Innovation or Degradation?: An Analysis of Hawai‘i’s Cultural Impact Assessment Process as a Vehicle of Environmental Justice for Kānaka Maoli

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[*] Juris Doctor 2011, William S. Richardson School of Law; B.A. University of Hawai‘i at Mānoa, 2008. I would like to dedicate this article to my son, Shane Kalei, so that it may inspire him to preserve and protect his cultural heritage and lands, for we do not inherit the Earth from our parents, rather, we borrow it from our children. Special thanks to my mother, Leona, and my grandmother Lorraine, for providing me with the foundation, opportunity, and drive to always kūlia i ka nu‘u (“strive for the summit”). Mahalo nui to D. Kapua‘ala Sproat for her invaluable guidance, inspiration and support; and to C.J. Richardson – without his vision, I would not be a lawyer today. Lastly, thank you to Terran Christopher for his enduring support and encouragement.

INTRODUCTION

"He ali'i ka 'āina; he kauwā ke Kānaka.
The land is chief; man is its servant." [1]

This 'ōlelo no'eau describes the relationship that Kānaka Maoli[2] possess with respect to the 'āina, or lands on which they live. This metaphor defines the Kānaka Maoli relationship to the 'āina and is embodied in the modern concepts of mālama 'āina[3] and aloha 'āina.[4] The

[1] MARY KAWENA PŪKU'I, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 62 (1983).

[2] As used in this paper, "Kānaka Maoli" refers to the indigenous people of Hawai'i, who can trace their ancestry to the people inhabiting the Hawaiian Islands prior to 1778, of pure or part blood quantum. *See* HAW. REV. STAT. § 10-2 (2009).

[3] Mālama 'āina is defined as "serving and caring for the Land." LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 25 (1992).

[4] Aloha 'āina is defined as "love of the Land." *Id.* at 25. According to tradition, the 'āina is the elder sibling and progenitor of the Hawaiian race. *Id.* at 23-25. There existed a reciprocal duty between the kānaka and the 'āina in which the people would care for the land and in return the land would provide for the kānaka. *See infra* Part II.B, for more information.

land has no need for kānaka,[5] but kānaka need the land and work it to sustain their families.[6] As currently applied, this relationship highlights the importance of maintaining a healthy environment to sustain a healthy society.

In ancient times, Hawai'i was completely self-sufficient and the traditional land tenure system regulated resource management.[7] New perceptions regarding the responsibilities of the human population and appropriate relationships to the land have forever altered the way in which Kānaka Maoli identify with their homelands.[8] Although Hawai'i may never return to complete self-sufficiency, the State is capable of becoming energy self-sufficient.[9] Hawai'i possesses an abundance of natural resources such as wind, ocean, solar, and geothermal, which could be harvested to allow the State to reduce its reliance on imported fossil fuels and become energy self-sufficient.[10]

In 2008, the State of Hawai'i and the U.S. Department of Energy recognized Hawai'i's potential to be a model of energy self-sufficiency for the rest of the world, and entered into the Hawai'i Clean Energy Initiative ("Initiative") – a partnership bringing together stakeholders committed to leading Hawai'i to energy independence.[11] To achieve this goal, the Initiative is working to develop Hawai'i's indigenous, sustainable sources of energy.[12]

Proponents of renewable energy development in Hawai'i are looking at the Interisland Wind Project as a major contributor to Hawai'i's

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[5] Kānaka is the plural form of "kanaka," which is defined as a "human being," or "man." MARY KAWENA PŪKU'I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (1986).

[6] PŪKU'I, *supra* note 1, at 62.

[7] *See* JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 47-49 (2002).

[8] CARLOS ANDRADE, HĀ'ENA: THROUGH THE EYES OF THE ANCESTORS 69 (2008).

[9] Interview with Henry Curtis, Exec. Dir., Life of the Land (Hawai'i), in Honolulu, Haw. (Jan. 11, 2010).

[10] *Id.*; *See* Hawai'i Clean Energy Initiative, *Renewable Energy*, http://www.hawaiicleanenergyinitiative.org/renewable-energy/ (last visited Oct. 21, 2011) [hereinafter *Renewable Energy*].

[11] Hawai'i Clean Energy Initiative, *About the Hawai'i Clean Energy Initiative,* http://www.hawaiicleanenergyinitiative.org/about/ (last visited Mar. 1, 2010).

[12] *See Renewable Energy*, *supra* note 10.

energy independence.[13] The Interisland Wind Project, as originally conceived, proposed to send up to 400 megawatts of renewable wind energy from the islands of Molokaʻi and Lānaʻi via an undersea electrical transmission cable to Oʻahu.[14] It is the first renewable energy development proposal stemming from the comprehensive energy agreement between the State of Hawaiʻi and the Hawaiian Electric Companies,[15] with the goal of helping the State move away from dependence on fossil fuels for electricity and ground transportation.[16] Although the scope of the Interisland Wind Project has since been modified to include other forms of renewable energy technologies, the heart of the Big Wind project remains the undersea transmission cable.[17]

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[13] *See* Press Release, Governor Lingle's Executive Chambers, Governor Lingle Announces Agreement to Advance 'Big Wind' Projects (Mar. 17, 2009) [hereinafter Lingle Announces Agreement] *available at* http://www.hawaiisenergyfuture.com/Images/Lingle_Big_Wind_Project.pdf.

[14] *What is the Interisland Wind and Cable Project*, Interisland Wind, http://www.interislandwind.com (last visited Jan. 28, 2010). The Interisland Wind Project proposal has undergone numerous amendments. Interview with Ryan Hurley, Wind Energy Specialist, Hawaiʻi State Energy Office, in Honolulu, Haw. (Oct. 29, 2011). As originally proposed, the Interisland Wind Project proposal included three major components: (1) the wind farms located on the islands of Molokaʻi and Lānaʻi; (2) the undersea cable connecting the islands of Oʻahu, Maui, Molokaʻi, and Lānaʻi; and (3) the additional transmission lines and infrastructure that will be needed on each island to convert and connect the wind energy to the existing electrical grids. For more information *see infra* Part III.

[15] Hawaiian Electric Company, Inc. ("HECO"), and its subsidiaries, Maui Electric Company, Ltd. ("MECO") and Hawaii Electric Light Company, Inc. ("HELCO"), serve ninety-five percent of the State's residents on the islands of Oʻahu, Maui, Hawaiʻi Island, Lānaʻi, and Molokaʻi. HECO, *About HECO,* http://www.heco.com/portal/site/heco/menuitem.20516707928314340b4c0610c510b1ca/?vgnextoid=613df2b154da9010VgnVCM10000053011bacRCRD&vgnextfmt=default (last visited Mar. 26, 2010) [hereinafter *About HECO*].

[16] *See* Hawaiʻi Clean Energy Initiative, *Hawaiʻi Energy Policy*, http://www.hawaiicleanenergyinitiative.org/policy.html (last visited Mar. 1, 2010).

[17] Using federal stimulus funds, AECOM was hired by the Department of Business, Economic Development & Tourism ("DBEDT") to write a programmatic environmental impact statement ("PEIS") for the Wind project. Henry Curtis, *Big Wind hits road blocks from State Procurement Office, Public Utilities Commission & the Association of Hawaiian Civic Clubs*, *available at* http://www.disappearednews.com/2011/11/big-wind-hits-road-blocks-from-state.html (last visited Nov. 23, 2011). After DBEDT complied and sorted through comments from more than 250 individuals and entities, "it became apparent that the request from the public for DBEDT to study additional renewable energy technologies as part of the programmatic EIS was an overwhelmingly common theme." *Id.* As such, DBEDT filed an Amendment with the State Procurement Office requesting the additional scope of services analyzed within the Big Wind project to include solar, photovoltaic, and geothermal alternatives. *Id.* The author notes that the larger "Interisland Wind Project"

The Interisland Wind Project proposes one of the largest, and most costly, energy projects in Hawai‘i’s history, and has the capacity to permanently transform Hawai‘i’s natural, cultural, and legal landscapes.[18] The way in which Hawai‘i approaches renewable energy projects like the Interisland Wind Project is critical in determining the way in which indigenous resources will be utilized in the future.

Because the Interisland Wind Project presents a multitude of legal and environmental issues, this paper focuses on issues stemming from the Environmental Impact Statement (“EIS”) process pursuant to Chapter 343 of the Hawai‘i Revised Statutes. More specifically, this paper recognizes the Cultural Impact Assessment process as a form of restorative justice for Kānaka Maoli communities, and uses the undersea cable between O‘ahu and Moloka‘i as an example of the cultural impacts and concerns implicated by these types of renewable energy projects and how they should be approached.[19]

This paper evaluates whether Hawai‘i’s current legal framework is sufficient to address the environmental and cultural impacts that renewable energy projects, such as the Interisland Undersea Cable, will generate. Section I outlines the Racializing Environmental Justice analytical framework employed throughout this paper, and recognizes the importance of environmental laws as a form of restorative justice for Kānaka Maoli communities. Section II provides an overview of the cultural and historical context regarding the Kānaka Maoli relationship with their natural environment.[20] Section III provides background on the State’s commitment to renewable energy sources and proposes the Interisland Undersea Cable Project as a means to achieve those energy goals.[21] Section IV details the evolution of Hawai‘i’s environmental protection laws and identifies specific legal provisions that protect Hawai‘i’s natural and cultural resources.[22] Finally, Section V identifies shortcomings in the current regulatory processes and offers potential safeguards to better protect the integrity of Hawai‘i’s natural and cultural resources by improving the State’s Environmental Impact Statement Law

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is being developed on a continuing basis. As such, the focus of the comment is to stress the importance of and propose recommendations on approaching renewable energy projects with cultural sensitivity, using the Wind Project merely as an example. *See infra* Part III for more information.

