The impacts will not be felt by only developers and large landowners but will also extend to Maui families who need water for their lands, affordable housing projects and Kuleana tenants.”); Written Testimony in Opposition to Designation from Paulus Subrata, Vice President, Maui Land & Pineapple Co., to Suzanne Case, Chairperson, Comm'n on Water Res. Mgmt. (June 13, 2022) (“While we don't believe the moratorium will be indefinite, [designation] will serve to delay housing for years, at a time when we are in an affordable housing crisis.”).

¹⁵⁰ STATE OF HAWAII REVIEW COMMISSION ON THE STATE WATER CODE, FINAL REPORT TO THE STATE LEGISLATURE 10 (1994), <https://evols.library.manoa.hawaii.edu/server/api/core/bitstreams/3747fce2-ada0-416c-9a8f-e174131a3279/content> [hereinafter REVIEW COMMISSION ON THE STATE WATER CODE 1994 REPORT].

¹⁵¹ *See* Klein & Sproat, *supra* note 18; CWRM, SURFACE AND GROUND WATER MANAGEMENT AREA DESIGNATION FINDINGS OF FACT REPORT, *supra* note 4.

¹⁵² CWRM, SURFACE AND GROUND WATER MANAGEMENT AREA DESIGNATION FINDINGS OF FACT REPORT, *supra* note 4, at 8.

¹⁵³ HAW. REV. STAT. § 174C-41(a) (1987).

prioritize constitutionally protected Native Hawaiian traditional and customary rights¹⁵⁴ and waters in their natural state over the private commercial use of water.¹⁵⁵ Many mahi 'ai¹⁵⁶ and community members in Maui Komohana appeared before the Water Commission to advocate for designation.¹⁵⁷ They did so despite the burden it would place on them as existing users¹⁵⁸ and with full knowledge of the Water Commission's

When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest.

Id.

¹⁵⁴ HAW. CONST. art. XII, § 7.

¹⁵⁵ See HAW. REV. STAT. §§ 174C-45 (1987) (describing criteria the Water Commission shall consider in designating an area for water use regulation, including (1) whether regulation is necessary to preserve the diminishing surface water supply for future needs; (2) whether stream diversions are adversely affecting public health or existing instream uses; or (3) serious disputes over surface water resources); *Kauai Springs, Inc. v. Planning Comm'n of Cnty. of Kauai*, 324 P.3d 951, 982, 133 Hawai'i 141, 172 (2014). In highlighting the purpose of the state resource public trust in protecting certain uses, the court emphasized:

We have recognized four such protected uses. First, "the maintenance of waters in their natural state constitutes a distinct 'use'" that the public trust protects. Second, the public trust protects domestic water use, in particular, protecting an adequate supply of drinking water. Third, the public trust protects the use of water in "the exercise of Native Hawaiian and traditional and customary rights[.]" Lastly, the reservation of water enumerated by the State Water Code constitutes a protected use under the public trust.

Id.

¹⁵⁶ HAWAIIAN DICTIONARY, *supra* note 2, at 219 (defining "mahī 'ai" as "farmer" or "planter").

¹⁵⁷ E.g., Haw. Comm'n on Water Res. Mgmt., *June 14, 2022 Monthly Water Commission Meeting*, VIMEO (Sept. 19, 2023, at 3:16:43), <https://vimeo.com/721616283>.

¹⁵⁸ The water use permitting process is extremely complex. See DEPT. OF LAND & NAT. RES., COMM'N ON WATER RES. MGMT., WATER USE PERMIT PROCESS, <https://files.hawaii.gov/dlnr/cwrn/forms/dgwup.pdf> (using a flowchart with over fifty arrows to explain the generalized process for completing a water use permit application). As of 2021, the Water Commission requires all appurtenant right holders to submit their land deed going back to the Māhele. HAW. COMM'N ON WATER RES. MGMT., NĀ WAI 'EHĀ FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER Report 261–73 (2021), <https://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/CCHMA1501-20210630-D&O.pdf>.

protracted failure to issue water use permits in Nā Wai 'Ehā.¹⁵⁹ On June 14, 2022, the Water Commission designated the Lahaina Aquifer Sector Area as both a Surface and Ground Water Management Area with an effective date of August 6, 2022.¹⁶⁰ In accordance with HRS § 174C-50(c), applicants had one year to complete and file their water use permit applications with the Water Commission.¹⁶¹ But, because August 5, 2023 fell on a Saturday, the effective deadline to file the applications fell on the following Monday, August 7, 2023.¹⁶² The fire that devoured Lahaina occurred the very next day.¹⁶³

WML's false dichotomy – pitting firefighting pretext against stream protections and Native Hawaiian water rights¹⁶⁴ – quickly took root in the state's response to the fires. Ostensibly to combat the fires, the Green administration suspended the Water Code in a series of emergency proclamations.¹⁶⁵ Citing the emergency proclamations, the Chair of the Water Commission granted WML's same-day request for “ongoing authorization” to fill its reservoirs, suspension of IIFSs, and proceedings to amend IIFSs to provide more water for fire suppression.¹⁶⁶ As WML publicly

¹⁵⁹ Water use permit applicants waited for over a decade for the Water Commission to recognize their water rights in Nā Wai 'Ehā. Trisha Kehaulani Watson-Sproat, *A Big Step Forward and a Half Step Back*, KA WAI OLA (Aug. 1, 2021), <https://kawaiola.news/cover/a-big-step-forward-and-a-half-step-back/>.

¹⁶⁰ HAW. COMM'N ON WATER RES. MGMT., PUBLIC NOTICE, LAHAINA AQUIFER SECTOR AREA, SURFACE AND GROUND WATER MANAGEMENT AREA DESIGNATION, ISLAND OF MAUI (July 29, 2022), <https://files.hawaii.gov/dlnr/cwrm/notice/2022/nt20220729.pdf>.

¹⁶¹ See HAW. REV. STAT. 174C-50(c) (“An application for a permit to continue an existing use must be made within a period of one year from the effective date of designation.”).

¹⁶² HAW. ADMIN. R. § 14-22.1-8 (LEXIS through 2024).

¹⁶³ Klein & Sproat, *supra* note 18; HAW. COMM'N WATER RES. MGMT., WATER RESOURCES BULLETIN (Jan. 2024), <https://files.hawaii.gov/dlnr/cwrm/bulletin/bull202401.pdf>.

¹⁶⁴ See Carolyn Kormann, *Why Maui Burned*, NEW YORKER (Oct. 30, 2023), <https://www.newyorker.com/magazine/2023/11/06/maui-wildfire-response-recovery>.

WML's co-founder and CEO, Peter Martin, maintained that “protecting water for Native Hawaiian cultural practices was ‘a crock of shit,’ and that invasive grasses and ‘this stupid climate-change thing’ had ‘nothing to do with the fire.’” *Id.*

¹⁶⁵ E.g., THIRD PROCLAMATION RELATING TO WILDFIRES, *supra* note 26; OFF. OF THE GOVERNOR, STATE OF HAW., FOURTH PROCLAMATION RELATING TO WILDFIRES (Aug. 10, 2023), <https://governor.hawaii.gov/wp-content/uploads/2023/08/4th-EP-on-Wildfires.pdf>.

¹⁶⁶ Michelle Broder Van Dyke, *Hundreds Submit Testimony Asking to Reinstate Kaleo Manuel to the Water Commission*, SPECTRUM NEWS (Sept. 20, 2023, 7:04 PM ET), <https://spectrumlocalnews.com/hi/hawaii/news/2023/09/20/reinstate-kaleo-manuel-water-commission>; Yerton, *The Lahaina Fire*, *supra* note 23 (quoting Glenn Tremble, an executive at the West Maui Land Co., who said, “I would love to see [designation] gone.”); Hiraishi, *Lāhainā Fires Reveal Ongoing Power Struggle*, *supra* note 22 (quoting Tremble days after the Lahaina fires who noted, “We followed the process. The process failed us.”).

pressured the Water Commission to reexamine designation in Lahaina in the wake of the fires,¹⁶⁷ the Green administration seized the opportunity to roll back stream protections long opposed by the developer community in yet another major watershed.¹⁶⁸ On August, 9, 2023, the day after the fires, the Attorney General filed a petition to allocate more water from Maui Hikina (East Maui) watersheds to Alexander & Baldwin (“A&B”), a commercial real estate corporation,¹⁶⁹ and its oldest subsidiary, East Maui Irrigation (“EMI”), a private water company.¹⁷⁰ The Attorney General falsely claimed

¹⁶⁷ See *supra* Part I; Chapman & Devine, *supra* note 23; Hurley, *supra* note 23.

¹⁶⁸ See *Carmichael v. Bd. of Land & Nat. Res.*, 150 Hawai‘i 547, 553–55, 506 P.3d 211, 217–18 (2022). In 2015, the Board of Land and Natural Resources (“BLNR”) approved four revocable permits that allowed for-profit corporate entities Alexander & Baldwin, Inc. (“A&B”) and its subsidiary East Maui Irrigation Co., Ltd. (“EMI”) to divert more than 100 million gallons of stream water per day from 33,000 acres of “ceded” lands in Maui Hikina. See *id.* BLNR, A&B, and EMI argued that the revocable permits were exempt from the Hawai‘i Environmental Policy Act (“HEPA”) compliance. *Id.*; see HAW. REV. STAT. § 343. The Hawai‘i Supreme Court rejected the corporate entities’ assertion that the continuation of revocable permits did not constitute “use of State land” or “applicant action” for which an environmental assessment was required. *Carmichael*, 150 Haw. at 556–57, 506 P.3d at 220–221. The court held that BLNR did not sufficiently demonstrate that it considered “the best interests of the state” as required by HRS § 171-55, emphasizing the circuit court’s finding that “A&B’s continuous uninterrupted use of these public lands on a holdover basis for the last 13 years is not the ‘temporary’ use that HRS Chapter 171 envisions.” *Id.* at 557, 566–67, 506 P.3d at 221, 230–31. The court also determined that BLNR did not fulfill its public trust obligations as a trustee of the state’s water resources. *Id.* at 566–67, 506 P.3d at 230–31; see also Broder Van Dyke, *supra* note 20.

¹⁶⁹ Since its establishment in 1870, A&B has remained one of the most influential economic forces in Hawai‘i. Nakanelua, *supra* note 102, at 192–93, 222–39 (describing A&B’s historical monopoly of water on Maui and its continued access to water throughout Hawai‘i via one-year revocable permits). Prior to its conversion to a commercial real estate investment trust in 2017, A&B was one of the state’s largest private landowners with roughly 87,000 acres of land in Hawai‘i. See *Alexander & Baldwin Strengthens its Commitment to Governance and Sustainability*, ALEXANDER & BALDWIN (Mar. 20, 2018), <https://investors.alexanderbaldwin.com/2018-03-20-Alexander-Baldwin-strengthens-its-commitment-to-governance-and-sustainability>. A&B began pursuing the monetization and disposition of its landholdings as part of the transition to commercial real estate investment in 2016. ALEXANDER & BALDWIN, 2023 ANNUAL REPORT AND FORM 10-K 28, 38 (2023).

¹⁷⁰ EMI owns the ditch system that diverts stream water from the Ke‘anae, Honomanu, Nahiku, and Huelo watersheds that span state-owned land. Pauahi Ho‘okano, *Aia i Hea ka Wai a Kāne? (Where Indeed is the Water of Kāne?): Examining the East Maui Water Battle*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 220, 222 (Noelani Goodyear-Ka‘ōpua et al. eds., 2014). For decades, EMI operated the ditch system under water leases issued by the Territory of Hawai‘i in 1938. DEED BETWEEN THE TERRITORY OF HAWAII AND THE EAST MAUI IRRIGATION COMPANY, LTD. (March 18, 1938), <https://dlnr.hawaii.gov/ld/files/2020/11/EMI-Territorial-Water-Agreement.pdf>. After EMI’s

that stream protections¹⁷¹ left the island with insufficient water to battle the fires, and in a blatant misrepresentation of the county's firefighting needs, blamed the Environmental Court judge for the "delayed delivery of that water."¹⁷² The Hawai'i Supreme Court swiftly denied the state's petition.¹⁷³ Thus, as Lahaina residents began the process of recovery,¹⁷⁴ government officials accelerated developer-driven efforts to suspend hard-won environmental protections.

As the corporations await the Water Commission's permit determinations in Maui Komohana, real estate corporations and their subsidiary private water companies, continue to hoard significant amounts of stream water in unlined reservoirs, sell the water to gentlemen estates,¹⁷⁵ and dispose of the

final remaining long-term water lease expired in 1986, a group of kalo farmers and residents of the region challenged EMI's application for yet another long-term water lease. EMI and BLNR attempted to negotiate a thirty-year water lease, but ultimately, BLNR resorted to annually renewing revocable permits for EMI to continue operating the ditch system on state land. Ho'okano, *supra*, at 224–25.

¹⁷¹ In June 2023, Environmental Court Judge Jeffrey Crabtree reduced the amount of water that could be diverted from Maui Hikina from 40.5 mgd to 31.5 mgd, and authorized 7.5 mgd requested by Maui County, which included water needed for fire suppression. *Sierra Club v. Bd. of Land & Nat. Res. Civ. No. 22-0001506* (Haw. Cir. Ct. June 16, 2023). In September 2023, the Environmental Court ruled that A&B and EMI failed to demonstrate their actual needs, and accordingly, denied their request to increase the 31.5 mgd cap. *Sierra Club v. Bd. of Land and Nat. Res. Civ. No. 22-0001506*, at 2 (Haw. Cir. Ct. Oct. 16, 2023).

¹⁷² Petition for Writ of Mandamus and Writ of Prohibition and Immediate Stay of Underlying Order at 1, *Bd. of Land & Nat. Res. v. Crabtree*, No. SPCW-23-0000471 (Haw. Aug. 18, 2023) ("Maui is in peril as it is ravaged by wildfires. Central Maui has no water for fire reserve because the [Environmental Court] Judge substituted his judgment for that of the agency. As a result, there was not enough permitted water to the battle the wildfires on Maui this morning."); Declaration of Mariana Löwy-Gerstmar, *Bd. of Land & Nat. Res. v. Crabtree*, No. SPCW-23-0000471 (Haw. Aug. 18, 2023) (attesting that the Maui County Fire Department had sufficient water to combat the fires).

¹⁷³ *Bd. of Land & Nat. Res. v. Crabtree*, No. SPCW-23-0000471, 2023 WL 5443252 (Haw. 2023) (denying the writs of mandamus and prohibition); see Daryl Huff, *High Court Justices Challenge State's Claim of Insufficient Water for Maui Firefighting*, HAW. NEWS NOW (Aug. 23, 2023, 6:16 PM), <https://www.hawaiinewsnow.com/2023/08/24/high-court-justices-challenge-states-claims-insufficient-water-maui-firefighting/>.

¹⁷⁴ See Mehta, *supra* note 1.

¹⁷⁵ Hofschneider & Bittle, *supra* note 147. Hofschneider and Bittle describe how selling stream water is a key component of WML's development model:

Over the last five decades, [Peter] Martin has made millions of dollars off this real estate boom, building a development empire on West Maui and turning hundreds of acres of plantation land into a paradise of palatial homes and swimming pools. He owns or holds interest in nearly three dozen companies that touch almost every aspect of the homebuilding process: companies that buy vacant land, companies that submit

resulting wastewater via injections into Lahaina's nearshore reefs.¹⁷⁶ Following the fires, legislative proposals to amend the Water Code to include "maintaining available fresh water for fire safety purposes"¹⁷⁷ appear to support "the banking of public fresh water resources, rather than fire safety in particular"¹⁷⁸ Another proposed amendment provides that any "public water supplier may declare a water shortage emergency condition without holding a public hearing in the event of a fire," which critics warn would grant "unbridled authority to private water companies."¹⁷⁹

Salient dimensions of disaster capitalism threaten to thwart Lahaina's post-disaster recovery and delay justice for Kānaka seeking to restore the natural flow of wai through their ancestral lands. Much like a century ago, heavily interlocked land interests continue to exert outsized influence on Hawai'i's government officials and agencies to ultimately accomplish what they could not otherwise achieve through the law.¹⁸⁰ Concerningly, as developers ascribed a lack of water to fight the fires to Hawai'i's water law regime,

development plans to local governments, companies that build houses, and companies that sell water to residents. His real estate brokerage helps find buyers for homes built on his land, and he's even got a company that builds swimming pools.

Id.

¹⁷⁶ See *infra* Section IV.B.

¹⁷⁷ S.B. 2089, 32nd Leg., Reg. Sess. (2024).

¹⁷⁸ See Written Testimony in Opposition to Senate Bill 2089 from Isaac H. Moriwake, Managing Attorney, Earthjustice Mid-Pacific Office to the Committees on Public Safety and Intergovernmental and Military Affairs and Water and Land (Feb. 7, 2024). The Water Code already authorizes the use of water for reasonable and beneficial purposes, such as fire safety. See HAW. REV. STAT. § 174C-3.

¹⁷⁹ See Written Testimony in Opposition to Senate Bill 2089 from Isaac H. Moriwake, Managing Attorney, Earthjustice Mid-Pacific Office to the Committees on Public Safety and Intergovernmental and Military Affairs; and Water and Land (Feb. 7, 2024).

¹⁸⁰ Within a century of the missionaries' arrival, sugar corporations took control of Hawai'i's economy, politics, and vast resources, resulting in the illegal overthrow of the Hawaiian Kingdom and the massive concentration of land in the hands of a few private owners. See generally MACLENNAN, SOVEREIGN SUGAR, *supra* note 10, at 52–102 (describing the five merchant families and four missionary families that influenced government, economics, education, politics, and life in Hawai'i). Today, in the wake of unprecedented disaster on Maui, the corporate descendants of Hawai'i's large landed interests continue to push through policies they were unable to secure when Hawai'i's Water Code was in place. See, e.g., Elena Bryant, *How Maui's Wildfire Sparked a Disaster Capitalist Power Grab for Hawai'i's Public Water*, EARTHJUSTICE (Aug. 28, 2024), <https://earthjustice.org/experts/elena-bryant/how-mauis-wildfire-sparked-a-disaster-capitalist-power-grab-for-hawaiiis-public-water>; *Plantation Disaster Capitalism: Native Hawaiians Organize to Stop Land & Water Grabs After Maui Fire*, DEMOCRACY NOW! (Aug. 18, 2023), https://www.democracynow.org/2023/8/18/maui_wildfire_sirens.

which affords special protections to Native Hawaiian water rights,¹⁸¹ the state government laid blame for the state’s deadliest disaster at the feet of an Environmental Court judge, the Water Commission’s Deputy Director, and a handful of Native Hawaiian kalo farmers.¹⁸² Indeed, Green’s allusion to “the great deal of water conflict” downplays the state’s longstanding failure to uphold its constitutional duty to prioritize public trust uses of water and deliver on its commitment to restorative justice for Kānaka.¹⁸³

III. RESTORING HAWAI‘I’S PUBLIC TRUST

“When you guys start to protect the public trust, then you can regain the public’s trust.”

—Kekai Keahi, Kalo Farmer¹⁸⁴

Chief Justice (“CJ”) William S. Richardson once reflected on the way Hawai‘i’s highest court “set about returning control of interpreting the law to those with deep roots in and profound love for Hawai‘i.”¹⁸⁵ Indeed, following the establishment of several landmark amendments to Hawai‘i’s state

¹⁸¹ Yerton, *The Lahaina Fire*, *supra* note 23 (quoting Glenn Tremble, a WML executive, who said, “I would love to see [designation] gone”); Hiraishi, *Lāhainā Fires Reveal Ongoing Power Struggle*, *supra* note 22 (quoting Tremble days after the Lahaina fires who exclaimed, “We followed the process. The process failed us.”); Hofschneider & Bittle, *supra* note 147 (quoting Tremble who claimed, “The problem is the process, or lack thereof, to provide water to Maui Fire Department and to the community.”).

¹⁸² Kawai Scanlan & Dru Hara, Opinion, *Upgrade Isles’ Water Management Laws*, HONOLULU STAR ADVERTISER (Apr. 14, 2024), <https://www.staradvertiser.com/2024/04/14/editorial/island-voices/column-upgrade-isles-water-management-laws/> (urging legislators to pass HB2690, a bill that sought to implement decades-old recommendations to alleviate political interference in water policy introduced in the 2024 legislative session).

¹⁸³ See N. Mahina Tuteur, *Reframing Kānāwai: Towards a Restorative Justice Framework for Indigenous Peoples*, 7 UCLA INDIGENOUS PEOPLES’ J.L. CULTURE & RESIST., 59, 86 (2020) [hereinafter Tuteur, *Reframing Kānāwai*].

¹⁸⁴ Ku‘uwehi Hiraishi, *Regaining Public Trust Could Be an Uphill Battle for the State Water Commission*, HAW. PUB. RADIO (Sept. 21, 2023), <https://www.hawaiipublicradio.org/local-news/2023-09-21/regaining-public-trust-could-be-an-uphill-battle-for-the-state-water-commission>.

¹⁸⁵ Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6 (2010) [hereinafter MacKenzie, *Standing Torch of Wisdom*] (explaining how William S. Richardson, chief justice of the Hawai‘i Supreme Court from 1966 to 1982, helped to reincorporate Native Hawaiian tradition and custom into state law) (quoting Chief Justice Richardson); see Jonathan Kay Kamakawiwo‘ole Osorio, *Kū‘ē and Kū‘oko‘a: History, Law, and Other Faiths*, in LAW AND EMPIRE IN THE PACIFIC: FIJI AND HAWAI‘I 213, 215 (Sally E. Merry & Donald Brenneis eds., 2004) (“Regardless of the fact that law has changed the Native and may have created a being that is not entirely like his ancestors, law has also been made a part of our being, adopted and adapted to our view of ourselves and the world.”).

constitution in 1978, the Hawai'i Supreme Court, led by CJ Richardson, assumed an active role in evolving Hawai'i's public trust doctrine.¹⁸⁶

In a series of path-forging opinions relating to water,¹⁸⁷ the Richardson court evolved the doctrine to redress decades of water misappropriation by plantations to ensure that certain uses, including traditional and customary Native Hawaiian rights and practices, were prioritized.¹⁸⁸ But, “[m]ore than a set of rules, the public trust embodies an entire way of thinking. Its conceptual premise – that the state holds natural resources in trust for the benefit of present and future generations – crosses over from the law to a pure statement of societal vision.”¹⁸⁹

This Part deconstructs the state's commitment to restorative justice for Kānaka Maoli, with a focus on wai. Section III.A examines the restorative roots of Hawai'i's public trust doctrine and Water Code and expounds on the state's struggle to implement the law's restorative mandate. Section III.B imports international human rights norms of self-determination to envision not only “what the law is, but what it should be.”¹⁹⁰

*A. Decisionmakers Confound “Balance” in the Struggle to Effectuate
Hawai'i's Public Trust*

For Kānaka Maoli, stewardship over freshwater resources is fundamentally expressed as a kuleana – both a responsibility and a

¹⁸⁶ See MacKenzie, *Standing Torch of Wisdom*, *supra* note 185, at 6–14.

¹⁸⁷ See *id.* at 7–8.

¹⁸⁸ See *Robinson v. Ariyoshi*, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982) (recognizing that the “public trust was imposed upon all waters of kingdom of Hawai'i.”); *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 539, 656 P.2d 57, 63 (1982) (affirming that “[o]ur local system of water rights is ‘based upon and is an outgrowth of ancient Hawaiian customs and methods of Hawaiians in dealing with the subject of water’”) (citing *Territory v. Gay*, 31 Haw. 376, 395 (1930)); see also *In re Waiāhole Ditch Combined Contested Case Hearing (Waiāhole I)*, 94 Hawai'i 97, 137–38, 9 P.3d 409, 449–50 (2000). See generally D. Kapua'ala Sproat & MJ Palau-McDonald, *The Duty to Aloha 'Āina: Indigenous Values as a Legal Foundation for Hawai'i's Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525 (2022) (describing how the duty to aloha 'āina is both a Native Hawaiian precept and a necessary component of Hawai'i's public trust applicable to fresh water, 'āina, and other resources).

¹⁸⁹ D. Kapua'ala Sproat & Isaac H. Moriwake, *Ke Kalo Pa'a o Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247, 276 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

¹⁹⁰ See Tuteur, *Reframing Kānāwai*, *supra* 183, at 60.

privilege.¹⁹¹ Kānāwai,¹⁹² the first laws to emerge in Hawai'i, encoded Native Hawaiian traditions governing the management and use of wai.¹⁹³

After about a century of the plantation industry's chokehold on Hawai'i's fresh water flows, sugar plantations began to close in the 1950s and 1960s.¹⁹⁴ As commercial sugar interests subsided, a movement transpired to return water use to public management and control.¹⁹⁵ Historic shifts in Hawai'i's judiciary following statehood in 1959 catalyzed this movement within the court system.¹⁹⁶ Judges appointed in Hawai'i, as opposed to judges selected in Washington D.C., better understood Hawai'i's laws and issues, and thus were more willing to uphold a legal foundation consistent with Native Hawaiian custom and tradition.¹⁹⁷

In 1973, the Richardson court reviewed the history of Hawaiian water usage, including the rights that the mō'ī (sovereign), Kamehameha III, intended to convey in the Māhele,¹⁹⁸ and decidedly rejected the concept of private ownership of water in *McBryde Sugar Co. v. Robinson*, a seminal and complex case that involved two sugar plantations seeking to settle competing claims to ownership of the Hanapēpē River's surface water.¹⁹⁹ The court adopted riparian principles²⁰⁰ and clarified that the appurtenant or riparian right to *use* water precluded any property interest

¹⁹¹ Sproat, *Water Law in Hawai'i*, *supra* note 12, at 526; see Antonio Perry, *Hawaiian Water Rights*, in HAWAIIAN ALMANAC AND ANNUAL FOR 1913, 91, 92 (Thomas G. Thrum ed., 1912).

¹⁹² HAWAIIAN DICTIONARY, *supra* note 2, at 127 (defining kānāwai as "law, code, rule, statute, act, regulation, ordinance, decree [or] edict").

¹⁹³ Sproat, *Water Law in Hawai'i*, *supra* note 12, at 526.

¹⁹⁴ *Why Hawaii's Sugar Plantations Have Disappeared*, CBS News (Jan. 8, 2016, 12:57 PM EST), <https://www.cbsnews.com/news/why-hawaiiis-sugar-plantations-have-disappeared/> (noting sugar plantations began to close starting in the 1950s).

¹⁹⁵ Sproat, *Water Law in Hawai'i*, *supra* note 12, at 534.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 183–84, 504 P.2d 1330, 1337 (1973). Facing interrelated pressures from colonization and the rapid decline of the Native Hawaiian population, King Kamehameha III initiated the Māhele process in the mid-1800s, which transitioned the Hawaiian nation to a private property regime to preserve a land base for all Hawaiian people. See MacKenzie, *Historical Background*, *supra* note 83, at 12–13. As part of the Māhele process, King Kamehameha III retained for himself and his heirs approximately 974,000 acres of land, which remained subject to the rights of native tenants, including the right to use parcels of land for kalo cultivation with sufficient water for irrigation. *Id.* at 9, 14.

¹⁹⁹ *McBryde*, 54 Haw. at 185–87, 504 P.2d at 1338–39; MacKenzie, *Standing Torch of Wisdom*, *supra* note 185, at 7.

²⁰⁰ *McBryde*, 54 Haw. at 197–98, 504 P.2d at 1344; Sproat, *Water Law in Hawai'i*, *supra* note 12, at 536.

in the water itself.²⁰¹ Significantly, the court concluded there was no “right” to divert waters outside the watershed, because the state, as “successor” to the mō‘ī, held the waters flowing in natural watercourses in trust for the people.²⁰² By expansively articulating public interests in the protection of water, the *McBryde* decision laid the foundation for a series of cases in both the state and federal court system to reaffirm what we recognize today as the public trust doctrine, which provides that Hawai‘i’s resources are held in trust and are to be managed for the benefit of present and future generations.²⁰³

As sugar plantations began to lose their dominant economic role to tourism and the military, “[c]ommunities seized this opportunity to reexamine the legal framework for water use and more proactively manage those resources for the benefit of the larger community, rather than for the profit of a handful of private interests.”²⁰⁴ In 1978, Hawai‘i’s citizens crafted amendments to Hawai‘i’s Constitution at the 1978 Constitutional Convention (“Con Con”) to elevate the management of natural and cultural resources to a constitutional mandate.²⁰⁵ Together, article XI, sections 1 and 7²⁰⁶ “adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i.”²⁰⁷

In a series of seminal water law cases, the Richardson court provided important clarifications on the rights of downstream kalo farmers²⁰⁸ and expounded on the the state’s trust obligation rooted in “Native Hawaiian practices respecting water, the tradition from which our water law ostensibly springs.”²⁰⁹ Significantly, the court accentuated the role of the public trust

²⁰¹ *McBryde*, 54 Haw. at 199, 504 P.2d at 1345; Sproat, *Water Law in Hawai‘i*, *supra* note 12, at 536.

²⁰² *McBryde*, 54 Haw. at 199, 504 P.2d at 1345–46; Sproat, *Water Law in Hawai‘i*, *supra* note 12, at 536.

²⁰³ See D. KAPUA‘ALA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER RESOURCE MANAGEMENT IN HAWAII 6–7 (2009); HAW. CONST. art. XI, §§ 1, 7; Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982); Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989).

²⁰⁴ D. Kapua‘ala Sproat, *Where Justice Flows Like Water: The Moon Court’s Role in Illuminating Hawai‘i Water Law*, 33 U. HAW. L. REV. 537, 547 (2011).

²⁰⁵ See *id.*

²⁰⁶ HAW. CONST. art. XI, § 1 (“All public natural resources are held in trust by the State for the benefit of the people.”); *Id.* § 7 (“The State has an obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of its people.”).

²⁰⁷ *In re Waiāhole Ditch Combined Case Hearing (Waiāhole I)*, 94 Hawai‘i 97, 132, 9 P.3d 409, 444 (2000) (citations omitted).

²⁰⁸ *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 539, 656 P.2d 57, 63 (1982).

²⁰⁹ Robinson v. Ariyoshi, 65 Haw. 641, 675, 658 P.2d at 310 (1982); *Reppun*, 65 Haw. at 539, 656 P.2d at 63.

doctrine in both traditional Hawaiian and modern usage²¹⁰ as “a dual concept of sovereign right and responsibility,”²¹¹ strongly reaffirming that the *McBryde* decision did not depart from settled legal principles.²¹²

The 1978 Con Con also established a new and comprehensive framework for water resource management by “centralizing the management of fresh water under a single state agency to minimize political influence at the county level.”²¹³ Like the public trust, “[m]any of the Water Code’s provisions were purposefully crafted to rectify the monopoly of resources by a handful of business interests.”²¹⁴ Designation, for example, was envisioned as a means for the Water Commission to institute a statewide unified permitting system under the Water Code.²¹⁵ Today, however, most of the state remains undesignated.²¹⁶

Today, despite a comprehensive regime of statutory safeguards, legal articulations, and judicial determinations underscoring agencies’ “affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever

In ancient times there was no resource more precious. Although there is a believe that at some point this resource was transformed into a freely transferable private commodity, we do not find this to be so. For in *McBryde* we re-examined what some believed to be the foundation of certain private rights and interests in water and found them to be fatally flawed. We therefore set about to correct these errors of the past, as it was both our duty and prerogative to do so.

Id.

²¹⁰ MacKenzie, *Standing Torch of Wisdom*, *supra* note 185, at 7; *Robinson*, 65 Haw. at 675 n.33, 658 P.2d at 310 n.33.

²¹¹ *Waiāhole I*, 94 Hawai‘i at 135, 9 P.3d at 447 (citing *Robinson*, 65 Haw. at 674, 658 P.2d at 310).

²¹² MacKenzie, *Standing Torch of Wisdom*, *supra* note 185, at 7; *Reppun*, 65 Haw. at 539, 656 P.2d at 63.

²¹³ Sproat, *Environmental Self-Determination*, *supra* note 77, at 202 n.236.

²¹⁴ See Sproat, *Environmental Self-Determination*, *supra* note 77, at 204; HAW. REV. STAT. § 174C-2 (2014); see also *Waiāhole I*, 94 Hawai‘i at 137–38, 9 P.3d at 449–50.