[18] *See infra* Part VI.A for more information.

[19] *See infra* Part V.

[20] *See infra* Part II.

[21] *See infra* Part III.

[22] *See infra* Part IV.

– thus facilitating movement towards restorative justice for Kānaka Maoli communities.[23]

I. PROVIDING A FRAMEWORK: ENVIRONMENTAL JUSTICE FOR KĀNAKA MAOLI COMMUNITIES

"Environmental justice" is generally understood as requiring the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[24] The environmental justice movement started in about 1994 when President Clinton signed Executive Order 12898 ("Executive Order"), which focused federal attention on the environmental and human health conditions of underrepresented groups with the goal of achieving environmental protection for all communities.[25] This Executive Order was intended to provide underrepresented groups with access to public information, and to also provide meaningful public participation in matters relating to human health and the environment.[26]

The concept of environmental justice has four general characteristics.[27] The first key concept centers on "improving [the] quality of life [for people of color] by making their communities safe from toxic chemicals, *without sacrificing resources for future generations*."[28]

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[23] *See infra* Part V.

[24] 2006 Haw. Sess. Laws Act 294, § 1 at 1189-90; *see also* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

[25] *Id.* Since President Clinton's issuance of Executive Order 12898, the Environmental Protection Agency ("EPA"), as the agency tasked with the protection and enhancement of the environment, has been working to integrate environmental justice initiatives into the Agency's programs, policies, and activities. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, PLAN EJ 2014, http://www.epa.gov/environmentaljustice/plan-ej/index.html (last visited Oct. 29, 2011). In recognition of the 20th anniversary of the issuance of Executive Order 12898, EPA has issued a strategy entitled "Plan EJ 2014" to help integrate environmental justice initiatives into EPA's day to day activities. *Id.* The goals of the plan are threefold: (1) to protect health in communities over-burdened by pollution, (2) to empower communities to take action to improve their health and environment, and (3) to establish partnerships with local, state, tribal and federal organizations to achieve healthy and sustainable communities. *Id.*

[26] 2006 Haw. Sess. Laws Act 294, § 1 at 1189-90; *see also* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

[27] Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 316 (2001); *see* Chasid M. Sapolu, *Dumping on the Wai'ānae Coast: Achieving Environmental Justice through the Hawai'i State Constitution*, 11 ASIAN-PAC. L. & POL'Y J. 204, 206-18 (2009) (discussing the environmental justice movement and its progression).

Second, the environmental justice framework focuses on the "disproportionate distribution of hazardous facilities and on the re-siting of those facilities."[29] This concept tends to focus on the physical location and relocation of polluting facilities, and not on the social and cultural effects on underrepresented communities.[30] Third, the framework seeks to ensure that communities of color have equal access to and representation in the administration of environmental laws and policies.[31] Environmental justice seeks to "level the playing field" with regard to environmental issues by opening communications between environmental and underrepresented groups in order to improve access to legislative, administrative, and judicial forums.[32] Finally, the environmental justice framework emphasizes a "community-based movement to bring pressure on the person or agency with decision-making authority."[33]

A. *Incorporating Environmental Justice into Hawai'i's EIS Process: Racializing Environmental Justice*

Although the environmental justice framework attempts to remedy "environmental racism,"[34] the established framework is not wholly applicable to Hawai'i's unique historical, social, and cultural landscapes.[35]

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[28] Yamamoto & Lyman, *supra* note 27, at 316-17 (emphasis added).

[29] *Id.* at 317.

[30] *Id.* at 318.

[31] *Id.*

[32] *Id.* at 318-19.

[33] *Id.* at 319.

[34] As part of the "environmental justice" movement, Dr. Benjamin Chavis coined the term "environmental racism" to describe the disproportionate environmental impact on racial minorities, focusing primarily on "toxic waste facilities[,] . . . poisons and pollutants in [the communities of] people of color." Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 289 (1995). This definition has since been broadened to focus on the unequal *results* of the practice. *See id.* at 290. Professor Robert Bullard, a sociologist who is the most widely published commentator on the subject, describes environmental racism as "[a]ny policy, practice, or directive that, *intentionally or unintentionally*, differentially impacts or disadvantages individuals, groups, or communities based on race or color; [as well as the] exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and staffs. *Id.* at 289-90 (emphasis and brackets in original).

[35] *See* Yamamoto & Lyman, *supra* note 27, at 312; *see also*, Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV'T 37, 38 (2007) (explaining that while effective, "the [environmental justice] framework often fails to comprehend complex

The problem with the general environmental justice framework is that it "undercuts environmental justice struggles by racial and indigenous communities because it tends to foster misassumptions about race, culture, sovereignty, and the importance of distributive justice."[36] Such misassumptions tend to gloss over things of central importance to these communities, including Kānaka Maoli.[37] For Kānaka Maoli, environmental justice is about their spiritual and economic connections to the environment, cultural resurrection, and political nationalism.[38] It is about preventing degradation to Kānaka Maoli communal, economic, and spiritual interests.[39] Thus, rather than taking a "one size fits all" approach, the established environmental justice framework needs to be reexamined and narrowly tailored for each indigenous community, in order to best accomplish both the environmental, cultural, and political needs and goals of these communities.

As proposed by Professor Eric K. Yamamoto,[40] the "racializing environmental justice" approach seeks to expand the standard environmental justice framework to "recognize that each racial group is differently situated according to its specific socio-economic needs, political power, cultural values, and group goals."[41] Racializing environmental justice reveals the interests of Kānaka Maoli communities by inquiring into the historical and contemporary social influences on Kānaka Maoli identity.[42] The "racializing environmental justice"

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issues of indigenous peoples' spiritual, social, and cultural connections to the land and natural environment.").

[36] Yamamoto & Lyman, *supra* note 27, at 320. For example, the general environmental justice framework "tends to assume that all racial and indigenous groups, and therefore racial and indigenous group needs, are the same." *Id.* at 323. Additionally, the framework "also assumes that fair distribution of physical burdens is the primary, if not sole, means of achieving environmental justice." *Id.* at 322. Finally, the framework assumes that for all indigenous communities, "a hazard-free physical environment is their main, if not only, concern." *Id.* at 320. Rather, for Kānaka Maoli, as well as other indigenous peoples, environmental justice is "largely about cultural and economic self-determination as well as about belief systems that connect their history, spirituality, and livelihood to the natural environment." *See* MacKenzie et al., *supra* note 35, at 38.

[37] Yamamoto & Lyman, *supra* note 27, at 320.

[38] *Id.* at 358.

[39] *Id.*

[40] Eric K. Yamamoto is an internationally recognized law professor who teaches at the University of Hawai'i William S. Richardson School of Law.

[41] Yamamoto & Lyman, *supra* note 27, at 359.

[42] *Id.* at 358.

approach explores the tension between Kānaka Maoli spiritual connections to the environment and the economic use and development of those resources.[43]

The gaps in Hawai'i's current process for assessing the cultural impacts of proposed activities on cultural resources requires the larger community to begin rethinking established environmental frameworks.[44] This necessitates the understanding and treatment of racial and native communities and their relationship to the environment "with greater complexity based on each community's cultural, historical, and political experience and its specific needs and goals."[45]

B. *Defining the "Injustice"*

> On the ancient burial ground of our ancestors, glass and steel shopping malls with layered parking lots stretch over what were once the most ingeniously irrigated taro lands, lands that fed millions of our people over thousands of years. Large bays, delicately ringed long ago with well-stocked fishponds, are now heavily silted and cluttered with jet skis, windsurfers, and sailboards. Multistory hotels disgorge over six million tourists a year onto stunningly beautiful (and easily polluted) beaches, closing off access to locals. On the major islands of Hawai'i, Maui, O'ahu, and Kaua'i, meanwhile, military airfields, training camps, weapons storage facilities, and exclusive housing and beach areas remind the Native Hawaiian who owns Hawai'i: the foreign, colonial country called the United States of America.[46]

The overthrow of the Kānaka Maoli government in 1893 and the forced annexation to the United States in 1898 began a long period of political and cultural suppression.[47] Even before the illegal overthrow of

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[43] *Id.*

[44] *Id.* at 360.

[45] *Id.*

[46] HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 2-3 (1999).