²¹⁵ In 1994, a nine-member Review Commission, appointed by members of the state legislature, recommended the gradual designation of the entire state as a Water Management Area over ten years. REVIEW COMMISSION ON THE STATE WATER CODE 1994, *supra* note 150, at 11.

²¹⁶ DEP’T OF LAND AND NAT. RES. COMM’N ON WATER RES. MGMT., DESIGNATED WATER RESOURCE MANAGEMENT AREAS (2023).

feasible,”²¹⁷ agencies struggle to apply the public trust framework.²¹⁸ Often, the crux of agencies’ struggles is the Water Code’s dual mandate on the state to both protect water resources and to make maximum reasonable beneficial uses of the state’s water resources.²¹⁹ The Water Code requires the Water Commission to weigh instream and offstream purposes²²⁰ and effectively balance the rights and priorities of water use.²²¹ A balancing construct affords flexibility to the courts to evolve Hawai‘i’s public trust doctrine.²²² Today’s politics, however, demand more than “the mere reminder of the necessity of ‘balancing.’”²²³

The *Waiāhole* majority exposed the fragility of an expansive view of balancing – a view that equivocally treats enumerated public trust purposes as one of many factors to be weighed against “reasonable beneficial” uses.²²⁴ The court made clear that under the public trust, “any balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment” and “use consistent with trust purposes [i]s the norm or ‘default’ condition.”²²⁵

The majority’s clarity on balancing was in and of itself a strong rebuke of LURF’s assertion that the public trust protects private use of resources for “economic development.”²²⁶ “[W]hile cognizant of the need to balance the competing interests in preserving and using the resource,” the framers of

²¹⁷ *Waiāhole I*, 94 Hawai‘i at 141, 9 P.3d at 453 (emphasis removed) (quoting *Nat’l Audubon Soc’y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 728 (Cal. 1983)).

²¹⁸ University of Hawai‘i Law Review, *Panel I – Fifty Years of McBryde v. Robinson: Chief Justice Richardson’s Legacy in Water Rights*, YOUTUBE at 58:51 (Apr. 8, 2024), https://www.youtube.com/watch?v=AGaBGzwmDJM&list=PLzHOTI_rIVKvaYpqXWL-g8-UQn8W63bwU&index=2 [<https://perma.cc/J869-YHGC>] (highlighting how agencies have dual responsibilities in both protecting and administering a resource, and how agencies struggle with applying the public trust framework).

²¹⁹ See HAW. REV. STAT. § 174C.

²²⁰ HAW. REV. STAT. § 174C(1)(E), (2)(D).

²²¹ See *Waiāhole I*, 94 Hawai‘i at 141–42, 9 P.3d at 453–54.

²²² See MacKenzie, *Standing Torch of Wisdom*, *supra* note 185 (quoting Gene Hunter, *Democrat Richardson Has His Heart in Hawaii*, HONOLULU ADVERTISER (Feb. 26, 1966) at A1.). At the beginning of his tenure on the Hawai‘i Supreme Court, CJ Richardson reflected on his aspirations as a jurist and opined, “The man who is Chief Justice must balance the rules of the past to conform with the state of society today. . . . He must adopt the fundamental principles of the past and bring them into focus with the present.” *Id.*

²²³ See *id.* at 190 n.108, 9 P.3d at 502 n.108.

²²⁴ See *id.* at 142, 9 P.3d at 454.

²²⁵ *Id.*

²²⁶ *Id.* at 137–38, 9 P.3d at 449–50 (rejecting LURF’s arguments that the “‘public interest’ advanced by the trust is the sum of competing private interests” and that the “rhetorical distinction between ‘public trusts’ and ‘private gain’ is a false dichotomy.”).

Hawai'i's Constitution made clear they did not contemplate a balancing construct that would accommodate the economic demands of offstream diverters seeking to use water for their private commercial gain, particularly at the expense of public trust purposes.²²⁷ The framers indeed rejected a "narrow sense of immediate financial return."²²⁸ In considering economic and social benefits, the framers instead embraced "the broad definition of economics, that of 'careful and thrifty' use of resources."²²⁹

Thus, a critical aspect of the public trust's balancing calculus is the absence of practicable alternatives. The Water Commission "is not obliged to ensure that any particular user enjoys a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake."²³⁰ Moreover, "[t]he Commission cannot fairly balance competing interests in a scarce public trust resource if it renders its decision prior to evaluating the availability of alternative sources of water."²³¹ Further addressing the permit applicant's burden of proof, the *Waiāhole* court clarified that the Water Code's "reasonable-beneficial use" standard allows use only "in such a quantity as is *necessary* for economic and efficient utilization."²³²

Furthermore, besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources. Such a requirement is intrinsic to the public trust, the statutory instream protection scheme, and the definition of 'reasonable-beneficial' use. . . and is an essential part to any balancing between competing interests.²³³

The *Waiāhole* court repudiated LURF's claims, which invoked the public trust – and in the same breath – contended the Water Commission "improperly expanded its statutory powers, upsetting the [Water] Code's

²²⁷ But see *In re Waiāhole Ditch Combined Case Hearing (Waiāhole I)*, 94 Hawai'i 97, 192, 9 P.3d 409, 504 (2000) (Ramil, J., dissenting) ("In fashioning the [s]tate's duty to conserve and develop its natural resources, the framers, while cognizant of the need to balance the competing interests in preserving and using the resource, did not mandate that such balancing be skewed to favor particular uses.").

²²⁸ Comm. Whole Rep. No. 18, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1026 (1980).

²²⁹ *Id.*

²³⁰ *Waiāhole I*, 94 Hawai'i at 165, 9 P.3d at 477.

²³¹ *In re Kukui*, 116 Haw. 481, 496, 174 P.3d 320, 335 (2007).

²³² *Waiāhole I*, 94 Hawai'i at 161, 9 P.3d at 473 (quoting HAW. REV. STAT. § 174C-3) (emphasis added).

²³³ *Id.*

‘balance of interests.’”²³⁴ The court ultimately eschewed “LURF’s view of the trust, in which the ‘public interest’ advanced by the trust is the sum of competing private interests,” concluding that the public trust “stops short of embracing private commercial use as a protected ‘trust purpose.’”²³⁵

Today, as was previously the case in *Nā Wai ‘Ehā*,²³⁶ Lahaina’s residents contend that private water companies have yet to meet their legal burden of demonstrating both actual water needs and the absence of practicable alternatives, “such as using another source of water or making their current use more efficient.” The community has long objected to water waste from Honokōhau ditch, which has enabled the out-of-watershed diversions of massive quantities of stream water, at the expense of protected public trust purposes. For decades, the community observed the mass dumping of water from the ditch, causing warm ditch water to flow out to the ocean via gulches, often outside of the water’s watershed-of-origin.²³⁷ In 2019, community group Ka Malu o Kahālāwai filed a water wasting complaint with the Water Commission, alleging that Maui Land & Pineapple Company (“MLP”), the Kaanapali Land Management Corporation (“KLMC”), and the Kapalua Water Company failed to properly maintain intakes, diversions, and ditches that withdraw from Honokōhau stream and release uncontrolled amounts of water elsewhere in the area.²³⁸ Kekai Keahi poignantly described the multipronged problem of the plantation-era practice of diverting stream water:

The majority of Honokōhau Stream is taken out of the valley and sent southward towards Lahaina town. The real issue, and the cause of the loss of habitat and the ability to farm kalo, is that MLP when it receives the water at the intake they cannot control how much gets diverted so all of the stream is taken. Because MLP does not need all of Honokohau Stream water, they dump the unused excess water into various other West Maui streams and areas, such as Honokōwai, Wahikuli, and Hanakao‘o, thus contining the dewatering of Honokōhau Stream and hampering the ability of the aquatic life to reproduce and the farmers to farm taro.²³⁹

²³⁴ *Id.* at 130, 9 P.3d at 442.

²³⁵ *Id.* at 138, 9 P.3d at 450.

²³⁶ See Sproat, *Wai Through Kānāwai*, *supra* note 40, at 201; *infra* note 159.

²³⁷ SCHEUER & ISAKI, *supra* note 65, at 72.

²³⁸ *Id.* at 71–72.

²³⁹ *Id.* at 72.

Revocable permits for state lands underlying the Honokōhau ditch has enabled private water purveyors, like MLP and KLMC, to extract millions of gallons of water per day from Honokōhau stream but has simultaneously disincentivized maintenance of the ditch.²⁴⁰ To alleviate pressure on Maui Komohana’s potable water supplies, the Water Commission initiated an assessment of alternative sources of water in response to mounting concerns over contaminated groundwater following the August 2023 Lahaina fires and the community’s long-held opposition to large-scale stream diversions. At a public meeting in October 2023, the Water Commission’s hydrologist, Dr. Ayron Strauch, presented a “practicable alternative” to stream diversions, echoing long-standing community demands to expand the county’s use of recycled wastewater.²⁴¹

B. Restorative Environmental Justice Envisions the Fullest Potential of Hawai‘i’s Legal Regime

Traditional notions of environmental justice²⁴² have gained political traction,²⁴³ but gloss over deeper issues impacting Native communities as “dispossessed, colonized people now seeking restorative justice.”²⁴⁴ This

²⁴⁰ *Id.* at 69–71. In 2018, DLNR recommended a thirty-year easement over public lands to the Kaanapali Land Management Corporation (“KLMC”), the real estate entity that emerged from Pioneer Mill’s closure in the 1990s. *Id.* at 70. The lease extension was ultimately denied, but KLMC has since sought a long-term lease to control the Honokōhau ditch to transport water to its other lands under the condition of maintaining the ditch. *Id.* at 71.

²⁴¹ Haw. Comm’n on Water Res. Mgmt., *September 19, 2023 Monthly Water Commission Meeting*, YOUTUBE, at 02:12:38 (Sept. 19, 2023), <https://www.youtube.com/watch?v=i7cDjJD9gp0/> [hereinafter *CWRM September 2023 Meeting*]. The Water Commission is required to “[p]rotect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.” HAW. REV. STAT. § 174C-71(3).

²⁴² The established environmental justice framework tends to treat racial minorities as exchangeable and assumes that for communities of color, health and equal distribution of environmental burdens are the only, or main, concerns. Eric K. Yamamoto & Jen-L Wong Lyman, *Racializing Environmental Justice*, 72 COLO. L. REV. 311, 348–51 (2001).

²⁴³ In 2021, President Biden “pledged to ‘deliver environmental justice in communities across all America.’” Susan K. Serrano, *Reframing Environmental Justice at the Margins of U.S. Empire*, 57 HARV. C.R.-C.L. REV. 475, 479 (2022) [hereinafter Serrano, *Reframing Environmental Justice*] (citing Exec. Order No. 14,008 86 Fed. Reg. 7619 (Jan. 27, 2021)).

²⁴⁴ Sproat, *Environmental Self-Determination*, *supra* note 77, at 196; *see* Serrano, *Reframing Environmental Justice*, *supra* note 243, at 495–99 (describing how environmental and civil rights claims can sideline sovereignty and self-determination-based Native American claims, and disregard the ways in which race, indigeneity, and political status intersect to produce different manifestations of environmental injustice); *see also* Winter et al., *Empowering Indigenous Agency*, *supra* note 101, at 342 (explaining how, in Hawai‘i, ambiguity in how “community” is defined has led some to claim that all citizens of the state have an equally vested interest regarding decisionmaking and stewardship of specific places).

acontextual²⁴⁵ approach fails to comprehend the enduring links between western colonialism and environmental justice,²⁴⁶ and thus fails to account for the unique worldviews of Indigenous communities and the specific harms imposed by colonial interests.²⁴⁷ As Professor U'ilani Tanigawa Lum explains, "[f]or Indigenous Peoples, and Kānaka Maoli in particular, constructs of restorative justice are crucial tools because they connect environmental justice and principles of self-determination to address the ongoing harms of colonization."²⁴⁸

Restorative environmental justice "expressly integrate[s] Indigenous Peoples' inimitable histories, cultural factors, and present day goals" in the pursuit of justice which, for Kānaka, is "less about equality and more about self-determination, including the return and restoration of traditional lands and other resources."²⁴⁹ For many Native communities, self-determination is essential to redress the loss of land, culture, health, and self-governance.²⁵⁰ As Kānaka Maoli legal scholar Melody Kapilialoha MacKenzie and others explain, "[f]or many indigenous peoples, environmental justice is thus largely about cultural and economic self-determination as well as about belief systems that connect their history, spirituality, and livelihood to the natural environment."²⁵¹

²⁴⁵ A contextual inquiry approach examines "what [is] really at stake for differing communities," as well as "how those communities interact[] with and value[] 'the environment.'" Eric K. Yamamoto & Susan K. Serrano, *Foreword to the Republication of Racializing Environmental Justice*, 92 U. COL. L. REV. 1383, 1384 (2021). To account for the critical distinctions between racial minorities and Indigenous peoples, the *racializing environment justice* framework acknowledges the "'influences of whiteness in the formation and implementation of environmental law and policy.'" Serrano, *Reframing Environmental Justice*, *supra* note 243, at 495 (quoting Yamamoto & Lyman, *supra* note 242, at 341).

²⁴⁶ MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 77, at 37–42 (providing examples of how colonialism dramatically altered Hawaiians' relationship to the land).

²⁴⁷ A. U'ilani Tanigawa Lum, *Aia i Wai'oli ke Aloha 'Āina: Re-centering 'Āina and Indigenous Knowledge for Restorative Environmental Justice*, 41 UCLA J. ENV. L. & POL'Y 301, 316–17, 333–56 (2023) [hereinafter Tanigawa Lum, *Restorative Environmental Justice*].

²⁴⁸ *Id.* at 316.

²⁴⁹ See Sproat, *Wai Through Kānāwai*, *supra* note 40, at 167. The central aim of restorative justice in the international human rights context involves "repair[ing] the persistent denial of [I]ndigenous rights by entrenched forces implanted by the legacy of colonialism." WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 99 (2013).

²⁵⁰ Sproat, *Environmental Self-Determination*, *supra* note 77, at 160 (describing self-determination as a fundamental expression of restorative justice).

²⁵¹ MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 77, at 38.

Practically, restorative approaches to environmental justice issues can help uproot neocolonial agency-based approaches and practices²⁵² and reframe reconciliatory initiatives to address colonialism’s enduring harms.²⁵³ Indigenous legal scholars have therefore expanded and refined the restorative environmental justice framework “to account for the unique interests and values of Native peoples.”²⁵⁴

IV. RECLAIMING LAHAINA’S WATER FUTURE

There is no future without water. There is no Hawai‘i without Kānaka.

—Kehaulani Kealoha-Franco²⁵⁵

This Part is about reclaiming wai, literally and figuratively. The Lahaina fires are a prime example of how Kānaka disproportionately experience “the deleterious impacts of climate change,”²⁵⁶ and why Indigenous People’s claims are “nearly always about more than competing land or water uses.”²⁵⁷ In this time of hulihiā,²⁵⁸ Hawai‘i’s Public Trust Doctrine seems to be “finding its way into the consciousness and working vocabulary of legislators and public officials, the media, and the public[.]” coalescing into “an affirmative push towards fulfilling the [Water] Code’s restorative mandate

²⁵² Winter et al., *Empowering Indigenous Agency*, *supra* note 101, at 338, 341.

²⁵³ Sproat, *Environmental Self-Determination*, *supra* note 77, at 197.

²⁵⁴ Serrano, *Reframing Environmental Justice*, *supra* note 243, at 498. One such expansion by Kānaka Maoli legal scholar Kapua‘ala Sproat conceptualizes the restorative environmental justice framework in terms of climate change and its projected impacts on Native Hawaiians. *See generally* Sproat, *Environmental Self-Determination*, *supra* note 77 (framing climate change as an environmental justice issue for Native Hawaiians and examining how Native Hawaiians can deploy local laws that embody restorative justice principles to construct meaningful remedies for colonialism’s longstanding cultural and environmental harms).