[47] *Id.* at 65. American businessmen were successful in infiltrating the Kānaka Maoli Government and organized themselves into an all-white regime recognized by the American Government as the "Provisional Government" of Hawai'i. *Id.* at 12. In 1893, confronted with the Provisional Government and the looming presence of U.S. military

the Hawaiian government, a survey of Kānaka Maoli history, beginning with the first foreign contact in 1778 through the present, reveals a long history of the upheaval of the traditional Maoli society: culturally, socially, and economically.[48] Colonialism in Hawai‘i not only worked to

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forces, Queen Lili‘uokalani ceded her authority to the United States of America on January 17, 1893 under protest in an attempt to "avoid any collision of armed forces and perhaps the loss of life," until such time as the U.S. Government would reinstate her as the constitutional sovereign of the Hawaiian Islands. *Id.* at 12-13; *see* LILI‘UOKALANI, HAWAI‘I’S STORY BY HAWAI‘I’S QUEEN 387-88 (1990) (citing a statement made by Queen Lili‘uokalani to U.S. Minister Blount). Then-President Grover Cleveland expressed his sentiments about the annexation treaty, explaining: "[b]y an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done[,] which a due regard for our national character as well as the rights of the injured people requires *we should endeavor to repair*." TRASK, *supra* note 46, at 15 (emphasis added). Hawai‘i was nevertheless illegally annexed to the U.S. government despite the great will of the people as expressed in a myriad of anti-annexation petitions. TRASK, *supra* note 46, at 13-15; *see also* James Blount, *Report of the Commissioner to the Hawaiian Islands*, Exec. Doc. No. 47, 53rd Congress, 2nd sess. 445-61 (1893); NOENOE SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 4 (2004) ("The [annexation] petition and the story of the several hui that organized it," affirmed that the Kānaka Maoli "had not stood by idly, apathetically, while their nation was taken from them.").

[48] There are many factors that together contributed to the cultural upheaval of the Kānaka Maoli. The missionary movement beginning in 1800's worked to suppress the "indulgent and naturalistic practices" of the Kānaka Maoli and instead urged Kānaka Maoli conformity with the "rigidly puritanical culture" of the Protestant and Catholic missionaries. *See* ANDREW W. LIND, HAWAII'S PEOPLE 4 (4th ed.1980). Meanwhile, introduced epidemics ravaged the Kānaka Maoli communitites and were responsible for the collapse of over ninety percent of the Native Population. OSORIO, *supra* note 7, at 9-10. As the Kānaka Maoli struggled to cope with the political complexities brought about by foreign threats, mass disease, and social disorder, their chiefs executed changes in the administration of government and in the traditional Maoli religion. *See id.* at 8. While Kānaka Maoli saw the growing presence of foreigners in the Islands as contributing to the miserable fortunes of their people, the foreigners and their new religion promised to rescue the Kānaka Maoli and their chiefs from the social breakdown. *Id*. at 11. The Kānaka Maoli chiefs initiated a system of laws based on Christian morality, which altered the traditional morality and custom, and caused the Kānaka Maoli to give up on their own culture and values. *Id.* Reliance on the advice of foreigners brought about the institution of a Western economic system that ultimately dispossessed the Natives of land, identity, and nationshood. *Id*. at 13. The very fabric of Kanaka Maoli society was ripped apart and replaced by a completely foreign institution.

As foreigners came to dominate the sandalwood trade beginning in the 1820s, and traditional lands were quickly transferred to foreign ownership and burgeoning sugar planataions. TRASK, *supra* note 49, at 6-7. The advent of a highly profitable planatation economy exploited Hawai‘i's finite natural resources and continued to transform Maoli society as plantations imported a foreign workforce. *See* LIND, at 5. The social hierarchy that developed in Hawai‘i as a result of the dominating sugar and pinapple industry had the effect of creating a "fairly distinct barrier of social distances [that] separated the proprietary whites from the large mass of nonwhite laborers." *Id.* at 7. The eventual decline of plantation agriculture gave rise to the commercial, tourist, and military

seize native lands and government, but isolated and removed Kānaka Maoli from their traditions, ideas, and institutions.[49]

Western contact brought catastrophic social change for Kānaka Maoli in the form of foreign diseases, which caused a major collapse in the native population – decimating the Kānaka Maoli population from approximately one million at the arrival of Westerners in 1778 to 39,000 by the end of the nineteenth century.[50] As foreign-introduced diseases ravaged Kānaka Maoli communities, foreigners introduced a new religion "promising life when death was everywhere."[51] This new belief system disrupted the spiritual beliefs that held Maoli society together for centuries and transcended into every aspect of Kānaka Maoli society.[52] After successfully implementing a new religion, missionaries began to consider

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exploitation of the Hawaiian Islands that is apparent in Hawai'i's society today. *See id.* at 77; TRASK, *supra* note 46, at 16-17 (noting "[u]nder foreign control, we have been overrun by settlers; missionaries and capitalists . . . adventurers and, of course, hordes of tourists, nearly seven million by 1998. Preyed upon by corporate tourism, caught in a political system where we have no separate legal status . . . to control our land base . . . In the meantime, shiploads and planeloads of American military forces continue to pass through Hawai'i . . . Fully one-fifth of our resident population is military, causing intense friction between locals, who suffer from Hawai'i's astronomically high cost of housing and land, and the military, who enjoy housing and beaches for their exclusive use."). This brief history gives breadth to the struggle of Maoli society, culture, and control over Kānaka Maoli natural and cultural resources.

[49] *See* OSORIO, *supra* note 7, at 3.

[50] *See generally,* DAVID STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT (1989); *see also* OSORIO, *supra* note 7, at 9-10; Troy Andrade, Native Hawaiian Redress 3 (Oct. 20, 2009) (unpublished article) (on file with author). There has long been disagreement as to the true numbers of the Kānaka Maoli population upon the arrival of the first documented foreigner, Captain James Cook, in 1778. *See* OSORIO, *supra* note 7, at 10. These numbers range from upwards of one million to a minimum of 500,000. *Id.* Even if the low range is used, the massive depopulation that occurred over the course of a century effectively decreased the Maoli population by ninety-two percent. *Id.*

[51] OSORIO, *supra* note 7, at 13. Kānaka Maoli believed that the rapid depopulation was a sign of the loss of pono in Hawaiian society. KAME'ELEIHIWA, *supra* note 3, at 140. From the Maoli perspective, pono is defined as "perfect harmony," and denotes a universe in perfect harmony. *Id.* at 25. This led Kānaka Maoli to believe that the 'Aikapu system, the previous system of governance in Hawaiian society, had failed and the only alternative for the governing chiefs was to accept the pono that missionaries promised in the form of the Christian religion. *See generally id.* at 137-47.

[52] OSORIO, *supra* note 7 at 10; *see* KAME'ELEIHIWA, *supra* note 3, at 144. The missionaries convinced the ali'i, or chiefs, that all Hawaiian customs were wrong and sinful, and the promise of life could only be obtained by the renunciation of these customs and by obedience to Jesus Christ. KAME'ELEIHIWA, *supra* note 3, at 144. As more ali'i renounced the old traditions and embraced Christianity, the "seed of self-doubt about the worth of Hawaiian culture was planted in the Hawaiian breast." *Id.*

the implications of these changes for their own good and sought to subvert the entire Maoli way of life.[53]

Drastic revisions worked to prohibit behavior that was intrinsically native, such as ʻawa[54] drinking, hula, and a ban on the ʻōlelo makuahine, or mother-tongue of Kānaka Maoli.[55] As the various elements of Maoli society were changing, the destruction of Maoli self-confidence in their own institutions caused them to rely on the power of foreign advice.[56] Western concepts of privatized land proceeded to change the relationship between kānaka, their aliʻi,[57] and the land.[58] With the privatization of previously communal land and water rights, American business interests quickly acquired a monopoly on Hawaiʻi's natural and cultural resources.[59] As large agricultural plantations diverted large amounts of water from Maoli communities, Kānaka Maoli were forced out of their homelands and obligated to replace subsistence lifestyles with Western forms of survival.[60]

As business interests peaked, American entrepreneurs created an all-white regime, recognized by the U.S. government as the "Provisional

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[53] *See* OSORIO, *supra* note 7, at 18-20.

[54] ʻAwa is defined as "[t]he kava (*Piper methysticum*)." PŪKUʻI & ELBERT, *supra* note 5, at 33. The root was a source of a narcotic drink used in ceremonies and it was also used medicinally. *Id.*

[55] OSORIO, *supra* note 7, at 13. ʻŌlelo makuahine is literally defined as "mother tongue" and often refers to the Hawaiian language. PŪKUʻI & ELBERT, *supra* note 5, at 284.

[56] OSORIO, *supra* note 7, at 13.

[57] Aliʻi is defined as "chief," or "monarch." PŪKUʻI & ELBERT, *supra* note 5, at 20.