²⁵⁵ Kehaulani Kealoha-Franco, a 17-year old haumana (student) at Ke Kula Kaiapuni Kekaulike, delivered powerful testimony before the Water Commission in October 2023 – the first time the Water Commission had met on Maui since the August 2023 fires. Haw. Comm’n on Water Res. Mgmt., *October 24, 2023 Monthly Water Commission Meeting*, YOUTUBE, at 2:28:50–30:46, https://www.youtube.com/watch?v=I6gjFEud_oQ&t=8512s. Hundreds of Lahaina residents appeared before the Water Commission on October 24, 2023 to demand changes in the way water is allocated in Maui Komohana. Hawai‘i News Now, *Emotional testimony shared at state water commission’s meeting on Maui*, YOUTUBE (Oct. 24, 2023), <https://www.youtube.com/watch?v=uStY6XpTbVM/>; *see* Paula Dobbyn, *Water Commission Implored to ‘Hit the Reset Button’ Following Maui Fires*, HONOLULU CIV. BEAT (Oct. 24, 2023), <https://www.civilbeat.org/2023/10/water-commission-implored-to-hit-the-reset-button-following-maui-fires/>.

²⁵⁶ *See* Sproat, *Environmental Self-Determination*, *supra* note 77, at 160; *supra* Section II.A.

²⁵⁷ *See* Sproat, *Environmental Self-Determination*, *supra* note 77, at 159.

²⁵⁸ *See supra* note 36 and accompanying text (describing this time of hulihiā).

and the Public Trust Doctrine's higher call.”²⁵⁹ As the people of Lahaina navigate the legacies of colonialism and the uncertainties of the climate crisis, decisionmakers have been called upon to ensure Hawai'i's unique legal protections are fully realized.²⁶⁰

To begin this necessary and fundamental shift, decisionmakers must “deploy a framework that not only considers the unique context of each place, but one that advances self-determination.”²⁶¹ Section IV.A. sets forth a restorative environmental justice framework rooted in self-determination for Indigenous Peoples²⁶² and Kānaka Maoli in particular.²⁶³ Section IV.B. utilizes this framework to examine critical aspects of water reclamation – a

²⁵⁹ Sproat & Moriwake, *supra* note 189, at 280; *see e.g.*, Kekai Keahi, Ke‘eaumoku Kapu & Archie Kalepa, Opinion, *Water Commission Needs Hawaiian Expert*, HONOLULU STAR ADVERTISER (Feb. 18, 2024), <https://www.staradvertiser.com/2024/02/18/editorial/island-voices/column-mayor-blangiardis-managerial-style-serving-him-well/> (calling for a true loea, or expert, in traditional and customary resource management practices to be appointed to the Water Commission); Hawai'i State Senate, *WTL-AEN Public Hearings 3-20-2024*, YOUTUBE, at 44:40–47:29, <https://www.youtube.com/watch?v=9cZkoJ1FrXQ> (oral testimony of Ernie Lau, former Water Commission Deputy and current Manager and Chief Engineer of the Honolulu Board of Water Supply, in Support of HB2690, HD2 who noted, “if I was not part of a semi-autonomous agency that was not independent of . . . politics, I couldn’t have taken the hard stand I did on Red Hill for our community to protect our wai.”); Scanlan & Hara, *supra* note 182 (“If water is life, then this is an epic battle for the soul of Hawai'i.”).

²⁶⁰ *See* Keahi, Ke‘eaumoku & Kalepa, *supra* note 259.

²⁶¹ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 306; *see infra* Section IV.A.

²⁶² *See generally* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1665 (2007) (exploring the Indigenous right to environmental self-determination and noting that it includes Indigenous Peoples’ “right to survive as a distinct people and the right to restrain national governments from undertaking policies that would jeopardize their continued physical or cultural survival”); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994) (examining international human rights norms of self-determination for Indigenous Peoples and Native Hawaiians in particular).

²⁶³ For further discussion on advancing self-determination for Hawai'i's Indigenous People, *see* Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 308–25. Professor Tanigawa Lum explains that “conversations around Hawaiian identity, self-determination, and ultimately justice, *must* consider ‘āina as an integral part of Kānaka Maoli themselves – including human wellbeing, culture, and more – and not just a resource separate and apart from human beings.” *Id.* at 311.

means by which the Water Commission can begin to address Lahaina’s water crisis and ‘auamo²⁶⁴ its kuleana as ke kahuwai pono.²⁶⁵

A. Four Values of Restorative Justice for Native Peoples

Recognizing that Hawai‘i’s legal regime has the potential to effectuate the state’s restorative justice commitment to Kānaka Maoli,²⁶⁶ a growing number of ‘Ōiwi legal scholars refine²⁶⁷ and deploy²⁶⁸ the Four Values of Restorative Justice for Native Peoples²⁶⁹ as a framework to guide decisionmakers in their affirmative duties. The framework impels decisionmakers to develop

²⁶⁴ To ‘auamo is to carry, as a burden, on the shoulders or back by means of a stick. HAWAIIAN DICTIONARY, *supra* note 2, at 30; e.g., Mālia Sanders, *Pick Up Your ‘Auamo*, KA WAI OLA (Mar. 1, 2022), [https://kawaiola.news/columns/lamaku-hookipa/pick-up-your-auamo/#:~:text=%CA%BB%20kuleana%20means%20that%20one,and%20place%20it%20in%20balance](https://kawaiola.news/columns/lamaku-hookipa/pick-up-your-auamo/#:~:text=%CA%BB%20kuleana%20means%20that%20one,and%20place%20it%20in%20balance.). “‘Auamo kuleana not only describes responsibility but the inherent ability and privilege to carry out this responsibility and place it in balance.” *Id.*

²⁶⁵ See *About Us*, HAW. COMM’N WATER RES. MGMT., <https://dlnr.hawaii.gov/cwrm/aboutus/> (last visited Dec. 1, 2023). The Water Commission’s motto “Ke Kahuwai Pono” embodies the state’s constitutional mandate to uphold the Public Trust as the primary authority over water use and management in Hawai‘i:

In the Hawaiian language, *wai* is “water,” *kahu* means “guardian, caretaker,” and *pono* stands for “proper, righteous.” Together, these words translate to “the trustee who oversees the rightful sharing of water.” It is with this conviction that the Commissioners, Deputy Director, and staff strive to ensure the availability of freshwater for generations to come.

Id.

²⁶⁶ See Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 312 n.68 (underscoring federal and state pledges to reconcile with Kānaka Maoli); e.g., Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510 (1993) (acknowledging the significance of the illegal overthrow of the Kingdom of Hawai‘i, apologizing for the federal government’s role in the overthrow, and agreeing to support Congressional efforts towards reconciliation with Native Hawaiians); HAW. CONST. art. XII § 5 (enshrining the state’s kuleana and commitment to restorative justice, including, for example, the establishment of the Office of Hawaiian affairs, protections around traditional and customary practices, and the public trust doctrine).

²⁶⁷ See Sproat, *Wai Through Kānāwai*, *supra* note 40, at 137, 177–85 (refining and deploying for the first time Professor Anaya’s four values as a framework to contextualize and analyze environmental justice issues affecting Native Hawaiians).

²⁶⁸ This Article refers the reader to the growing body of ‘Ōiwi scholarship deploying the Four Values of Restorative Justice Framework. See, e.g., Sproat, *Wai Through Kānāwai*, *supra* note 40, at 137, 177–85; Sproat, *Environmental Self-Determination*, *supra* note 77, at 160; Tuteur, *Reframing Kānāwai*, *supra* note 183, at 73–81, 83–90; Sproat & Palau-McDonald, *supra* note 188, at 526; Palau-McDonald, *supra* note 82, at 397–400; Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 318–25, 333–56.

²⁶⁹ Anaya, *supra* note 262, at 342–60. International law scholar and architect of the Four Values of Restorative Justice, James Anaya, used international human rights principles of self-determination to identify four analytical categories of restorative justice for Indigenous Peoples and Kānaka Maoli in particular. See Sproat, *Environmental Self-Determination*, *supra* note 77, at 161 n.12.

“affirmative measures to redress the consequences of colonization, including climate change”²⁷⁰ in light of “decades of systemic oppression, dispossession of ‘āina and resources, and ultimately, the loss of political autonomy.”²⁷¹

Fundamentally, the framework exposes the true impact of decisions by asking what is really at stake.²⁷² As a starting point, the framework requires consideration of four “inextricably intertwined” values: (1) mo‘omeheu (cultural integrity) (2) ‘āina (land and natural resources) (3) maui ola (social determinants of health and well-being) and (4) ea (self-determination).²⁷³ This critical context imparts “an expanded kind of realism”²⁷⁴ on issues of restorative environmental justice for Indigenous peoples. For Kānaka in particular, this context expounds decisionmakers’ duty to restore Hawai‘i’s mo‘omeheu, ‘āina, maui ola, and ea.²⁷⁵ Just as life, law, land, and sovereignty were intimately connected in traditional Hawaiian society,²⁷⁶ the four values coalesce to define the unique injustice confronting Kānaka today.

1. Mo‘omeheu

Mo‘omeheu “looks to both the past and present context” to assess the impacts of decisionmaking on “all aspects of an [I]ndigenous group’s survival as a distinct culture.”²⁷⁷ Culture is at the center of Indigenous Peoples’ constant struggle to not only maintain traditional lifeways,²⁷⁸ but

²⁷⁰ Sproat, *Environmental Self-Determination*, *supra* note 77, at 161.

²⁷¹ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 324.

²⁷² Sproat, *Environmental Self-Determination*, *supra* note 77, at 161 n.16; *see* JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 3–4 (2000) (providing tools of critical inquiry).

²⁷³ Sproat, *Wai Through Kānāwai*, *supra* note 40, at 137; Tuteur, *Reframing Kānāwai*, *supra* note 183, at 61, 68. Mahina Tuteur re-framed these values in ‘ōlelo Hawai‘i. *See* Tuteur, *Reframing Kānāwai*, *supra* note 183, at 61. “Like Kānaka Maoli’s relationship to ‘āina and the natural world, the dimensions of the framework are ‘inextricably intertwined.’” Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 314, 319.

²⁷⁴ *See* Sproat, *Wai Through Kānāwai*, *supra* note 40, at 138. For further discussion on how contextual legal analysis exposes how a narrow, mechanistic approach to issues prevents society from internalizing the real injustice to historically disadvantaged groups, *see* Sproat, *Wai Through Kānāwai*, *supra* note 40, at 167–68.

²⁷⁵ *See* Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 314.

²⁷⁶ *See, e.g.,* Noelani Goodyear-Ka‘ōpua, *Introduction*, in A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 1, 3–4 (Noelani Goodyear-Ka‘ōpua et al. eds., 2014) [hereinafter Goodyear-Ka‘ōpua, A NATION RISING].

²⁷⁷ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 319–20 (quoting Anaya, *supra* note 262, at 343–44).

²⁷⁸ *See* Sproat, *Wai Through Kānāwai*, *supra* note 40, at 179 (“Indigenous Peoples are in a constant struggle to maintain culture and traditional lifestyles due to a myriad of factors, including colonization and other pressures of a quickly changing world.”); Tanigawa Lum,

also “successfully re-engage and evolve in their culture.”²⁷⁹ In Lahaina, for example, decades of polluted effluent not only jeopardize the cultural survival of lawai‘a,²⁸⁰ who rely on important subsistence species, but also threaten survival of the reef itself.²⁸¹ Mo‘omeheu is central to crafting remedies to restore ‘Ōiwi lifeways that provide the critical foundation upon which Lahaina rebuilds itself.²⁸²

2. ‘Āina

‘Āina “refers here to all resources that sustain Native Hawaiians physically, culturally, and politically, as well as the reciprocal relationship between Kānaka and the environment, embodied in the concepts of kuleana and aloha ‘āina.”²⁸³ “Taken apart, ‘āina means ‘that which feeds’ and speaks to humans’ reliance on ‘āina to sustain life.”²⁸⁴ In the Kānaka Maoli worldview, “‘āina and kānaka share the same mo‘okū‘auhau.”²⁸⁵ Because of this, “‘āina is the central component of kinship-based values and ethics”²⁸⁶ and is “expressed via the inter-related concepts of aloha ‘āina (love of land), mālama ‘āina (care of land), and kia‘i ‘āina (protection of land), which convey a kinship-driven kuleana (responsibility) to [p]lace.”²⁸⁷ As the “central and orienting framework for any attempt to understand what it means to be Kānaka Maoli,”²⁸⁸ aloha ‘āina gives rise to a distinct duty that extends to state and local decisionmakers as fiduciaries of Hawai‘i’s public trust.²⁸⁹

Restorative Environmental Justice, *supra* note 247, at 319–21 (expounding on Kānaka Maoli rights and efforts towards a full, living culture); *see also* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at 3 (Sept. 13, 2007) (expressly recognizing Indigenous Peoples’ right to “practice and revitalize their cultural traditions and customs” and “maintain, protect, and develop the past, present and future manifestations of their cultures”).

²⁷⁹ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 319.

²⁸⁰ Lawai‘a means fisherman. HAWAIIAN DICTIONARY, *supra* note 2, at 197.

²⁸¹ *See* discussion *infra* Section IV.B.1.

²⁸² *See* Tuteur, *Reframing Kānāwai* *supra* note 183, at 74 (citing Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 199 (2001)).

²⁸³ Sproat & Palau-McDonald, *supra* note 188, at 570.

²⁸⁴ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 308–09.

²⁸⁵ *Id.* at 309. Mo‘okū‘auhau refers to “genealogy.” *Id.* at 309 n.46 (explaining that “mo‘o” and “kū‘auhau” can be translated to “a tax,” or a “story or history or genealogy of the ancestors.”).

²⁸⁶ Winter et al., *Empowering Indigenous Agency*, *supra* note 101, at 341.

²⁸⁷ *Id.* (emphasis omitted).

²⁸⁸ JAMAICA HEOLIMELEIKALANI OSORIO, REMEMBERING OUR INTIMACIES: MO‘OLELO, ALOHA ‘ĀINA, AND EA 9 (2019).

²⁸⁹ For further discussion on aloha ‘āina’s legal evolution and inscription, *see* Sproat & Palau-McDonald, *supra* note 188.

For decisionmakers, “[a]loha ‘āina is thus both a protected Public Trust purpose and a duty of trustees charged with managing the trust.”²⁹⁰

Aloha ‘āina embodies a key aspect of restorative justice, requiring decisionmakers to consider whether an action “perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way.”²⁹¹ As kānaka continue to return to their ancestral ‘āina along Maui Komohana’s streams, the Water Commission will once again have to balance instream values versus offstream demand and examine the potential for restored stream flow to support the perpetuation and practice of Hawaiian culture.²⁹² To avoid subverting the values that the state’s constitutional public trust obligations are designed to protect, the Water Commission must ensure that water use permit applicants meet their burden of demonstrating both actual water needs and the absence of practicable alternatives to large-scale offstream diversions, for example, by making their use more efficient.²⁹³

3. *Mauli ola*

Mauli ola examines “the complex and interconnected systems, circumstances, environments, and institutions” to assess whether a decision “improves social determinants of health and well-being or perpetuates the status quo.”²⁹⁴ This holistic examination of well-being relies on “socio-economic indicators of health, education, and living standards,” and more fundamentally, “[an] understanding that Kānaka Maoli identity is innately tied to their ‘āina hānau (land of one’s birth).”²⁹⁵ The systemic dispossession of Kānaka Maoli from their ancestral ‘āina following the western imposition of a private ownership system²⁹⁶ underscores the need for decisionmakers to think critically about historical and institutional practices that crippled access

²⁹⁰ *Id.* at 542; see *supra* Section III.A.

²⁹¹ See Sproat, *Wai Through Kānāwai*, *supra* note 40, at 181.

²⁹² See *id.* at 193–201.

²⁹³ See HAW. REV. STAT. § 174C–71(3); *In re Waiāhole Ditch Combined Case Hearing (Waiāhole I)*, 94 Hawai‘i 97, 161–62, 9 P.3d at 473–74, 484–85; *In re Waiāhole Ditch Combined Case Hearing (Waiāhole II)*, 105 Hawai‘i 1, 19, 93 P.3d 643, 661 (Haw. 2004) (holding that the Water Commission, according to its own standard, must determine whether practicable alternatives are “available and capable of being used after taking into consideration cost, existing technology and logistics”). For further discussion on the legal burden of proof, and an example of the economic interests at play in determining the “practicability” of alternative water sources in Nā Wai ‘Ehā, see Sproat, *Wai Through Kānāwai*, *supra* note 40, at 201–09.

²⁹⁴ Tuteur, *Reframing Kānāwai*, *supra* note 183, at 77.

²⁹⁵ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 322.

²⁹⁶ See *supra* Section II.A.

to natural and cultural resources, like wai.²⁹⁷ Today, Kānaka-led calls for greater stream protections²⁹⁸ and dignified long-term housing in Lahaina following the displacement of thousands of fire survivors,²⁹⁹ not only exemplify “Kānaka Maoli’s inextricable tie to ‘āina,” but also illustrate important aspects of maui ola at stake for Lahaina’s kupa‘āina, particularly “in the throes of the climate crisis.”³⁰⁰

4. *Ea*

Ea, as an “overarching political dimension of ongoing self-determination,”³⁰¹ begins with restoring decisionmaking power to Indigenous communities.³⁰¹ Professor U‘ilani Tanigawa Lum expounds on the layered meanings and significance of *ea* for Kānaka Maoli in particular, describing *ea* as “a political philosophy and a driving ethic” that also carries the meanings “‘life,’ ‘breath,’ and to ‘emerge.’”³⁰² Though “[e]a is often referred to and associated with ‘sovereignty,’” the term transcends western notions of sovereignty.³⁰³ Hawai‘i’s famed state motto, “ua mau ke ea o ka ‘āina i ka pono” (the *ea* of our land is perpetuated through justice), for example, accentuates “‘āina as the center of ea[,] ‘āina as the center of life for kānaka, and ultimately, ‘āina as the center of justice.”³⁰⁴ This final dimension of

²⁹⁷ See Sproat, *Environmental Self-Determination*, *supra* note 77, at 201–02 (describing the four values of restorative justice framework as a necessary response to “years of repressive colonial interests that seized native lands and appropriated massive quantities of water for plantation agribusiness, which decimated [I]ndigenous communities reliant on free flowing streams”).

²⁹⁸ See *supra* notes 144–52 and accompanying text.

²⁹⁹ *Lahaina Strong Rally and March Draws 300 in Call for Dignified Housing for Fire Survivors in West Maui*, MAUI NOW (Apr. 1, 2024, 8:24 AM HST), <https://mauiNOW.com/2024/04/01/lahaina-strong-rally-and-march-draws-300-in-call-for-dignified-housing-for-fire-survivors-in-west-maui/>; Debbie Elliott, *More Than 5,000 Maui Residents Are Still Displaced After Last Summer’s Fires*, NAT’L PUB. RADIO (Feb. 8, 2024, 6:31 PM EST), <https://www.npr.org/2024/02/08/1230181195/more-than-5-000-maui-residents-are-still-displaced-after-last-summer-fires>.

³⁰⁰ See Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 305, 308, 322.

³⁰¹ *Id.* at 323 (quoting Anaya, *supra* note 262, at 354), 352–56.

³⁰² *Id.* at 323–24 (quoting Goodyear-Ka‘ōpua, A NATION RISING, *supra* note 276, at 3–4); see Goodyear-Ka‘ōpua, A NATION RISING, *supra* note 276, at 4 (emphasizing that each of these translations of “*ea*” is an active state of being, and thus, “[l]ike breathing, *ea* cannot be achieved or possessed; it requires constant action day after day, generation after generation”).

³⁰³ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 324.

³⁰⁴ *Id.* (noting that by articulating “ua mau ke ea o ka ‘āina i ka pono,” King Kamehameha III proclaimed sovereignty was “returned to the *land* itself . . . to which Kanaka are inextricably connected”) (internal quotations omitted). King Kamehameha III first declared “ua mau ke ea o ka ‘āina i ka pono” following the formal return of Hawai‘i’s sovereign government by the United Kingdom, after an illegal seizure by one of their representatives. *Id.*; *La Ho‘iho‘i Ea 2023*, LĀ HO‘IHO‘I EA, <https://lahoihoiea.org/> (last visited Apr. 30, 2024).

restorative justice thus recognizes the dispossession of Kānaka from ‘āina³⁰⁵ and requires constant inquiry into whether a decision empowers or, as a minimum baseline, “involves Kānaka Maoli in ‘decisions that affect them.’”³⁰⁶ As Lahaina kupa‘āina Paele Kiakona cogently put it, “We [] demand recognition and respect as the rightful stewards of this land, and not as second-class citizens. Time and time again, decisions impacting Lahaina have been made without our input. Today, we say enough.”³⁰⁷

B. Reclaiming Wai in Lahaina

The majority of wastewater generated in Maui Komohana is discharged into the nearshore waters of Honokōwai, one of six legendary bays of Nā Hono a Pi‘ilani, the collective epithet for the bays named from their adjoining ahupua‘a in Kā‘anapali moku.³⁰⁸ Built in the plantation heyday,³⁰⁹ the Lahaina Wastewater Treatment Facility (“LWRF”)³¹⁰ has since fallen far short of its potential to reclaim water in Lahaina. The County of Maui

³⁰⁵ See generally JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 3 (2002) (exploring how “colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government”); see discussion *supra* Section II.A.

³⁰⁶ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 353 (citing Sproat, *Wai Through Kānāwai*, *supra* note 40, at 177).

³⁰⁷ Catherine Cluett Pactol, *Lahaina Residents Stake Out at Kā‘anapali Beach to ‘Fish’ for Secure Housing*, HAW. PUB. RADIO (Nov. 14, 2023, 2:24 PM HST), <https://www.hawaiipublicradio.org/local-news/2023-11-14/lahaina-residents-stake-out-at-kaanapali-beach-for-housing-needs> (quoting Paele Kiakona, a Lahaina Strong community leader and key organizer for the “Fishing for Dignified Housing” movement who was displaced by the fires).

³⁰⁸ Literally, “the bays of Pi‘ilani.” PATA, *supra* note 39, at 188–89. From west Maui to northwest Maui, the six legendary hono are: Honokōwai, Honokeana, Honokahua, Honolua, Honokōhau, Hononana. *Id.* Famous in song, the six bays were ruled by Pi‘ilani and are named from their adjoining ahupua‘a in Kā‘anapali moku. *Id.* Pi‘ilani was the first ali‘iaimokupuni to unite the entire island of Maui. Peter T. Young, Nā Hono a Pi‘ilani, IMAGES OF OLD HAW. (Oct. 31, 2019), <https://imagesofoldhawaii.com/na-hono-a-piilani/>; Scott Fisher, *Pi‘ilani: Ka Mo‘olelo o Ke Ali‘i Maika‘i*, HAW. LAND TRUST, <https://www.hilt.org/ka-moolelo-o-waihee/wsfg8hrh6ybf1imyjwgz3mabftidgy> (last visited Apr. 30, 2024).

³⁰⁹ See *supra* Section II.A.

³¹⁰ The County of Maui operates LWRF via two recycled water distribution systems: the Mauka System and the South System. CNTY. OF MAUI, DEP’T. OF ENV’T MGMT., FINAL ENVIRONMENTAL ASSESSMENT: WEST MAUI RECYCLED WATER SYSTEM 2 (2021) [hereinafter CNTY. OF MAUI, WEST MAUI RECYCLED WATER SYSTEM FINAL EA]. The Mauka System consists of two pumps and a recycled waterline that connects to two reservoirs, the Honokōwai Reservoir at 300-foot elevation and a county reservoir at 725-foot elevation. *Id.* The South System also consists of two pumps and a recycled waterline that terminates at a Kā‘anapali Golf Course reservoir. *Id.* The county reservoir is no longer in regular operation because of decreased demand for irrigation water following the cessation of Maui Land and Pineapple Co. operations. Cerizo, *supra* note 143.

initially constructed LWRF in the 1970s to subsidize additional irrigation water for plantation agribusiness.³¹¹ Today, located about half a mile away from the Hā'enanui shoreline,³¹² LWRF collects, filters, and disinfects wastewater from approximately 40,000 people in residential subdivisions, resort accommodations, and light commercial businesses across Maui Komohana.³¹³ With a maximum hydraulic flow capacity of 9 million gallons per day ("mgd"), LWRF produces, on average, 3 to 5 mgd³¹⁴ of R-1 quality recycled water, the highest grade of non-potable recycled water.³¹⁵ Between 1

³¹¹ Terrestrial demand for recycled water tapered off dramatically once sugarcane cultivation ceased in Lahaina. See ENV'T PROT. AGENCY, LAHAINA GROUNDWATER TRACER STUDY, 1-4 to 1-5 (2013) [hereinafter EPA, LAHAINA GROUNDWATER TRACER STUDY]. To address growing concerns about nearshore pollution, the county later upgraded LWRF to produce R-1 recycled water, which was then used to irrigate Maui Land and Pineapple Co.'s pineapple fields. See EPA, LAHAINA GROUNDWATER TRACER STUDY, *supra*. For further discussion of wastewater treated to R-1 standards, see *infra* note 315. Since the phase out of pineapple in the 1990s, however, little use has been made of the alternative resource. *Id.* Thus, in 1996, the county began mandating the use of recycled water for the irrigation of commercial properties "in areas where a reclaimed water distribution system has been installed and can be used in compliance with regulatory requirements." MAUI COUNTY, HAW., ORDINANCES ch. 20.30, art. I (1996).

³¹² It is commonly known as Kahekili Beach. Lance D. Collins, *History of West Maui's Injection Wells*, SIERRA CLUB OF HAW., <https://sierraclubhawaii.org/july-oct-2020/west-maui/> (last visited Feb. 1, 2024) (describing the original place name of Kahekili Beach as Hā'enanui). For further discussion of Hā'enanui's inoa 'āina (traditional place name), see *infra* note 341 and accompanying text.

³¹³ CNTY. OF MAUI, DEP'T OF PUB. WORKS AND ENV'T MGMT., LAHAINA WASTEWATER RECLAMATION FACILITY, UIC PERMIT RENEWAL, PERMIT NO. HI596001 PERMIT RENEWAL APPLICATION, ATTACH. U (2004), <https://archive.epa.gov/epa/sites/production/files/2015-11/documents/lahainapermitapp.pdf> [hereinafter LWRF UIC PERMIT RENEWAL APPLICATION].

³¹⁴ Letter from David L. Henkin et al., Earthjustice, to State of Haw. Dep't of Health, Clean Water Branch (Aug. 14, 2023) [hereinafter Request for Public Hearing and Comments on NPDES Permit] (requesting a public hearing on Water Pollution Control Permit for Lahaina Wastewater Reclamation Facility, Lahaina, Maui, NPDES No. HI 0021848, and comments on NPDES No. HI 0021848) (on file with author).

³¹⁵ R-1 recycled water has undergone oxidation, filtration, and disinfection with chlorine and UV radiation and is therefore considered the highest grade of non-potable recycled water. HAW. STATE DEP'T. OF HEALTH WASTEWATER BRANCH, REUSE GUIDELINES, VOLUME I: RECYCLED WATER FACILITIES 3 (2016). R-1 is suitable for many uses, including landscape irrigation and firefighting, but can only be applied in approved areas as defined by DOH and cannot be used for drinking. HAW. STATE DEP'T. OF HEALTH WASTEWATER BRANCH, REUSE GUIDELINES, VOLUME II: RECYCLED WATER PROJECTS 8–9 (2016).

and 1.8 mgd³¹⁶ of R-1 is supplied to a reservoir within the Kā'anapali resort³¹⁷ for its landscaping irrigation needs.³¹⁸ The remaining R-1 is discharged into the groundwater below LWRP via four on-site injection wells.³¹⁹ Studies using dyes to trace the flow of injected effluent show that 100% of it ultimately discharges into the ocean where it “emerges from submarine springs located offshore at Hā'enanui.”³²⁰ Additional studies concluded LWRP's injected effluent “pollute the ocean and destroy the coral reef ecosystem by altering the acidity, temperature, and chemical composition of the receiving ocean waters.”³²¹

³¹⁶ In 2004, the county estimated “about 1 [mgd] was delivered to reuse customers for irrigation uses.” LWRP UIC PERMIT RENEWAL APPLICATION, *supra* note 313. “In 2021, the county stated LWRP delivers up to 1.8 million gallons per day (“mgd”) to Honua Kai Resort, Kaanapali Golf Course, Hyatt Regency, and Hyatt Residence Club. . . .” CNTY. OF MAUI, WEST MAUI RECYCLED WATER SYSTEM FINAL EA, *supra* note 310.

³¹⁷ The Kā'anapali resort was developed on Pioneer Mill lands in the 1960s. COOPER & DAWES, *supra* note 13, at 223–24 (describing the resort's development as “a turning point in Maui's modern economic history, and in the history of tourism in all of Hawaii.”). As Hawai'i's first fully integrated, master-planned, and “perennially most successful” destination resort, Kā'anapali catalyzed the extensive development of Maui beginning in the late 1960s. *Id.* at 223–24, 278–79.

³¹⁸ See *CWRM September 2023 Meeting*, *supra* note 241, at 02:13:20–22:34. See generally CNTY. OF MAUI, WEST MAUI RECYCLED WATER SYSTEM FINAL EA, *supra* note 310 (describing LWRP's existing capacity and outlining the county's proposed improvements to decrease demand on potable water resources and reliance on LWRP's injection wells for effluent disposal).

³¹⁹ LAHAINA GROUNDWATER TRACER STUDY, *supra* note 311, at 1–4.

³²⁰ Request for Public Hearing and Comments on NPDES Permit, *supra* note 314; see, e.g., HUNT & ROSA, U.S. GEOLOGICAL SURVEY, *supra* note 35.

³²¹ Request for Public Hearing and Comments on NPDES Permit, *supra* note 314. In 2006, the state Department of Health (DOH) designated the Lahaina coast as “Water Quality Limited Segments” for exceeding one or more water-quality criteria – such as nitrogen, turbidity, or suspended sediment. HUNT & ROSA, U.S. GEOLOGICAL SURVEY, *supra* note 35, at 3. Section 303(d) of the Clean Water Act requires that each state identify those water quality-limited segments for which existing technology-based pollution controls are not stringent enough to attain or maintain state water quality standards and for which total maximum daily loads (“TMDLs”) must be prepared. 40 C.F.R. § 130.7(b)(4) (2024). A TMDL is the calculation of the maximum amount of a pollutant allowed to enter a waterbody so that the water body will meet and continue to meet water quality standards for that particular pollutant. *Overview of Total Daily Loads (TMDLs)*, ENV'T PROT. AGENCY, <https://www.epa.gov/tmdl/overview-total-maximum-daily-loadstmdls#:~:text=A%20TMDL%20is%20the%20calculation,standards%20for%20that%20particular%20pollutant/> (last visited Mar. 8, 2024). In the years that followed, a number of studies found a significant nexus between wastewater effluent via injection wells and reefs with depleted herbivore populations severely overgrown by algae. See, e.g., Megan Ross, et al., *Characterization of “Dead Zones” and Population*

Lahaina's kupa'āina have been advocating for wastewater reuse solutions over the past half-century. As part of its heavily industrialized operations in the 1960s and 1970s, Pioneer Mill appropriated "some 11 million gallons of water for washing sugar cane delivered from the fields, and for [power plant] cooling purposes."³²² In 1971, citizen groups opposed a state-issued discharge permit that authorized Pioneer Mill to pump 6 million gallons of brackish "black water" – a mix of runoff and mill water containing "decomposing sugar residue and other complex compounds" – toward the ocean.³²³ Though its sugarcane fields required tremendous amounts of irrigation water,³²⁴ Pioneer Mill nonetheless "hedged against accepting effluent for sugarcane irrigation," fearing that harmful levels of nutrients in undiluted effluent would stifle the growth of sugarcane.³²⁵ Thus, "[a] second method of disposal, which was implemented to much controversy, was pumping the effluent into deep wells that would take it below the island's freshwater table and into the saltwater below."³²⁶ Nearly four decades later, in 2008, an EPA hearing on the county's ten-year application to renew the Lahaina wastewater injection well permit drew over seventy people – including residents, subsistence fishermen, scientists, doctors, and environmental advocates – who objected to the proposed ten-year term of the permit, and testified in support of phasing out the injection wells and re-directing recycled water for beneficial use on land.³²⁷

Demography of Poritas Compressa Along a Gradient of Anthropogenic Nutrient Input at Kahekili Beach Park, Maui, Hawai'i Coral Reef Assessment Program, HAW. INST. MARINE BIOLOGY (2012); Nancy G. Prouty, et al., *Vulnerability of Coral Reefs to Bioerosion from Land-Based Sources of Pollution*, 122 J. GEOPHYSICAL RSCH. 9319 (2017); Joseph Murray, et al., *Coral Skeleton δ15N as a Tracer of Historic Nutrient Loading to a Coral Reef in Maui*, Hawai'i, 9 SCI. REP. 5579 (2019).