[58] OSORIO, *supra* note 7, at 20. The privatization of land in Hawaiʻi was accomplished via a "drastic transformation in the political authority of the chiefs, especially their control of the land." *Id.* Traditionally land was the responsibility of the Mōʻī, who placed lesser aliʻi in charge of managing the land and the people on it. *Id.* at 47. The restructuring of the traditional land tenure system separated the makaʻāinana, or commoners, from their aliʻi and forced upon them a sense of individual liability. *Id.* at 49. The mechanism created to provide for private ownership of previously communal land worked to separate foreign and Hawaiian worldviews, leaving very little that was recognizably Hawaiian. *Id.* at 49-50. As owners of land for the first time, makaʻāinana were easily divested of their property "without the weight of tradition, custom, konohiki, or Mōʻī to intercede on their behalf." *Id.* at 49.

[59] D. KAPUAʻALA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAIʻI 6 (2009).

[60] *See id.*

Government" of Hawai'i, which moved briskly to secure annexation of Hawaiian lands to American forces.[61] To prevent any loss of life, the sovereign of the Hawaiian Kingdom yielded her authority under protest until such a time that the U.S. Government would reinstate her.[62] In an address to Congress, President Grover Cleveland asserted that the U.S. Government "should endeavor to repair" the "substantial wrong" that they had committed against Kānaka Maoli and their government.[63] Despite these sentiments, shortly after President Cleveland left office, the Provisional Government seized and ceded native lands to the United States, who then unilaterally annexed Hawai'i as a territory in 1898 by virtue of a resolution rather than by treaty.[64] As a condition of Hawai'i's admission into the Union, the State of Hawai'i agreed to hold certain lands granted to it by the United States in a public land trust, which is known as the "ceded lands trust."[65] In 1959, without acknowledging the controversy surrounding the illegal overthrow, the Hawai'i Admission Act was passed and signed into law, making Hawai'i the United States of America's 50th State.[66]

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[61] *See* TRASK, *supra* note 46, at 12.

[62] LILI'UOKALANI, *supra* note 47, at 387 (detailing Queen Lili'uokalani's statement made to U.S. Minister James Blount). In this statement, Lili'uokalani "solemnly protest[ed] against any and all acts done against myself and the constitutional government of the Hawaiian kingdom." *Id*. She further yielded to the "superior force of the United States of America" in an attempt to "avoid any collision of armed forces, and perhaps the loss of life . . . until such time as the Government of the United States shall . . . undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands." *Id.* at 387-88.

[63] TRASK, *supra* note 46, at 15.

[64] *Id.* at 16; *see also* NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004); Andrade, *supra* note 50, at 5. There remain questions today regarding the legality of the annexation of Hawai'i.

[65] An Act to Provide for the Admission of the State of Hawai'i into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959). The lands referred to in the Admission Act are defined as "the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation . . . or that have been acquired in exchange for lands or properties so ceded." *Id.* § 5(g). The bulk of these lands are comprised of Crown and Government lands. *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 9 (2008) ("Under the Republic of Hawaii and during the territorial and statehood periods, the Kingdom's Government Lands and Crown Lands were joined together and managed simply as the Ceded Lands or the Public Lands Trust."). While the Government Lands were designed to be public lands in which to provide for the general needs of the population, the Crown Lands were originally part of the personal domain of Kamehameha III and evolved into a resource designed to support the Hawaiian Monarchs. *Id.* The Monarchs understood that these lands were a collective resource and should be used to support the common Hawaiians. *Id.* at 10.

Despite the promises that Statehood offered,[67] the devastating consequences of the illegal overthrow, annexation, and statehood continued.[68] The crippling consequences of colonialism separated Kānaka Maoli from their one hānau[69] as well as their traditions, and worked to psychologically and spiritually harm the Indigenous People's will, confidence, and trust.[70] Thus, Hawai'i's economic, social, and political history of the past two centuries can be told largely in terms of the "persistent search for more effective means of supporting human life and of capitalizing on its limited land and sea resources within the context of a rapidly changing world community."[71]

In 1993, the U.S. Government passed the Apology Resolution recognizing the historical injustice and continuing wrongs inflicted upon Kānaka Maoli.[72] This federal action acknowledged the historical

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[66] An Act to Provide for the Admission of the State of Hawai'i into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959). *See also*, Andrade, *supra* note 50, at 6. This was done without offering Kānaka Maoli other decolonization options such as independence or commonwealth status. *Id.*

[67] Statehood helped change the legal landscape of the early heavily westernized courts in Hawai'i. *See* SPROAT, *supra* note 59, at 6 (noting that after statehood, "judges were appointed locally instead of being chosen from Washington D.C., as they were during the Territorial period."). *Id.* This provided for judges that were "better versed in local laws and issues, including Hawaiian custom and tradition, which provide a foundation for Hawai'i's common law." *Id.*; *see also infra* Part IV.

[68] *See supra* Part I.B.

[69] One hānau is defined as "birthplace" or "homeland." PŪKU'I & ELBERT, *supra* note 5, at 289.

[70] This concept has been described as the "cultural bomb" by some scholars. *See* NGUGI WA THIONG'O, DECOLONIZING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE 3 (1986). As Ngugi wa Thiong'o has explained, "the biggest weapon wielded . . . by imperialism . . . is the cultural bomb. The effect of the cultural bomb is to annihilate a people's belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves." *Id.*

[71] LIND, *supra* note 48, at 1.

[72] Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter "Apology Resolution"]. In the Apology Resolution, Congress "acknowledges the historical significance of [the illegal overthrow of the Kingdom of Hawaii] which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;" recognized and commends "efforts of reconciliation[;]" "apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow . . . and the deprivation of the rights of Native Hawaiians to self-determination;" "expresses its commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation[;]" and urges the President of the United States to also acknowledge the ramifications and to "support reconciliation efforts between the

significance of the illegal overthrow and expressed a strong congressional commitment to support reconciliation and restoration efforts.[73] In acknowledging that the Kānaka Maoli "are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with the own spiritual and traditional beliefs, customs, practices, language, and social institutions," the apology resolution paves the way for federal and state reconciliation efforts to preserve and protect Kānaka Maoli rights in their land and natural and cultural resources.[74]

C. *The Enactment of Natural and Cultural Resource Protections as a Mechanism for Restorative Justice for Kānaka Maoli*

The emergence of the "Hawaiian Renaissance" in the 1970s[75] spurred action at both the federal and state levels.[76] State leaders at the 1978 State Constitutional Convention responded by reaffirming the State's obligation to protect Kānaka Maoli rights "customarily and traditionally exercised for subsistence, cultural and religious purposes," by incorporating it into the article XII, section 7 of the Hawai'i State

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United States and the Native Hawaiian people." *Id*.

[73] *Id*. Within the apology resolution, Congress expressed a "strong commitment of reconciliation and urged the President to apologize for the United States' active role in the illegal 'conspiracy' to overthrow the . . . Kingdom of Hawai'i," and a commitment to "support reconciliation efforts between the United States and the native Hawaiian people." Andrade, *supra* note 50, at 7-8.

[74] *Id.*

[75] By the mid-1960s, a renewed interest in traditional Hawaiian arts and culture was beginning to emerge in Hawai'i. Michael Tsai, *Hawaiian Renaissance*, HONOLULU ADVERTISER, Aug. 16, 2009, http://the.honoluluadvertiser.com/article/2009/Aug/16/In/hawaii908160330.html (last visited Sept. 1, 2011). As Hawaiian arts and culture were making a comeback, young Native Hawaiians inspired by the civil rights movement of the 1960s and the worldwide struggles by indigenous peoples to attain social justice turned their attention to land struggles brought about by the tourism-propelled development boom of the 1960s and '70s. *Id.* From the early 1970s, Native Hawaiians initiated a sovereignty movement for land reclamation, cultural resurrection and self-governance. Andrade, *supra* note 50 at 7. The Hawaiian movement "evolved from a series of protests against land abuses, through various demonstrations and occupations to dramatize the exploitative conditions of Hawaiians, to assertions of Native forms of sovereignty based on indigenous birthrights to land and sea." TRASK, *supra* note 46, at 66. At this time, the "merging of land-rich but capital-poor landowners with out-of-state corporations became a familiar pattern" and resort and residential developments "spurred antidevelopment battles wherever it occurred." *Id.* at 67.

[76] TRASK, *supra* note 46, at 69.

Constitution.[77] This breathed new life into protections for Hawai‘i’s natural and cultural resources.[78] In Hawai‘i, the definition of environmental justice incorporates an “emphasis on the responsibility of every person in Hawai‘i to uphold traditional and customary Native Hawaiian practices that preserve, protect, and restore the ‘aina [sic] for present and future generations.”[79]

In 2000, Act 50 amended Hawai‘i’s EIS process, which is one of the primary processes for evaluating impacts to Hawai‘i’s natural resources.[80] The Act 50 amendments required a comprehensive assessment of any impacts on the “economic welfare, social welfare, and *cultural practices of the community*.”[81] To effectuate this policy, the State must recognize the importance of traditional Kānaka Maoli values and practices so that past and continuing harms to natural and cultural resources may be considered and mitigated.[82] Without accounting for environmental justice concerns in Hawai‘i’s EIS process, the goals articulated by the State Legislature and courts regarding the protection of cultural resources, practices, and beliefs will never be fully realized nor will Kānaka Maoli ever possess a sense of restorative justice for the past wrongs committed against their people, land, government, and culture.[83]

II. THE CULTURAL AND HISTORICAL SIGNIFICANCE OF WIND AND WATER TO KĀNAKA MAOLI

Kānaka Maoli have a special connection to the natural elements, such as the wind and water, which goes above and beyond the general public’s affinity for these elements.[84] Deeply-rooted values of respect and

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[77] HAW. CONST. art. XII, § 7.

[78] *See infra* Part IVIII.B (discussing other protections given to natural and cultural resources, including HAW. REV. STAT. §§ 1-1, 7-1 (2009)).

[79] Leslie Kahihikolo, State of Haw. Envtl. Council, Hawai‘i Environmental Justice Initiative Report 4-6 (2008).

[80] *See infra* Part VIV.B for more information on Hawai‘i’s Environmental Impact Statement laws.

[81] 2000 Haw. Sess. Laws 93 (codified in HAW. REV. STAT. § 343-2 (2010)).

[82] *See infra* Part VIIII.

[83] *See infra* Part V.

[84] For a discussion on the Kānaka Maoli connection to the natural elements, *see generally* THE KUMULIPO: A HAWAIIAN CREATION CHANT (Martha Warren Beckwith ed. & trans., 1951) [hereinafter THE KUMULIPO].

responsibility for the ʻāina and its resources are prevalent in and fundamental to Maoli culture.[85]

A. *Kumulipo: Kānaka Maoli's Source of Origin*

The Kumulipo is the sacred creation chant of a family of Hawaiian aliʻi[86] that traces that family's history to the beginning of the world.[87] The Kumulipo articulates and reveals the connection between sky and earth, earth and ocean, ocean and land, land and kānaka, kānaka and gods, and returns again to create the interrelationship of all things in an everlasting continuum.[88] It is the genealogy that connects Kānaka Maoli to a host of natural and cultural resources.[89] Engrained in the Kumulipo is a dichotomy between species from mauka and makai; every species on land has a counterpart in the sea.[90] It is this balance that allows the natural environment to achieve a state of pono.[91] Although traditional management systems are no longer in place to protect Hawaiʻi's natural resources, the principles of aloha ʻāina and mālama ʻāina are still prevalent today.[92] Many believe that if you take care of the land, the land will take care of you.[93] This deep affinity for the ʻāina is derived from the

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[85] *See* KAMEʻELEIHIWA, *supra* note 3, at 25.

[86] *See* PŪKUʻI & ELBERT, *supra* note 5, at 20.

[87] *See generally* THE KUMULIPO, *supra* note 84.

[88] Pualani Kanakaʻole Kanahele, *Kūʻula Kumulipo*, http://www.edithkanakaolefoundation.org/projects/kumulipo/index.htm (last visited Mar. 3, 2010).

[89] *Id*.

[90] *See generally* THE KUMULIPO, *supra* note 84.

[91] For Kānaka Maoli, this balance and harmony is known as "pono." *See* KAMEʻELEIHIWA, *supra* note 3, at 25. Pono is defined as "true condition or nature," "in perfect order," and "goodness." PŪKUʻI & ELBERT, *supra* note 5, at 340. *See also*, KAMEʻELEIHIWA, *supra* note 3, at 25 ("[Pono] is often translated in English as 'righteous,' but actually denotes a universe in perfect harmony.").

[92] KAMEʻELEIHIWA, *supra* note 3, at 33 ("[N]o matter how corrupting and powerful the capitalist pressures for the private ownership of '*Āina* might have been, the concept of *mālama* endured and still endures in modern times."). Kānaka Maoli possess a spiritual as well as genealogical connection to the natural environment. This connection is embodied in the Kumulipo, the cosmogonic genealogy that traces the Kānaka Maoli to the very origins of the earth. *See generally* THE KUMULIPO, *supra* note 84.

[93] KAMEʻELEIHIWA, *supra* note 3, at 25.

Kumulipo and the spiritual and genealogical connection possessed by every Kānaka Maoli.[94] It is the Kumulipo, specifically the genealogy of Papa and Wākea, which inherently connects the Kānaka Maoli to the ʻāina.[95] Although the Kumulipo is a genealogical prayer chant linking a specific royal family to the creation of the Earth, the Kumulipo applies to all Maoli as a reflection of "old Hawaiian social life and philosophy in its treatment of the birth of life on earth and the myths of the gods."[96]

B. *"I paʻa i ke Kalo ʻaʻole ʻoe e puka; If it had ended with the Kalo you would not be here."*[97]

Kānaka Maoli believe that Hāloanaka, the first kalo plant, was the elder sibling of the first Kānaka. Had it ended with the Kalo, the Kānaka Maoli people would never have existed.[98] Many genealogical lines are incorporated into the Kumulipo,[99] including that of Papa, *earth-mother*, and Wākea, *sky-father*. The genealogy of Papa and Wākea is critical in forming the relationship between Maoli and the ʻāina.[100] The mating of Papa and Wākea resulted in the creation of most of the principal Hawaiian Islands.[101] Their mating also produced a daughter, Hoʻohōkūkalani.[102] In a subsequent nīʻaupiʻo[103] mating between Wākea and Hoʻohōkūkalani,

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[94] *See generally* THE KUMULIPO, *supra* note 84.

[95] *See infra* Part I.B.

[96] THE KUMULIPO, *supra* note 84. The Kumulipo establishes some of the foundational values, such as mālama ʻāina and aloha ʻāina, that make up the fabric of Hawaiian culture.

[97] MARY KAWENA PŪKUʻI, ʻŌLELO NOʻEAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 135 (1983)

[98] *Id.*

[99] *See generally* THE KUMULIPO, *supra* note 84.

[100] *See* KAMEʻELEIHIWA, *supra* note 3, at 23.

[101] *Id.* Papa and Wākea are said to be the parents of the islands of Hawaiʻi, Maui, Kauaʻi, Niʻihau, as well as the islands of Lehua and Kaʻula. *Id.*

[102] *Id.*

[103] Nīʻaupiʻo is defined as "offspring of the marriage of a highborn brother and sister, or half-brother and half-sister." PŪKUʻI & ELBERT, *supra* note 5, at 265. Incest, from the Maoli perspective, is by definition a formula for creating divinity; further, the very act of incest is proof of divinity because it was reserved only for the highest classes of aliʻi. KAMEʻELEIHIWA, *supra* note 3, at 40.

Hāloanaka was born.[104] Hāloanaka, a still-born offspring, subsequently became the first kalo plant.[105] A second offspring, Hāloa, eventually became the progenitor of all Kānaka Maoli.[106] This relationship establishes the inherent spiritual and genealogical connection that Kānaka Maoli have to the ʻāina: Hāloa as the elder sibling, and Kānaka Maoli as the younger sibling.[107] In traditional Hawaiian society, it was the duty of younger siblings and junior lineages to love, honor, and serve their elders; the relationship between Kānaka (man) and Hāloa (ʻāina) establishes the Kānaka Maoli cultural values of mālama ʻāina and aloha ʻāina that survive today.[108]

C. *Cultural Significance of the Wind*

Kānaka Maoli cultivate a spiritual relationship with their natural environment.[109] They believe that natural phenomena such as wind, clouds, sea, and sky are physical manifestations of beings that dwell upon the earth much longer than kānaka themselves.[110] This affinity extends to both the tangible and intangible.[111] Every type of water, rain, and wind are individually named.[112] With regard to wind specifically, Kānaka Maoli

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[104] KAMEʻELEIHIWA, *supra* note 3, at 24.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 25.

[108] *Id.*

[109] *See* THE KUMULIPO, *supra* note 84.

[110] ANDRADE, *supra* note 50, at 23.

[111] *See* THE KUMULIPO, *supra* note 84.