³²² Buck Quayle, *That Maui Rotten Egg Smell*, LAHAINA SUN (Sept. 8, 1971), <https://www.maui-lahaina-sun.com/maui-rotten-egg.html/> (describing the "odorific assault" produced by Pioneer Mill's practice of holding wastewater in settling ponds before dumping the "black water" into the ocean at Launiupoko). SCHEUER & ISAKI, *supra* note 65, at 59–61 ("John Siemer, Pioneer Mill's manager at the time, said he did not believe discharge from any of the seven areas would cause ecological harm – but the company's environmental record did not support his belief.").

³²³ Quayle, *supra* note 322.

³²⁴ See *supra* note 99–102 and accompanying text.

³²⁵ SCHEUER & ISAKI, *supra* note 65, at 61. Ironically, Pioneer Mill's manager at the time said he did not believe discharge would cause ecological harm. Quayle, *supra* note 322.

³²⁶ SCHEUER & ISAKI, *supra* note 65, at 61.

³²⁷ *About: DIRE Coalition*, DIRE, <https://dontinject.wordpress.com/about-2/> (last visited Apr. 30, 2024) (describing how over seventy people attended the November 2008 EPA public hearing to comment on the county's ten-year application to renew the Lahaina wastewater injection well permit); U.S. ENV'T PROT. AGENCY, NOTICE OF PUBLIC HEARING CONCERNING

In 2012, after decades of activism and advocacy drew attention to the pollution of Maui Komohana's nearshore waters,³²⁸ community groups represented by Earthjustice filed a lawsuit³²⁹ to compel the county to comply with the federal Clean Water Act³³⁰ and secure a National Pollution Discharge Elimination System ("NPDES") permit for LWRP's injection well discharges.³³¹ In 2021, the Supreme Court concluded that LWRP's subsurface discharges are the "functional equivalent" of a direct discharge to surface waters and must be regulated by an NPDES permit.³³² In 2022, the

THE DRAFT UNDERGROUND INJECTION CONTROL (UIC) PERMIT FOR THE LAHAINA WASTEWATER RECLAMATION FACILITY, 41, 79, 90 (Nov. 6, 2008), available at <https://archive.epa.gov/epa/sites/production/files/2015-11/documents/1345e.pdf> [hereinafter TRANSCRIPT OF PUBLIC HEARING].

³²⁸ See, e.g., U'ilani Tanigawa Lum, *County Needs to Stop Denying the Injection Wells Problem and Fix It*, MAUI NEWS (June 19, 2020), <https://www.mauinews.com/opinion/columns/2020/06/county-needs-to-stop-denying-the-injection-wells-problem-and-fix-it/>. "We did not get in this fight to win lawsuits; we got in it to save reefs, to protect this precious resource, and to advocate for wastewater reuse solutions that will ultimately save taxpayers money in the long run. [Maui] [C]ounty now has a choice: waste taxpayer money to delay the inevitable or invest in fixing the problem, as we have been collectively urging since day one. Fortunately, there are solutions readily available to the county." *Id.* U'ilani Tanigawa Lum is a professor of law at the William S. Richardson School of Law, Co-Director of the Ka Huli Ao Center for Native Hawaiian Excellence Native Hawaiian Rights Clinic, a Native Hawaiian cultural practitioner, and former President of the West Maui Preservation Association. *Id.*

³²⁹ The disposal of Lahaina's wastewater has been litigated for more than a decade. See generally Hi'ilei K. Casco, Gillian S. Kim, Micah M. Miyasato & Siena I. Schaar, *Water and Justice for Maui's Communities: Lessons and Lasting Impacts from a Decade of Litigating Maui County v. Hawai'i Wildlife Fund*, 44 U. HAW. L. REV. 345 (2022) (examining the environmental, social, political, and cultural ramifications of Judge Susan Oki Mollway's 2021 order in *Hawai'i Wildlife Fund v. County of Maui*). "Hawai'i Wildlife Fund, Surfrider Foundation, Sierra Club-Maui Group, and West Maui Preservation Association –four Hawai'i-based environmental organizations represented by Earthjustice – filed suit against the County as the owner and operator of LWRP." *Id.* at 349. "Earthjustice is the premier nonprofit public interest environmental law organization" that "wield[s] the power of the law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change." *About Earthjustice*, EARTHJUSTICE, <https://earthjustice.org/about> (last visited May 1, 2024).

³³⁰ Complaint for Declaratory and Injunctive Relief ¶ 64, *Haw. Wildlife Fund v. Cnty. of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014) (No. 12-0198) 2012 WL 1329000 (alleging, specifically, that the County "ha[d] violated and [was continuing to] violat[e] section 301(a) of the CWA, 33 U.S.C. § 1311(a), and H.R.S. § 342D-50(a), which prohibit discharges of pollutants without an NPDES permit").

³³¹ See Request for Public Hearing and Comments on NPDES Permit, *supra* note 314.

³³² *Cnty. Of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 183 (2020). In a 6-3 decision, the U.S. Supreme Court held that the CWA "requires a permit when there is a direct discharge

state Department of Health (DOH) prepared a draft NPDES permit to upgrade LWRF³³³ – the first of its kind in Hawai‘i to regulate a wastewater treatment facility that discharges to the ocean via groundwater.³³⁴ But, the draft NPDES permit sets allowable levels of harmful nutrients to current levels of pollution, “which far exceed the state’s water quality limits, and which evidence shows is steadily degrading the coral reef.”³³⁵ Thus, the legacy of over a century and a half of plantation agriculture³³⁶ still lingers in Lahaina’s nearshore waters, where fertilizer-derived pollutants persist in high concentrations.³³⁷

1. *Mo‘omeheu: Restoring the Integrity of Coral Reefs and Subsistence Fishing Rights at Hā‘enanui*

He pūko‘a kani ‘āina.

[of pollutants] from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.” *Id.*

³³³ In 2021, the county transmitted the Final Environmental Assessment and Finding of No Significant Impact as part of its plans to upgrade the LWRF, to provide a more reliable recycled water supply to users, and to reduce the use of injection wells for effluent disposal. CNTY. OF MAUI, WEST MAUI RECYCLED WATER SYSTEM FINAL EA, *supra* note 310. Recycled water is predominately generated during the day when wastewater flow into the LWRF is high. *Id.* at 3. The county’s proposed upgrades thus include renovating the existing Honokōwai Reservoir to provide sufficient storage volume, so that recycled water can be stored until higher user demand occurs, typically at night. *Id.*; see Cerizo, *supra* note 143.

³³⁴ See *Public Comments Sought for Lahaina Wastewater Facility Clean Water Act Permit*, EARTHJUSTICE (July 31, 2023), <https://earthjustice.org/press/2023/public-comment-sought-for-lahaina-wastewater-facility-clean-water-act-permit/>. The deadline for public comment and to request a public hearing on the proposed NPDES permit ended just a few days after the Lahaina fires. *Id.* The DOH has since suspended the NPDES permitting process indefinitely. See Gary Kubota, *Earthjustice Calls for More Time for Public Comment on Maui County Wastewater Proposal*, MAUI NOW (Aug. 13, 2023), <https://mauinow.com/2023/08/13/earthjustice-calls-for-more-time-for-public-comment-on-maui-county-wastewater-proposal-due-to-lahaina-fire/>.

³³⁵ EARTHJUSTICE, *supra* note 334. A 2019 report, specifically addressing the harmful levels of terrestrial nutrients at Hā‘enanui, found that increased levels of terrestrial nutrients in ocean water negatively affect the structure of marine biotic communities. *Id.* High nutrient loads from LWRF’s discharges create an imbalance between factors that promote algal growth (e.g. nutrient availability) and those which control algal abundance (e.g. grazing by herbivore populations) on Maui’s coral reefs. *E.g.*, HAW. DIV. AQUATIC RES., KAHEKILI HERBIVORE FISHERY MANAGEMENT AREA – RESULTS BRIEF (2018); HAW. DIV. AQUATIC RES., STATUS OF MAUI’S CORAL REEFS (2014).

³³⁶ See discussion *supra* Section II.A.

³³⁷ A 2009 geochemical report by the U.S. Geological Survey found that even based on limited study of the effects of these contaminants, such high concentrations of nitrogen are likely to remain in the groundwater for decades. See HUNT & ROSA, U.S. GEOLOGICAL SURVEY, *supra* note 35. According to the report, this finding is “consistent with hydrologic understandings of groundwater flushing times, which are on the order of decades.” *Id.*

*A coral reef that grows into an island.*³³⁸

My education comes from 2,000 years of trial and error and observation.

—Kekai Keahi³³⁹

Once “teeming with life,”³⁴⁰ dead coral in the reefs of Hā‘enanui³⁴¹ occurs today in distinct patches called “dead zones.”³⁴² Decades of harmful ocean

³³⁸ This ‘ōlelo noeau reveals “a person beginning in a small way gains steadily until they become firmly established.” PUKUI, *supra* note 59, at 100. It uplifts both individual efforts towards growth, as well as collective, generational efforts that often begin with a single individual. *Id.*; see *infra* notes 347–50 and accompanying text (describing the significance of generational knowledge in shaping the sophisticated techniques of lawai‘a); see also TEDxTalks, *He pūko‘a kani ‘āina: Creating Pathways for Indigenous Language Vitality* | Candace Galla | TEDxJIBC, YOUTUBE, <https://www.youtube.com/watch?v=fvArPvKA4yk> (describing the growth of the Hawaiian language revitalization movement).

³³⁹ Kekai Keahi described the foundation for his subsistence fishing practices at Hā‘enanui at a public hearing before the EPA regarding the county’s ten-year application to renew the Lahaina wastewater injection well permit in 2008. TRANSCRIPT OF PUBLIC HEARING, *supra* note 327, at 102–03. “I born and raised in the ocean. I’m not one commercial fisherman, but subsistence fisherman. From my tutu to my father to me, we always were taught for respect the ocean, no take more than you need. If you get extra, you go give your friends or your family. That’s how we live. That’s Hawaiian style, yeah.” *Id.* at 102. “Us guys, we live there, we catch the fish and we eat ‘em.” *Id.* at 103.

³⁴⁰ “Ka‘a iho i kai o Hā‘enanui, I ka papa holo i‘a a ka nui manu.” LEI NĀHONOAPI‘ILANI: SONGS OF WEST MAUI (Nicholas Keali‘i Lum & Zachary Alaka‘i Lum, eds., 2020). “Reaching the sea of Hā‘enanui, In the abundant reef of the flock of birds.” The second verse in the mele “Honokōwai” describes how the Hā‘enanui reef was once “teeming with life.” Chelsie Machado, *Keauhou - Honokōwai (Official Music Video)*, YOUTUBE (Aug. 19, 2019), <https://www.youtube.com/watch?v=3K5fwzXc3VM> [hereinafter *Honokōwai (Official Music Video)*]. Composer Nicholas Keali‘i Lum explained, “Now, because of the injection wells and the pollution going into the water, [the reefs are] pretty much decimated. I wrote that verse to bring awareness to that, and also to bring a hope that the reefs will revive to what they used to [be].” *Id.* The mele celebrates the ‘āina of Honokōwai and the efforts of groups such as West Maui Preservation to restore the abundance of the fisheries in Honokōwai. *Id.*

³⁴¹ Hā‘enanui is an ‘ili in the ahupua‘a of Honokōwai. PATA, *supra* note 39, at 115; see LEI NĀHONOAPI‘ILANI: SONGS OF WEST MAUI (Nicholas Keali‘i Lum & Zachary Alaka‘i Lum, eds., 2020). Describing the significance of Hā‘enanui’s inoa ‘āina (traditional place name), hula practitioner U‘ilani Tanigawa Lum explains, “Mele and the hula that follow offer a unique opportunity to highlight the value of these ‘āina. We remember these place names and their historical significance, but we also reorient them in its present-day context.” *Honokōwai (Official Music Video)*, *supra* note 340.

³⁴² Emily Kelly et al., Letters to the Editor, *Wastewater Detrimental to Coral Reefs Off Kahekili*, MAUI NEWS (Aug. 31, 2019), <https://www.mauinews.com/opinion/letters-to-the-editor/2019/08/wastewater-detrimental-to-coral-reefs-off-kahekili/> (summarizing research performed individually by the Division of Aquatic Resources, University of Hawai‘i, the U.S.

discharges from LWRF have led to the degradation of the once abundant reefs of Hā‘enanui,³⁴³ a cornerstone of Native Hawaiian cultural identity.³⁴⁴ The Kumulipo – the Hawaiian creation chant of the cosmos that traces the birth of Kānaka Maoli to the beginning of time in Hawai‘i – states that life began with the coral polyp.³⁴⁵ This fundamental worldview of the coral polyp as the foundation for all life more fully illustrates what is at stake for Kānaka in particular, beyond the economic and recreational value provided by coral reefs.³⁴⁶ Ōiwi lifeways evolve with the reef as well. The ‘ōlelo no‘eau “he pūko‘a kani ‘āina,”³⁴⁷ for example, attests to the evolution of Native Hawaiian culture over “2,000 years of trial and error and observation.”³⁴⁸ This foundation has indeed enabled lawai‘a “to fish in a highly productive, but sustainable manner” for thousands of years.³⁴⁹ Today, “[t]here is scientific consensus that increasing pollution will virtually assure the continued, and perhaps accelerating, decline of Hawai‘i’s coral reefs unless action is taken.”³⁵⁰

“Am I a criminal for living. . . the way people have lived for 2,000 years?”³⁵¹ Kekai Keahi asked at a public hearing concerning EPA’s renewal of LWRF’s injection well permit in 2008. Native Hawaiians have frequented Hā‘enanui for over a millenia to exercise traditional and customary practices and rights.³⁵² Reef degradation from the LWRF’s injection wells have led to

Geological Survey, and the University of California, Santa Cruz). The authors of this article are scientists involved in studies of the effects of injection wells on coral reef health. *Id.*

³⁴³ *See id.*

³⁴⁴ *See, e.g.,* Sproat, *Environmental Self-Determination*, *supra* note 77, at 165, 167–68, 181 (explaining why for Native Hawaiians, Kānaka Maoli identity is inextricably tied to specific lands and resources).

³⁴⁵ *See id.* at 167 n.36 (citing E.S. CRAIGHILL HANDY, ET AL., *NATIVE PLANTERS IN OLD HAWAI‘I: THEIR LIFE, LORE & ENVIRONMENT* 74–75 (4th ed. 1995)); NOELANI ARISTA, *THE KINGDOM AND THE REPUBLIC: SOVEREIGN HAWAI‘I AND THE EARLY UNITED STATES* 16 (2018) (“First among all things born in the world is the coral polyp, spawning in the ocean.”).

³⁴⁶ *See* MICHAEL E. FIELD ET AL., *THE MAJOR CORAL REEFS OF MAUI NUI, HAWAI‘I: DISTRIBUTION, PHYSICAL CHARACTERISTICS, OCEANOGRAPHIC CONTROLS, AND ENVIRONMENTAL THREATS* 56–61 (2019) (explaining the economic, cultural, and recreational value of coral reefs, and highlighting the importance of their long-term survival to the local communities and all of Hawai‘i). “If Maui Nui and the rest of Hawai‘i continue on a pathway of ‘business as usual’ in regards to protection measures against land-based pollution and over fishing, the future for Hawaiian coral reefs appears to be bleak.” *Id.* at 60.

³⁴⁷ PUKUI, *supra* note 59, at 100.

³⁴⁸ TRANSCRIPT OF PUBLIC HEARING, *supra* note 327, at 104. Kekai Keahi describes the foundation for his subsistence fishing practices, “My education comes from 2,000 years of trial and error and observation.” *Id.*

³⁴⁹ *See* Sproat, *Environmental Self-Determination*, *supra* note 77, at 180.

³⁵⁰ FIELD ET AL., *supra* note 346, at 1.

³⁵¹ TRANSCRIPT OF PUBLIC HEARING, *supra* note 327, at 103.