[112] The names given to these resources "reflected their particular character and nature and contain traditional knowledge accumulated by Hawaiian ancestors in utilizing the natural resources of these areas, providing [Kānaka Maoli] with information they need to understand and adapt to the qualities and character of the land in which they live." DAVIANNA PŌMAIKAʻI MCGREGOR, NĀ KUAʻĀINA: LIVING HAWAIIAN CULTURE 5 (2007). The names of places and natural elements "not only provide a profound sense of identity with the ʻāina or land and natural resources, they also convey a sense of responsibility to provide stewardship of the area where they live." *Id. See generally* MOSES K. NAKUINA, THE WIND GOURD OF LAʻAMAOMAO (1990). Every wind of the principle Hawaiian Islands are individually named according to its location and individual characteristics. *Id.* Many rains are also named and associated poetically with particular origins and characteristics of the rain with regard to its effect on the flora and fauna, and on the kānaka themselves. *See also* PŪKUʻI & ELBERT, *supra* note 5, at 361.

gave a detailed relation of all the winds that ever blew throughout the islands, including their names, attributes, and localities.[113] Winds were revered and honored by Kānaka Maoli in the form of ʻōlelo noʻeau, moʻolelo,[114] oli,[115] and mele.[116]

The epic of Pākaʻa, as written in *The Wind Gourd of Laʻamaomao*, epitomizes the Kānaka Maoli relationship with the wind.[117] Laʻamaomao was worshipped as an ʻaumakua[118] and exalted as a demigod.[119] His gourd was believed to contain all the winds of Hawaiʻi, each of which could be called forth by chanting their names.[120] The gourd itself was the embodiment of Lono, the Hawaiian god of agriculture and fertility:[121] "Lono is the gourd; the cosmic gourd is the heavens whence come winds, clouds, and rain."[122] In the epic of Pākaʻa, the gourd, along with the wind chants naming the dozens of local winds across the Hawaiian Islands, was passed down from Laʻamaomao.[123]

Similarly, kai (sea) was also named according to locale and characteristic. *See, e.g., id.* at 115 (citing examples of different types of kai, including for example, "kai ʻewalu," which is a poetic expression referring to the channels between the islands).

[113] ABRAHAM FORNANDER, ANCIENT HISTORY OF THE HAWAIIAN PEOPLE 112 (1996).

[114] A moʻolelo is a "story, tale, myth, history, tradition, literature, legend," etc. PŪKUʻI & ELBERT, *supra* note 5, at 254.

[115] An oli is a "chant that was not danced to." *Id.* at 285.

[116] A mele is a "song, anthem, or chant of any kind; poem, poetry." *Id.* at 245; *see generally*, NAKUINA, *supra* note 112.

[117] *See generally* NAKUINA, *supra* note 112.

[118] An ʻaumakua refers to "family or personal gods, deified ancestors who might assume the shape of sharks (all islands except Kauaʻi), owls (as at Mānoa, Oʻahu and Kaʻū and Puna, Hawaiʻi), hawks (Hawaiʻi), ʻelepaio, ʻiwi, mudhens, octopuses, eels, mice, rats, dogs, caterpillars, rocks, cowries, clouds, or plants. PŪKUʻI & ELBERT, *supra* note 5, at 32. A symbiotic relationship existed; mortals did not harm or eat ʻaumākua, and ʻaumākua warned and reprimanded mortals in dreams, visions, and calls." *Id.*

[119] FORNANDER, *supra* note 113, at 53.

[120] NAKUINA, *supra* note 112, at viii.

[121] *Id.* at viii-ix.

[122] E.S.C. HANDY & E.G. HANDY, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT 220 (1972).

[123] *See* NAKUINA, *supra* note 112.

D. *Cultural Significance of the Sea*

He ui, he nīnau,	*A query, a question,*
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E ui aku ana au iā ʻoe	*This question I ask of you:*
Aia i hea ka Wai a Kāne?	*Where, pray, is the water of Kāne?*
Aia i kai, i ka moana,	*Yonder, at sea, on the ocean,*
I ke Kualau, i ke ānuenue	*In the driving rain, in the heavenly bow,*
I ka pūnohu, i ka ua koko,	*In the piled-up mist wraith, in the blood-red rainfall*
I ka alewalewa;	*In the ghost-pale cloud form;*
Aia i laila ka Wai a Kāne.	*There is the water of Kāne.*[124]

The traditional mele[125] "He Mele Nō Kāne" exemplifies the place of water in Maoli society and explains that prized waters lie in the land of the gods: under the waves, beyond the horizon, in the heavy clouds supporting the arches of heaven, and in the driving sheets of rain that surround us in our natural environment.[126] In ancient times, water was a procreative force identified with the gods.[127] Kānaka Maoli made their way to the Hawaiian Islands over the vast expanse of the Pacific Ocean.[128] The waters surrounding them not only offered a spiritual connection to

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[124] Excerpt from NATHANIEL B. EMERSON, KA WAI A KĀNE, UNWRITTEN LITERATURE OF HAWAIʻI, THE SACRED SONGS OF THE HULA 257-59 (1964) (kahakō added). "Wai" generally refers to fresh water as opposed to sea water; however, such resources are also found in the "kai." Kai generally refers to sea water and the eight seas. "Nā Kai ʻEwalu" are often poetically used to refer to the channels dividing the eight main Hawaiian Islands. PŪKUʻI & ELBERT, *supra* note 5, at 114.

[125] *See supra* note 116 (defining "mele").

[126] RITA KNIPE, THE WATER OF LIFE: A JUNGIAN JOURNEY THROUGH HAWAIIAN MYTH 11 (1989).

[127] John Castle & Alan Murakami, *Water Rights*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 149 (1991) [hereinafter NATIVE HAWAIIAN RIGHTS HANDBOOK].

[128] FORNANDER, *supra* note 113, at 2-3 ("[F]rom their own genealogies and legends . . . during the first and second centuries of the Christian era many and properly organised [sic] migrations of the Polynesians into the Pacific Ocean took place from various points of the archipelago. . . . that branch of the Polynesian family from which the oldest ruling line of Hawaiian chiefs claim descent arrived at the Hawaiian group during the sixth century of the Christian era. . . . all the principal [island] groups had been occupied and peopled by the Polynesians migrating thither.")

their ancestors but also gave Kānaka Maoli a wealth of resources.[129] Kānaka Maoli gained sustenance from the waters of Kāne and reciprocated their appreciation by imposing strict kapu[130] and took the utmost care to hoʻomālama[131] these valuable resources.[132]

Mālama ʻāina is at the very core of Kānaka Maoli's relationship with the natural environment.[133] In recent years, Kānaka Maoli communities have been shaken by a myriad of large-scale developments that have wreaked havoc on Hawaiʻi's natural and cultural resources.[134] By circumventing protections under the Hawaiʻi's statutory and regulatory frameworks,[135] these projects have seriously impacted the integrity of Maoli resources and have fostered distrust within Kānaka Maoli communities regarding both the developments as well as the Environmental Impact Statement process.[136] This fractured relationship

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[129] MCGREGOR, *supra* note 112, at 15 ("The ocean provides an abundance of food. Subsistence activities continue to be the primary source of sustenance for the [Kānaka Maoli].").

[130] Kapu is defined as a "prohibition." PŪKUʻI & ELBERT, *supra* note 5, at 132. Kānaka Maoli treated their lands and resources with love and respect. MCGREGOR, *supra* note 112, at 14. "If a resource is declining they will observe a *kapu* or restriction on its use until it recovers. . . . An inherent aspect of these practices is conservation to ensure availability of natural resources for present and future generations." *Id.*

[131] Hoʻomālama is defined as "to take care of, tend, maintain, preserve, protect." *Id.* at 232.

[132] MCGREGOR, *supra* note 112, at 16 ("The first rule with regard to the land, ocean, and natural resources is to only take what is needed. Wasting natural resources is strongly condemned. It is also important to protect the ability of living resources to reproduce.").

[133] KAMEʻELEIHIWA, *supra* note 3, at 25.

[134] *See* discussion in Part V, *infra.*

[135] *See e.g.*, Hawaiʻi Environmental Policy Act ("HEPA"), HAW. REV. STAT. ch. 343 (2010). Although the original bill was called "A Bill for an Act Relating to Environmental Impact Statements," 1974 Haw. Sess. L. Act 246, at 706, and HRS chapter 343 is entitled "Environmental Impact Statements," the law has long been referred to as the Hawaiʻi Environmental Policy Act, short formed as "HEPA." Sierra Club v. Dep't of Transp., 115 Hawaiʻi 299, 304 n.4, 167 P.3d 292, 297 n.4 (2007). HEPA was patterned after the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321-4370(f) (2006), and requires that the government give systematic consideration to the environmental, social, cultural, and economic consequences of proposed development projects prior to allowing construction to begin. *See id.* at 299, 167 P.3d at 306.

[136] An "environmental impact statement" is defined as

An informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects

will prove challenging for proponents and developers of the Interisland Wind and Undersea Cable Project,[137] whose project purports to further impact the Kānaka Maoli relationship with the ʻāina. In conjunction with the Honolulu mass-transit rail project,[138] the Interisland Wind and Undersea Cable project comes at a critical time in Hawaiʻi's history and has the potential to significantly reshape Hawaiʻi's natural and cultural landscapes forever.[139]

III. THE PUSH TO "GO GREEN": HAWAIʻI'S INTERISLAND WIND PROJECT

There is no question that something must be done about Hawaiʻi's ever-growing energy needs.[140] The State of Hawaiʻi's dependence on fossil fuels far exceeds the rest of the country.[141] In 2007, Hawaiʻi spent $750 million on fossil fuels,[142] and petroleum currently provides nearly

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of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

HAW. REV. STAT. § 343-2 (2010).

[137] *See infra* Part III for more information on the Interisland Wind Project.

[138] *See generally* Natasha Baldauf, *One-Way Track to Desecration: Implications of the Honolulu Rail's Failure to Comply with Protections Mandated for Native Hawaiian Burials*, 12 ASIAN-PAC. L. & POL'Y J. 141 (2010). *See* Baldauf, *at* 158 n.121 (referring to CITY AND COUNTY OF HONOLULU, HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT DRAFT ENVIRONMENTAL IMPACT STATEMENT, CHAPTER ONE, BACKGROUND, PURPOSE AND NEED, 1-1 to 1-3 (2008), *available at* http://www.honolulutransit.org/library/files/chapter%201.pdf).

[139] The author notes that given Kānaka Maoli's traditional lifestyles, many assume that renewable energy projects would be favorably looked upon. However, to do so at the expense of the natural and cultural resources, when other alternatives have not yet been fully analyzed, directly contradicts the Kānaka Maoli value of mālama ʻāina.

[140] *See generally* U.S. Energy Information Administration, *Independent Statistics and Analysis*, http://tonto.eia.doe.gov/state/state_energy_profiles.cfm?sid=HI (last visited Nov. 10, 2011) (noting Hawaiʻi's high consumption and dependence on fossil fuels) [hereinafter U.S. Energy Information].

[141] *Id.*

[142] Katie Falloon, *Yalies to Study Environment in Hawaii*, YALE DAILY NEWS,

nine-tenths of all the energy consumed in Hawai‘i.[143] As the most reliant state, and the furthest away from any other landmass, the importance of working to achieve energy self-sufficiency is critical.[144] This shocking conclusion has spurred action at the federal, state, and county levels.[145] Due to the abundance of available indigenous resources, Hawai‘i is one of only a handful of places on the planet that is capable of being completely energy self-sufficient.[146] The use and exploitation of Hawai‘i's renewable resources, while necessary to achieve energy self-sufficiency, must be balanced carefully against the need to preserve and protect Kānaka Maoli lands, resources, and cultural values.

A. *Hawai‘i Clean Energy Initiative: Moving Hawai‘i Towards Energy Self-sufficiency*

Former Hawai‘i Governor Linda Lingle and the U.S. Department of Energy signed a Memorandum of Understanding establishing the Hawai‘i Clean Energy Initiative on January 31, 2008.[147] The Hawai‘i Clean Energy Initiative ("HCEI") is a long-term partnership between the State of Hawai‘i and the U.S. Department of Energy with the goal of obtaining seventy percent of Hawai‘i's energy from renewable energy sources[148] by 2030.[149] Even with the inauguration of the Abercrombie

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Nov. 11, 2009, *available at* http://www.yaledailynews.com/news/scitech-news/2009/11/11/yalies-study-environment-hawaii/ (last visited on Nov. 10, 2011).

[143] U.S. Energy Information, *supra* note 140.

[144] Interview with Joshua Strickler, Facilitator of Renewable Energy Projects, Dept. of Bus., Econ. Dev. & Tourism, in Honolulu, Haw. (Jan. 15, 2010).

[145] *See e.g.*, State of Hawai‘i & U.S. Dept. of Energy, *Memorandum of Understanding between the State of Hawai‘i and the U.S. Department of Energy*, http://hawaii.gov/dbedt/info/energy/hcei/hawaii_mou.pdf (last visited Apr. 24, 2010) [hereinafter *Memorandum of Understanding*]; State of Hawai‘i & Dept. of Energy, *Clean Energy Initiative* (on file with the author); State of Hawai‘i, *Energy Agreement Among the State of Hawai‘i, Division of Consumer Advocacy of the Department of Commerce & Consumer Affairs and the Hawaiian Electric Companies*, http://hawaii.gov/dbedt/info/energy/agreement/signed2008oct20.pdf (last visited Apr. 24, 2010) [hereinafter *Hawai‘i Energy Agreement*].

[146] Interview with Henry Curtis, *supra* note 9.

[147] *Memorandum of Understanding*, *supra* note 145.

[148] *See* HAW. REV. STAT. § 269-91 (Supp. 2010) (defining renewable electric energy as "energy generated or produced using . . . (1) Wind; (2) The sun; (3) Falling water; (4) Biogas, including landfill and sewage-based digester gas; (5) Geothermal; (6) Ocean water, currents, and waves, including ocean thermal energy conversion; (7) Biomass, including biomass crops, agricultural and animal residues and wastes, and municipal solid waste and other solid waste; (8) Biofuels; and (9) Hydrogen produced

administration, the commitment to sustainable living remains; in Governor Abercrombie's State of the State address on January 24, 2011, the Governor made clear, "[j]obs in energy, agriculture, and environmental protection will be a cornerstone in the new sustainable economy in Hawaii."[150] The State plans on substantively transforming its regulatory, financial, and institutional systems to achieve the rigorous energy goals of the projected renewable energy portfolio.[151] This initiative between the State and the federal government recognizes that economic and "culturally sensitive use of natural resources" can provide energy security.[152] Thus, the State of Hawai'i has committed itself to coordinate with Kānaka Maoli and others to ensure that local cultural needs are considered in achieving these rigorous energy goals.[153] Despite the State's commitment to taking a culturally sensitive approach to the Interisland Wind Project, these intentions are not being realized as Kānaka Maoli communities continue to express concern over the project and its ramifications for Hawai'i's natural and cultural resources.[154]

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from renewable energy sources."). As such, renewable energy is energy generated from natural resources such as sunlight, wind, geothermal heat, etc., which are renewable (*i.e.*, naturally replenished). *See also* HECO, www.heco.com (follow the "Clean Energy" hyperlink; then follow the "Renewable Energy Basics" hyperlink) (last visited Nov. 10, 2011).

[149] *Memorandum of Understanding*, *supra* note 145.

[150] *Text of governor's State of the State speech*, THE HONOLULU STAR-ADVERTISER, Jan. 24, 2011, http://www.staradvertiser.com/news/breaking/114512144.html.

[151] State of Hawai'i & Dept. of Energy, *Clean Energy Initiative: Strategic Vision and Implementation Presentation*, http://hawaii.gov/dbedt/info/energy/hcei/HCEI-summary-2008mar.pdf (last visited Apr. 24, 2010) [hereinafter *Clean Energy Initiative Presentation*]. Renewable portfolio standard refers to the "percentage of electrical energy sales that is represented by renewable electric energy." HAW. REV. STAT. § 269-91 (2007). By statute, each electric utility company that sells electricity must establish a renewable portfolio standard of ten per cent of its net electricity sales by December 31, 2010, fifteen percent of its new electricity sales by December 31, 2015, twenty-five percent of its net electricity sales by December 31, 2020, and forty percent of its net electricity sales by December 31, 2030. HAW. REV. STAT. § 269-92 (Supp. 2010).

[152] *Memorandum of Understanding*, *supra* note 145.

[153] *See id.*

[154] *See* Maria Kanai, *Interisland dilemma*, THE HONOLULU WEEKLY, Aug. 3, 2011, http://honoluluweekly.com/diary/2011/08/interisland-dilemma/. Some Kānaka Maoli homesteaders on the Island of Moloka'i, who continue to live subsistence lifestyles, stand firmly against the project because "[t]he impacts are too huge for our island. . . . there is the possibility of damage to our reef. It can't be replaced once they go over there and do the damage. . . . No matter what benefits they offer us, it's not worth trading what we have already, which is a simple lifestyle." *Id.*

B. *Hawai‘i Energy Agreement*

On October 20, 2008, the State of Hawai‘i entered into an "Energy Agreement" with the Department of Commerce and Consumer Affairs' Division of Consumer Advocacy, and the Hawaiian Electric Companies[155] to work towards HCEI's goals.[156] The primary objective of the Energy Agreement is to acquire seventy percent of Hawai‘i's energy needs from clean energy sources by 2030.[157] To do so, by 2030, forty percent of Hawai‘i's energy consumption needs are expected to come from renewable energy resources and the remaining thirty percent from energy efficiency techniques.[158] The Interisland Wind Project, which is further detailed within the Hawai‘i Energy Agreement, is the first project that has been put forward as a major component to achieve this forty percent goal.[159]

C. *Breaking Barriers, Linking Islands: The Proposal for a Costly Interisland Undersea Cable*

"The change won't come cheap and it won't be without sacrifices."[160]

Hawai‘i's current energy needs have driven the State to propose the largest renewable energy project to date, which includes plans to connect four independent island electrical grids for the first time.[161] The island of

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[155] *See About HECO*, *supra* note 15.

[156] *Id.*

[157] *See Hawai‘i Energy Agreement*, *supra* note 145.

[158] *Id.; see also* Marc Matsuura, *Renewable Energy Integration from a Hawaiian Perspective*, IEEE POWER & ENERGY MAGAZINE 64 (Nov. 2009), *available at* http://www.hawaiisenergyfuture.com/articles/2009-11_IEEE_PES_-_Island_Breezes.pdf (last visited Nov. 21, 2011).