³⁵² *See id.*; Request for Public Hearing and Comments on NPDES Permit, *supra* note 314.

the establishment of “management measures that directly interfere with subsistence rights in the area and threaten to regulate them out of existence.”³⁵³ In 2009, for example, the prevalence of invasive algae at Hā‘enanui led the state Department of Natural and Land Resources (“DLNR”) to establish the Kahekili Herbivore Fisheries Management Area and regulate fishing for culturally significant subsistence species, such as nenu (chubs), ‘uhu (parrotfish), and wana (sea urchin) in designated areas.³⁵⁴ Regulations have in effect determined how and where Kānaka are permitted and able to fish. Keahi powerfully drilled down on the impact of the state’s management practices on his community’s cultural lifeways.

They put one law into place that I cannot use nets at nighttime, because we was a problem. Us Hawaiian people was a problem, the reason why no more fish in the ocean anymore, because we overfishing. But that’s not how us Hawaiian people was raised. We only take what we need. But then, at the same time, I look back at all these injection wells, the hotels is right on the beach with the fertilizers. If you go to Kā‘anapali, they get this big lake kind of thing where all the fertilizers collect. And they [] turn on the pumps and they pump ‘em out into the ocean.³⁵⁵

Despite robust black letter law steering decisionmakers to protect Hawai‘i’s cultural resources,³⁵⁶ Ke‘eaumoku Kapu poignantly recounted how decisionmakers’ failure to consider mo‘omeheu inverts this reality for Native Hawaiians, “Now we at the top of the most endangered list in the State of Hawai‘i as minorities to this state, where we have a constitution that’s supposed to protect our rights, our gathering rights, all these different types of rights.”³⁵⁷

³⁵³ Request for Public Hearing and Comments on NPDES Permit, *supra* note 314, at 9; see *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 45–47, 7 P.3d 1068, 1082–84 (2000).

³⁵⁴ These species comprise much of the herbivorous population at Hā‘enanui. HAW. ADMIN. R. §§ 13-60.7-1, -4 (LEXIS through 2024).

³⁵⁵ TRANSCRIPT OF PUBLIC HEARING, *supra* note 327, at 102 (diacriticals added). [Kekai](#) Keahi expounded on the lack of regulation of resort and golf course fertilizers on the nearshore waters. *Id.* at 101–02. “If you look at the golf course . . . it’s only about six feet above sea level, maybe less. [The foreman at the golf course right here in Kā‘anapali] tell me that they fertilize their golf courses using 144,000 pounds of fertilizer, that they water with two million gallons of water, and that thing percolate right back down into the ocean.” *Id.*

³⁵⁶ See *supra* Section III.A.

³⁵⁷ TRANSCRIPT OF PUBLIC HEARING, *supra* note 327, at 46–48 (emphasis added). [Ke‘eaumoku](#) Kapu described how the failure to uphold constitutional Native Hawaiian

Current limits under the draft NPDES permit, set by DOH, effectively “rubber-stamp” the status quo by authorizing LWRF to discharge the maximum levels of nitrogen and phosphorus each day.³⁵⁸ In effect, the draft NPDES permit would allow LWRF to discharge this maximum mass of nutrients each day, on average, thereby authorizing LWRF to exceed current levels of pollution.³⁵⁹ “Despite [a] proven connection between [LWRF’s] nutrient laden-discharges and coral mortality, and DOH’s own data showing extreme nutrient-loading at the submarine seeps” proactive measures to curb discharges have yet to come to fruition. As Kapu cogently pointed out, robust data linking algae blooms to Lahaina’s injection wells “still defies the fact that we don’t take into consideration . . . these kinds of things when we start changing or reimplementing or allowing new permits.”³⁶⁰

Even a cursory examination of impacts to mo‘omeheu exposes the way the status quo tangibly threatens survival of the Hā‘enanui reef, a critical cultural resource, and undermines Native Hawaiians’ right to a full, living culture. “Understanding the innate spiritual connection that Kānaka Maoli share with native resources provides a crucial foundation for decision-makers and communities to come together to craft proactive policies to address climate change’s catastrophic harms.”³⁶¹ To ensure the long-term survival of the Hā‘enanui reef and the lifeways that depend on it, particularly as the climate crisis inevitably worsens,³⁶² DOH must require meaningful limits on, and improved monitoring of, LWRF’s nutrient discharges under the NPDES permit that “satisfy both the Clean Water Act’s mandates to protect water quality and DOH’s duties to conserve and protect public trust resources.”³⁶³

traditional and customary rights is confounding, even considering development pressures, “[A]ll it boils down to, is one simple little permit. We need to consider how we gonna take care of the mass people we have now, not . . . asking the county how many more development on the west side is coming.” *Id.* at 48. “[F]ind it within you[r] na‘au, think about the most simplest thing, the farmer and the fisherman, the person that just trying to provide for his family.” *Id.* at 49.

³⁵⁸ DOH is the regulatory body authorized to set allowable levels of polluted effluent. *See* HAW. ADMIN. R. §§ 11-62-02, -25, -26 (LEXIS through 2024). Maximum levels of nitrogen and phosphorus allowed under the draft NPDES permit are derived based on highest average daily flow and highest observed annual average pollutant concentration. *See* Request for Public Hearing and Comments on NPDES Permit, *supra* note 314.

³⁵⁹ Request for Public Hearing and Comments on NPDES Permit, *supra* note 314; *see* Casco et al., *supra* note 329, at 361 (describing the public health concerns regarding polluted effluent from LWRF’s injections) (“With LWRF nearby, however, communities are often exposed to drugs like carbamazepine, sulfamethoxazole, and diphenhydramine, as well as household cleaners, food additives, and cosmetic products.”).

³⁶⁰ TRANSCRIPT OF PUBLIC HEARING, *supra* note 327, at 47–48.

³⁶¹ Sproat, *Environmental Self-Determination*, *supra* note 77, at 167.

³⁶² *See* FIELD ET AL., *supra* note 346.

³⁶³ *See* Request for Public Hearing and Comments on NPDES Permit, *supra* note 314.

2. *‘Āina: Enabling Mauka to Makai Flow in Honokōhau Stream to
Protect Instream Values*

*We are at a critical point in needing to change the way we as humans
interact with ‘āina, our natural counterpart.*

—U‘ilani Tanigawa Lum³⁶⁴

Honokōhau, one of the famed hono of Nā Hono a Pi‘ilani, was once lined with “thousands of lo‘i kalo supporting a vibrant farming community” as “the most extensive system of lo‘i along West Maui’s coast.”³⁶⁵ From mauka to makai, Maui Komohana’s valleys, streams, and bays share the same place name, signaling the biocultural interconnectedness between these ecosystems. Honokōhau valley houses a perennial stream, Honokōhau stream, “whose perpetual waters conditioned the ability of thousands of lo‘i kalo to flourish along its banks.”³⁶⁶

One of the last remaining sources of fresh water in Maui Komohana, Honokōhau Stream, is diverted to provide on average 1.7 mgd³⁶⁷ of potable water for the county’s water supply system, which services residences in the coastal areas of Launiupoko, Lahaina, Kā‘anapali, Honokōwai, Nāpili, and Kapalua.³⁶⁸ The Honokōhau ditch, originally constructed by Pioneer Mill, transports stream and development tunnel water across three aquifers and is the largest of the eight water collection systems that comprise the Lahaina Aquifer Sector.³⁶⁹ The Honokōhau ditch irrigates 6,200 acres, 1,600 of which are owned by the state.³⁷⁰

Ke‘eaumoku Kapu effectively captured how important decisions involving ‘āina too often sideline Kānaka. “We don’t take into consideration [] how this gonna affect the fishing guy who trying to feed his family, how it’s going to affect the guy who want to stay in the mountains trying to grow kalo and feed his family.”³⁷¹ Despite the closure of its pineapple operations

³⁶⁴ *Honokōwai (Official Music Video)*, *supra* note 340.

³⁶⁵ SCHEUER & ISAKI, *supra* note 65, at 67.

³⁶⁶ *Id.*

³⁶⁷ Non-potable water is transmitted from Honokōhau stream via the Honokōhau ditch to the Māhinahina Water Treatment Facility. CWRM, SURFACE AND GROUND WATER MANAGEMENT AREA DESIGNATION FINDINGS OF FACT REPORT, *supra* note 4, at 19.

³⁶⁸ The MDWS system produces approximately 5.4 mgd of potable water, relying on a combination of two surface water treatment facilities at Lahaina and Māhinahina and twelve production wells. *Id.* at 18–19.

³⁶⁹ *Id.* at 17.

³⁷⁰ SCHEUER & ISAKI, *supra* note 65, at 69.

³⁷¹ TRANSCRIPT OF PUBLIC HEARING, *supra* note 327, at 48.

in 2009,³⁷² the Maui Land and Pineapple & Co. (“MLP”) uses the majority of Honokōhau stream water to irrigate smaller-scale diversified agricultural lots and golf courses, and to provide water for the “domestic” needs of luxury estates located on land zoned for agriculture.³⁷³ For example, companies associated with WML, one of the area’s largest private landowners, “own more than 5,500 acres of land around Lahaina, according to an analysis of county records, making [it] one of the area’s largest private landowners.”³⁷⁴ In addition, many properties within its luxury subdivisions consume, on average, forty times as much water as the average American home, according to Water Commission data.³⁷⁵

As a “practicable alternative,” upgraded storage and distribution facilities at LWRF could expand wastewater reuse and offset offstream demands for fresh water,³⁷⁶ with significant potential to restore mauka to makai flow and reestablish beneficial instream uses of water in Honokōhau valley,³⁷⁷ including Native Hawaiian traditional and customary practices that “exemplify Kānaka Maoli’s identity, and in particular, their dependence on and familial relationship with ‘āina.”³⁷⁸ Kaipo Kekona reflected on the interconnectedness of ‘Ōiwi lifeways and ‘āina, particularly regarding health and food, “Our diet prior to western forms depended largely on the ocean. . . . And the ocean was vibrant, because of what we were doing on land.”³⁷⁹

‘Āina is inextricably tied to the health of its streams,³⁸⁰ especially for Kānaka Maoli who trace their ancestry to kalo, the staple food of the Hawaiian people.³⁸¹ Today’s overreliance on imported and processed

³⁷² Gary T. Kubota, *Maui Pineapple Harvests Final Crop*, HONOLULU STAR BULL. (Dec. 24, 2009), https://archives.starbulletin.com/content/20091224_maui_pineapple_harvests_final_crop/.

³⁷³ SCHEUER & ISAKI, *supra* note 65, at 127, 175–86; Colleen Uechi, *Interview with Peter Martin: Developer Talks About His Start, Challenges Building Affordable Homes*, MAUI NEWS (July 18, 2019), <https://www.mauinews.com/news/local-news/2019/07/latest-peter-martin-projects-generate-familiar-opposition/> (describing the proliferation of single-family homes on one-acre agricultural lots known as “gentlemen estates”).

³⁷⁴ Hofschneider & Bittle, *supra* note 147.

³⁷⁵ *Id.*

³⁷⁶ CWRM September 2023 Meeting, *supra* note 241, at 2:12:24.

³⁷⁷ *Id.*

³⁷⁸ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 309.

³⁷⁹ Kaipo Kekona, Maoli Thursday Guest Speaker, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawai'i William S. Richardson School of Law (Apr. 4, 2024) (recording on file with author) [hereinafter Maoli Thursday with Kaipo Kekona].

³⁸⁰ See, e.g., Sproat, *A Question of Wai*, *supra* note 64, at 202; Ho'okano, *supra* note 170, at 220–22; Anaya, *supra* note 262, at 312–19.

³⁸¹ MacKenzie, *Historical Background*, *supra* note 83, at 6.

foods³⁸² has resulted in negative health outcomes, particularly amongst Kānaka Maoli.³⁸³ The diversion of streams for plantation agriculture – and now, commercial properties and luxury subdivisions – has uprooted and prevented the cultivation of traditional foods for over a century.³⁸⁴ Significantly, “[t]his theft of resources has crippled native communities and forced Maoli to adopt a western diet and lifestyle.”³⁸⁵ Kalo has since become “an icon of resistance and restorative justice.”³⁸⁶ Kalo cultivation thus represents both the perpetuation of traditional Native Hawaiian lifeways and the restoration of food security, sustainability, and community health.³⁸⁷ Eating is as kalo farmer, Daniel Anthony, articulated, “a powerful declaration of sovereignty . . . and the means by which Native Hawaiians will regain their independence.”³⁸⁸ The restoration of stream flow to grow kalo and other traditional crops not only enables Kānaka communities to reclaim the Native diet,³⁸⁹ but also allows Kānaka Maoli to embrace their kuleana to aloha ‘āina.³⁹⁰

3. *Mauli ola: Reinforcing Community Resiliency with Agroforestry and Fire-Resilient Landscapes*

Fire is a symptom of these bigger structural problems.

³⁸² Hawai‘i imports an estimated 85 to 90 percent of its food. OFF. OF PLAN., DEP’T. BUS. ECON. DEV. & TOURISM, INCREASED FOOD SECURITY AND FOOD SELF-SUFFICIENCY STRATEGY ii (2012), https://files.hawaii.gov/dbedt/op/spb/INCREASED_FOOD_SECURITY_AND_FOOD_SELF_SUFFICIENCY_STRATEGY.pdf; Lurline Wailana McGregor, *How Food Secure Are We If Natural Disaster Strikes?*, 2 KA PILI KAI, 1, 2 (2020). If a natural disaster or global event were to disrupt shipping and food supply, Hawai‘i has an inventory of fresh produce that would last consumers no more than seven days. McGregor, *supra*, at 5.

³⁸³ See generally Kaylee Kilolani Michiko Correa, *The Relationship Between Food Sovereignty and Hawaiian Health: The Implications Behind Alexander and Baldwin’s Recent Land Sale*, 17 IND. HEALTH L. REV. 257, 265–69 (2020) (discussing how health issues can be attributed to the impact of westernization on many native communities).

³⁸⁴ Sproat, *Environmental Self-Determination*, *supra* note 77, at 200.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 349.

³⁸⁸ Correa, *supra* note 383, at 272.

³⁸⁹ See, e.g., Nina Lakhani, *The Farmers Restoring Hawaii’s Ancient Food Forests That Once Fed an Island*, GUARDIAN (June 17, 2022), <https://www.theguardian.com/environment/2022/jun/17/hawaii-traditional-farming-methods-ancient-food-forests>; Megan Ulu-Lani Boyanton, *In a Bid for Food Sovereignty, Hawaiian Farmers Return to Indigenous Roots*, AMBROOK RSCH. (Sept. 22, 2023), <https://ambrook.com/research/crops/hawaii-farming-Indigenous-food-sovereignty>.

³⁹⁰ See Tanigawa Lum, *Restorative Environmental Justice* *supra* note 247, at 310–11.

—Clay Trauernicht³⁹¹

Renowned for its power of destruction and famed in mele, the powerful Kaua‘ula winds blow directly above Kaua‘ula valley.³⁹² “Decades of plantation agriculture, and more recently, commercial real estate development, led to aridification of traditional crop lands that once sustained Lahaina, the first capital of the Hawaiian Kingdom.”³⁹³ The hundreds of lo‘i kalo³⁹⁴ and roughly ten square miles of ‘ulu trees³⁹⁵ that once defined the landscape in Lahaina have since been displaced by thousands of acres of fire-prone brush, which fueled destructive brush fires in Kaua‘ula in 2007, 2012, and 2018.³⁹⁶

Fire-prone conditions undermine the safety, health, and well-being of kuleana users who have a protected right under the Water Code to access water for cultural practices and taro farming, and rely on stream water for growing food, basic household needs, and fire protection.³⁹⁷ In 2018, however, the Palakikos and other kuleana users in Kaua‘ula valley “found

³⁹¹ Clay Trauernicht, Maoli Thursday Guest Speaker, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawai‘i William S. Richardson School of Law (Apr. 4, 2024) (recording on file with author) [hereinafter Maoli Thursday with Clay Trauernicht].

³⁹² *Kaua‘ula, the Powerful Wind of Lahaina*, BISHOP MUSEUM, <https://blog.bishopmuseum.org/nupepa/kaua%CA%BBula-the-powerful-wind-of-lahaina> (last visited May 1, 2024). The ‘ōlelo no‘eau “Ka ipukukui pio ‘ole i ke Kaua‘ula,” which translates as “The light that will not go out in spite of the blowing of the Kaua‘ula wind,” was written about Lahainaluna, the first high school built in the Hawaiian Kingdom. KEPĀ MALY & ONAONA MALY, VOLUME I (PART 1): A COLLECTION OF TRADITIONS AND HISTORICAL ACCOUNTS OF KAUA‘ULA AND OTHER LANDS OF LAHAINA, MAUI 61–62 (2007). Lahainaluna was burned by fire in 1860 but the school nevertheless came to be known as a leader of instruction. *See id.*

³⁹³ Mike Opgenorth, *NTBG Supports Wildfire Recovery with Breadfruit*, NAT’L TROPICAL BOTANICAL GARDEN (Mar. 7, 2024), <https://ntbg.org/stories/maui-wildfire-recovery/>.

³⁹⁴ MALY & MALY, *supra* note 389 at 107. Kalo dominated Lahaina’s landscape in the mid-1800s with over 350 recorded lo‘i in Kaua‘ula valley alone. Ku‘uwehi Hiraishi, *The Battle Over Water Rights in West Maui is Generational for this Kaua‘ula Taro Farmer* HAW. PUB. RADIO (Aug. 17, 2023, 5:50 PM HST), <https://www.hawaiipublicradio.org/local-news/2023-09-14/the-battle-over-water-rights-in-west-maui-is-a-generational-one-for-this-kaua-ula-taro-farmer>.

³⁹⁵ FEEDING HAWAI‘I, *Kaipo Kekona*, <https://www.feedinghawaii.org/talkstory/kaipo-kekona> (last visited May 26, 2024).

³⁹⁶ Maoli Thursday with Clay Trauernicht, *supra* note 391; Sophie Kevany, *Non-Native Grass Species Blamed for Ferocity of Hawaii Wildfires*, GUARDIAN (Aug. 16, 2023, 9:50 AM), <https://www.theguardian.com/global-development/2023/aug/16/non-native-grass-species-blamed-for-ferocity-of-hawaii-wildfires/>; Brianna Sacks & Justine McDaniel, *A Terrifying Fire Struck Maui in 2018. Officials Were Warned of a Repeat*, WASH. POST (Aug. 22, 2023, 6:00 PM EDT), <https://www.washingtonpost.com/weather/2023/08/22/maui-fire-2018-lahaina-warning/>.

³⁹⁷ Hiraishi, *supra* note 394.

themselves with little, if any, water available to fight the 2018 wildfire.”³⁹⁸ The 2018 fire started in Kaua‘ula valley and broke out over a twenty-four hour period, scorching a total of 1,500 acres and destroying twenty-one homes and twenty-seven cars.³⁹⁹ According to Kaipo Kekona, there have been at least seven other fires in the last twelve years, “That alone has given us enough to see there’s been a track here. We didn’t do anything about it and now we paid the ultimate price to be where we’re at.”⁴⁰⁰

The impact of the August 2023 fires have also accentuated mounting environmental concerns as Lahaina residents prepare for the long process of restoring safe water service.⁴⁰¹ After the fires destroyed an estimated 2,200 buildings, the Maui County Department of Water Supply discovered traces of the carcinogenic chemical benzene in Lahaina’s municipal water system.⁴⁰² The county advised wildfire survivors not to drink tap water, as scientists continue to test for contaminants that could be released by the incineration of plastics, vehicles, household chemicals, and other sources.⁴⁰³ Amidst disaster recovery efforts, scientists have also echoed the community’s long-standing concerns about contaminated run-off flowing into Lahaina’s coral reefs.⁴⁰⁴

As the climate crisis continues, decisions centered on maui ola have the potential to ensure the well-being of Kānaka communities, including their ability to adapt to changing conditions and recover from disaster.⁴⁰⁵ As Kekona aptly predicts, “It’s not just the fire. We’re going to experience the flooding, the extreme windiness. We need to strategize on that.”⁴⁰⁶ Historically in Lahaina, the Indigenous agroforestry system “provided a cooling effect that created a buffer against torrential heat and drought.”⁴⁰⁷ Maximizing LWRF’s capacity to store and distribute R-1 recycled water for

³⁹⁸ *Id.*

³⁹⁹ Maoli Thursday with Kaipo Kekona, *supra* note 379; *Conditions “Unprecedented” in Battling West Maui Fires During Hurricane Warning*, MAUI NOW (Aug. 27, 2018, 7:10 PM HST), <https://mauiNOW.com/2018/08/27/conditions-unprecedented-in-battling-west-maui-fires-during-hurricane-warning/>. Months before the 2018 fires, the Water Commission ordered WML to restore stream flow. HAW. COMM’N ON WATER RES. MGMT., WEST MAUI INTERIM INSTREAM FLOW STANDARDS (Mar. 20, 2018), <https://files.hawaii.gov/dlnr/cwrm/submittal/2018/sb20180320B1.pdf>.

⁴⁰⁰ Maoli Thursday with Kaipo Kekona, *supra* note 379.

⁴⁰¹ *See, e.g.*, Tollefson & Nature Magazine, *supra* note 34; Peterson, *supra* note 34.

⁴⁰² Tollefson & Nature Magazine, *supra* note 34.

⁴⁰³ *Id.*

⁴⁰⁴ *See id.*

⁴⁰⁵ *See supra* Section IV.A.3.

⁴⁰⁶ Maoli Thursday with Kaipo Kekona, *supra* note 379.

⁴⁰⁷ Opgenorth, *supra* note 393.

agricultural and non-potable uses would expand opportunities to reincorporate fire-resistant planting through practices like agroforestry.

Upgrading Lahaina's reclamation facilities is thus a prime example of how decisionmakers can begin to directly address the climate and food challenges confronting Kānaka today.⁴⁰⁸ Repurposing the Field 140 reservoir will significantly offset demands for stream water, increase the availability of non-potable water to irrigate much-needed fire breaks, and replenish reservoirs for firefighting purposes.⁴⁰⁹ At an elevation of 700 feet, the Field 140 reservoir could support gravity-fed irrigation throughout Lahaina's mauka lands, providing much-needed water to irrigate fire-resistant vegetation buffers.⁴¹⁰ Post-disaster aid⁴¹¹ can potentially expedite desperately needed improvements to the Field 140 reservoir, which remains in poor condition but can be repurposed to meet dam safety standards.⁴¹² Beyond a "practicable alternative," upgraded wastewater infrastructure is key to improving maui ola in Maui Komohana, where surface water is increasingly scarce and wildfires grow more prevalent and intense.

4. *Ea: Reframing R-1 Water as a Community Asset*

Reframing R-1 recycled water as a critical community asset in this era of accelerated climate change can help restore Kānaka Maoli lifeways and an Indigenous circular economy that did not simply "subsist" for centuries, but rather, thrived.⁴¹³ Ōiwi scholars demonstrate that a clearer understanding of

⁴⁰⁸ See Correa, *supra* note 388, at 266–69 (examining the importance of traditional foods, like kalo, through the lens of food sovereignty and increased health outcomes).

⁴⁰⁹ See CWRM September 2023 Meeting, *supra* note 241, at 2:12:24.

⁴¹⁰ See *id.*

⁴¹¹ See Fact Sheet: Six Months After Maui Wildfires, Biden-Harris Administration Continues to Support Survivors and Impacted Communities, THE WHITE HOUSE (Feb. 7, 2024) <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/07/fact-sheet-six-months-after-maui-wildfires-biden-harris-administration-continues-to-support-survivors-and-impacted-communities/>.

⁴¹² The Field 140 reservoir is state-regulated with a "high" hazard potential classification, meaning failure or mis-operation will probably cause loss of human life. *Reservoir 140*, DEPT. OF LAND & NAT. RES., ENG'G DIV., DAM INVENTORY SYSTEM, <https://dams.hawaii.gov/DamInformation.aspx?id=f420d085-f552-4910-adf0-78eb93d2a287> (last visited Apr. 14, 2024); see CWRM September 2023 Meeting, *supra* note 241, at 2:12:24.

⁴¹³ The circular economy concept has gained traction among scholars and practitioners, but the concept means many different things to different people. See, e.g., Julian Kirchherr, et al., *Conceptualizing the Circular Economy: An Analysis of 114 Definitions*, 127 RES., CONSERVATION & RECYCLING 221, 221–28 (2017); Beamer et al., *Indigenous Systems of Circularity*, *supra* note 58, at 1–2. One study indicated that the circular economy is most frequently depicted as a combination of reduce, reuse, and recycle activities – the main aim being economic prosperity, followed by environmental quality. Kirchherr, et al., *supra*.

how Indigenous economies thrived can inform efforts to catalyze systemic change within today's dominant market structure.⁴¹⁴ Still, "the universal transition toward a circular economy is one that begins with policy-makers, businesses, and the finance sector's ability to directly determine the materials and products they deem best fit to put on the market."⁴¹⁵

Ea implores decisionmakers to advance self-determination principles in the decisionmaking process itself by involving Kānaka communities in decisions that affect them, and in decisions about mo'omeheu, 'āina, and mauli ola.⁴¹⁶ Critically, "[a]s detached agencies make decisions about communities of which they are not a part, there *must* be ties to 'āina so that Indigenous Peoples are informing the decisions being made about their own land and natural resources."⁴¹⁷ Actualizing the community's calls for minimizing LWRP's injections of polluted effluent, restoring stream flow, and maximizing community resilience are important steps towards restoring ea in decisionmaking.

Wai ea embodies the right of communities to define their own water systems and is thus a powerful construct for restorative justice.⁴¹⁸ For decades, Lahaina's residents have advocated for alternatives to excessive stream diversions and wastewater dumping, epitomizing a growing public consciousness around the Water Commission's potential to enforce the law. In the aftermath of the Lahaina fires, Kekai Keahi powerfully articulated:

Oftentimes, conceptualizations of the circular economy do not consider impacts on social equity or future generations, or more generally, the need for a systemic shift. *Id.* 'Ōiwi scholars, however, embrace the "unclear stance on the social predispositions and impacts necessary for transition," reconceptualizing the circular economy as a system that enables Indigenous communities to act as agents of environmental change. Beamer et al., *Indigenous Systems of Circularity*, *supra* note 58, at 1–2.

⁴¹⁴ Beamer et al., *Indigenous Systems of Circularity*, *supra* note 58, at 3, 8 (articulating "how the concept of nature, environment, and land in a Hawaiian context is interconnected with humanity," and underscoring the "inherent relationship between people and the environmental as one of reciprocity and stewardship").

⁴¹⁵ *Id.* at 1.

⁴¹⁶ See Sproat, *Wai Through Kānāwai*, *supra* note 40, at 177; Anaya, *supra* note 262, at 355. See generally Sproat, *Environmental Self-Determination*, *supra* note 77, at 200–08 (providing examples of how Kānaka Maoli and Hawai'i decisionmakers together can effectuate the Indigenous right to environmental self-determination to proactively respond to the impacts of climate change on Maoli cultural practices).

⁴¹⁷ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 355–56.

⁴¹⁸ See United Nations, *Strengthening Water Sovereignty of Indigenous People Through Community Water Resources System*, UNITED NATIONS SUSTAINABLE DEV. GRP., <https://sdgs.un.org/partnerships/strengthening-water-sovereignty-indigenous-people-through-community-water-resources>.

It's not enough to rest on the instream flow standards we fought for, for so many years. [It's] not enough to rest on designation for ground and surface water that we fought for, for so many years. That's not enough to replenish our aquifers—not enough to sustain a population on the west side. So, we gotta rebuild our aquifers and we gotta look at different ways and how we gonna do that.⁴¹⁹

As Lahaina's people turn towards rebuilding their beloved town, decisions to rebuild its aquifers and repair its hydrologic systems will be of paramount importance to ensure ea for Hawai'i's people and wai. There is scientific consensus that the significant downward trend in Hawai'i's rainfall over the past century⁴²⁰ will likely result in a "decrease in groundwater discharge to streams, [and thus,] a decline in overall groundwater recharge and storage."⁴²¹ In light of severe groundwater contamination from the fires⁴²² – heightening the demand for potable water overall – it is both urgent and critical that decisionmakers expand storage and distribution facilities to maximize wastewater reuse. Increased use of R-1 recycled water will also help conserve groundwater resources that are essential for the replenishment of aquifers, particularly as Maui's water crisis continues.⁴²³ Wastewater

⁴¹⁹ Council for Native Hawaiian Advancement, *Know Your Wai: Where Did the Water Go?* 22nd Annual Native Hawaiian Convention, YOUTUBE (Nov. 17, 2023), <https://www.youtube.com/watch?v=oV-DkewhNCQ>.

⁴²⁰ Sproat, *Environmental Self-Determination*, *supra* note 77, at 176 (citing CLIMATE CHANGE AND PACIFIC ISLANDS: INDICATORS AND IMPACTS: REPORT FOR THE 2012 PACIFIC ISLANDS REGIONAL CLIMATE ASSESSMENT 24, 40 (Victoria W. Keener et al. Eds., 2013)).

⁴²¹ *Id.* at 177 (citing DELWYN S. OKI, U.S. GEOLOGICAL SURVEY, TRENDS IN STREAMFLOW CHARACTERISTICS AT LONG-TERM GAGING STATIONS, HAWAII 36, 193–202 (2004), <http://pubs.usgs.gov/sir/2004/5080/pdf/sir20045080/>).

⁴²² MAUI CNTY., *Department of Water Supply: Unsafe Water Advisory Interactive Map*, <https://www.mauicounty.gov/water/> (last visited Mar. 9, 2024).

⁴²³ See, e.g., *Urgent Water Conservation Request for West Maui*, MAUI NOW (Dec. 28, 2022), <https://mauinow.com/2022/12/28/urgent-water-conservation-request-for-west-maui/> (“Despite recent rainfall, . . . source water supply is at insufficient levels to maintain the Mahinahina Water Treatment Facility.”). On January 4, 2023, State Senator Angus McKelvey described ongoing drought conditions in Maui Komohana, as he pointed to water tanks lining the Honoapi‘ilani Highway, “We’re talking about no water for bathing, no water for sanitation. We’re talking about families with little kids who have no water, who have to come with buckets to a water truck.” Hawaii News Now, *Grappling with water shortage ‘crisis,’ West Maui residents demand answers*, YOUTUBE (Jan. 4, 2023), <https://www.youtube.com/watch?v=w5RH-uLQBkk> (reporting on the 800 West Maui residents grappling with either no water or low water pressure because of ongoing drought conditions and a construction pipe impacting flow); MAUI CNTY., *Notice of Declaration of Continued Stage 1 Water Shortage for West Maui* (Oct. 19, 2023),

reclamation also presents a tremendous opportunity to alleviate pressures on Maui Komohana's streams, especially as Moku'ula and Malu 'Ulu o Lele have become focal points of community-centered conversations about restoring Lahaina's historic abundance.

V. CONCLUSION

Wai ea envisions a way forward that fulfills the law's potential, advances Hawai'i's commitment to restorative justice, and serves as a roadmap for the restoration and reclamation of law, culture, and justice for Hawai'i's people and Kānaka Maoli in particular. As our understanding of restorative justice expands, Hawai'i's cultural practices and indigenous methods of biocultural resource management will become increasingly central "to cultivat[ing] a successful, more just society."⁴²⁴ For years, Lahaina's community members, practitioners, and 'āina stewards have championed full utilization of the region's wastewater as a practicable alternative to stream water diversions. In the wake of the Maui wildfires, the immense need for and potential of this alternative to secure Lahaina's water future is unprecedented.

Wai continues to reemerge within the Pahumanamana 'Auwai, the legacy of a far more intricate and resilient system of Indigenous waterways. At this critical juncture, Hawai'i's decisionmakers are charged with restoring Hawai'i's public trust to realize a more equitable water future. How the state decides to 'auamo its kuleana as ke kahuwai pono, in light of Hawai'i's colonial history and the powerful interests at play, is a crucial matter of restorative justice and a determinative step towards reclaiming Lahaina's water future.

<https://www.mauicounty.gov/DocumentCenter/View/143717/2023-10-19-Stage-1-Notice-of-Declaration-of-Water-Shortage-ad> (determining that anticipated water demand in the area is projected to exceed available water supply).

⁴²⁴ Tanigawa Lum, *Restorative Environmental Justice*, *supra* note 247, at 356. Life, law, land, and sovereignty were inextricably intertwined in traditional Hawaiian society because "Kānaka Maoli recognized the interconnectedness of life to cultivate a successful, more just society." *Id.*; *see also* Goodyear-Ka'ōpua, A NATION RISING, *supra* note 276, at 4.