[159] *Hawai‘i Energy Agreement*, *supra* note 145, at 3-6. While the Interisland Wind Project is purported to be a major contributor towards Hawai‘i's renewable energy goals, the project is expected to help the State achieve approximately six percent of its overall forty percent renewable energy goals. Joshua Strickler, Facilitator of Renewable Energy Projects, State of Hawai‘i, Address at the William S. Richardson School of Law, Environmental Law Program Colloquium Series, DBEDT Energy Planning and Policy Branch: Insight into Energy Projects in Hawai‘i (Feb. 23, 2010) [hereinafter "DBEDT Colloquium"].

[160] Editorial, *Shift in Power Production will be Expensive but Necessary*, HONOLULU STAR BULLETIN, Oct. 23, 2008, *available at* http://archives.starbulletin.com/content/20081023_Shift_in_power_production_will_be_expensive_but_necessary.html (last visited Apr. 24, 2010).

Oʻahu consumes the most electric power as compared to the other islands or counties in the State of Hawaiʻi.[162] Because wind power is limited on Oʻahu[163] and abundant on the neighbor islands, the parties to the Hawaiʻi Energy Agreement have proposed the Interisland Wind Project.[164] This project, as originally conceived, was comprised of three components: (1) two large-scale wind farm projects located on the islands of Lānaʻi and Molokaʻi; (2) an undersea cable system;[165] and (3) additional infrastructure and grid upgrades necessary to incorporate the wind energy into current island electrical grids.[166] The State has accepted primary

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[161] Greg Wiles, *UH to Identify Best Route for Undersea Cable*, HONOLULU ADVERTISER, June 5, 2009, *available at* http://the.honoluluadvertiser.com/article/2009/Jun/05/ln/hawaii906050339.html.

[162] *Hawaiʻi Energy Agreement*, *supra* note 145, at 3; *see also* Matsuura *supra* note 158. HELCO, which serves the Island of Hawaiʻi (Hawaiʻi County), has a peak load of approximately 180 megawatts and a minimum load of approximately ninety megawatts. *Id*. at 60. MECO, Maui County's electric system is similar in load and size to the HELCO system, having a peak load of approximately 190 megawatts, and a minimum load of approximately eighty-five megawatts. *Id.* at 63. Maui County encompasses the islands of Maui, Molokaʻi, Lānaʻi, and Kahoʻolawe. In comparison, HECO, which serves the Island of Oʻahu (City and County of Honolulu) is the largest electricity consumer and possesses a peak load of approximately 1,200 megawatts, and a minimum peak load of approximately 600 megawatts. *Id.* at 63.

[163] While wind resources are not as abundant on Oʻahu as it is on the other Hawaiian Islands, there are still wind resources available on the island of Oʻahu. Wind developer, First Wind, has proposed and successfully developed a wind farm along the Kahuku hillside (located on the North Shore of the island of Oʻahu), which consist of twelve wind turbines. Alan Yonan, Jr., Wind farm in Kahuku powers up, Honolulu Star Advertiser, Mar. 24, 2011, *available at* http://www.staradvertiser.com/business/businessnews/20110324_Wind_farm_in_Kahuku_powers_up.html (last visited Nov. 19, 2011). The Kahuku wind farm produces thirty megawatts of energy power for the island of Oʻahu. *See id.* The Kahuku wind farm also has a fifteen-megawatt battery energy storage system. *Id*. While the thirty-megawatt output is a small part of HECO's islandwide peak load of 1250 megawatts, the Kahuku wind farm is noted as being "part of the incremental move toward decreasing the state's dependence on oil." *Id.* Apart from further development of wind resources on the Island of Oʻahu, there are other clean energy sources available on the island of Oʻahu such as ocean and solar energy. Interview with Curtis, *supra* note 9.

[164] *Hawaiʻi Energy Agreement*, *supra* note 145, at 3.

[165] Undersea cable systems include all facilities between Oʻahu and the neighbor islands' transmission systems to transfer power between each island's grids. *Id.* In order to use the wind energy produced on Molokaʻi and Lānaʻi, it is necessary to transmit the wind power produced on those islands by undersea cable to Oʻahu.

[166] Additional infrastructure, such as landing sites for the undersea cables is necessary, as well as upgrades to our current islands' electric grids. The wind power generated on the islands of Molokaʻi and Lānaʻi will be transferred to Oʻahu as direct current ("DC") and it will be necessary to have converter stations on each island in order

responsibility for all matters related to the undersea cable system's siting and permitting. Because of the large scope of the Interisland Wind Project and the vast amount of issues implicated, the analysis of this article is meant to apply to renewable energy projects generally, while using the undersea cable component of the Big Wind project merely as an example.[167] Additionally, for purposes of detailing key areas and its environmental and cultural concerns, this paper will focus primarily on the cable components of the project, as they are the lifeblood of the larger Interisland Wind Project.

The Interisland Wind Project has the capacity to change Hawai'i's social and cultural landscapes forever.[168] Financing is clearly a hot issue as the cable component itself is preliminarily projected to cost $800 million to $1 billion.[169] Although the details of the interisland wind and cable project have yet to be finally determined, the project's proponents and developers appear to be pushing forward with the environmental approval processes, rallying the troops with a cry for the transition from fossil fuels to alternative energy.[170] Originally, the State was rushing to spend $4.94 million in federal stimulus money on consulting contracts and an EIS for the Big Wind and Interisland Undersea Cable project before the April 2012 federal deadline for stimulus funding expires, however since then, the State has requested for additional funds to conduct studies, which broaden the scope of the Interisland Wind Project to include solar,

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to convert the energy from alternate current ("AC"). DC transmission is used because it best prevents energy loss during transmission. DBEDT Colloquium, *supra* note 159.

[167] With regards to the other components, the wind developers (First Wind and Castle & Cooke) will be primarily responsible for the wind farms on the islands of Moloka'i and Lāna'i, and the Hawaiian Electric Companies will be responsible for the infrastructure and grid upgrades necessary to tie the project together. *See Hawai'i Energy Agreement*, *supra* note 145. Each responsible party is responsible for securing all permits and approvals for their respective components. *Id.*

[168] Sean Hao, *Planning Begins for Hawaii Undersea Cable System: Project could Reduce State's Oil Use, but at a Cost of up to $3B*, HONOLULU ADVERTISER, Dec. 22, 2009, *available at* http://the.honoluluadvertiser.com/article/2009/Dec/22/ln/hawaii912220361.html (last visited Apr. 24, 2010). The Interisland Wind Project has been referred to as the "priciest, most controversial public utility project in the state's history," even at such an early stage in the project. *See Big Wind must be transparent*, HONOLULU STAR ADVERTISER, Jun. 19, 2011 *available at* http://www.staradvertiser.com/editorials/20110619_Big_Wind_must_be_transparent.html (last visited Nov. 19, 2011).

[169] Sean Hao, *supra* note 168. Moreover, development of the cable hinges on the construction of two privately developed wind farm projects expected to cost $500 million to $1 billion each, as well as power grid upgrades by HECO that would carry its own additional costs. *See id*.

[170] *See id.*

photovoltaic, and geothermal energy, at an additional cost of $2.1 million.[171]

1. Purpose, Objectives & Goals of the Project

There are currently no transmission lines that tie one island grid to another; rather, each grid is self-sufficient and operates independently.[172] Hawaiian Electric Co., Inc. ("HECO"), which serves the island of Oʻahu, has just recently added wind generation to its system, following MECO and HELCO's lead.[173] The HECO system's daily peak load[174] is approximately 1,200 megawatts; the minimum is approximately 600 megawatts.[175] In a March 17, 2009 news release, Governor Lingle, Castle & Cooke, First Wind Hawaiʻi, and HECO announced an agreement to work together to provide wind energy for Oʻahu.[176] Castle & Cooke planned to develop a 400 megawatt wind farm on the island of Lānaʻi, and

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[171] *Id.*; Curtis, *supra* note 17 ("*Big Wind hits road blocks*"). The plan has "drawn fire" from environmental and community groups as well as some government officials for both the substance of the project itself and what is perceived as a lack of transparency in the planning process. *See* Alan Yonan, Jr., *Big Wind discussion stymied*, HONOLULU STAR ADVERTISER, Jun. 12, 2011, *available at* http://www.staradvertiser.com/business/businessnews/20110612_Big_Wind_discussion_stymied.html (last visited Nov. 23, 2011).

[172] Matsuura, *supra* note 158, at 63.

[173] *See* Alan Yonan, Jr., *Wind farm in Kahuku powers up*, HONOLULU STAR ADVERTISER, Mar. 24, 2011, *available at* http://www.staradvertiser.com/business/20110324_Wind_farm_in_Kahuku_powers_up.html?id=118563004 (last visited Nov. 21, 2011). Officials from First Wind LLC, HECO, and the state government recently dedicated the Kahuku wind farm, Oʻahu's first large-scale wind farm. *Id*. The Kahuku wind farm is built upon 575 acres of land, most of which is owned by wind developers First Wind. *Id.* The Kahuku wind farm feature a dozen 2.5-megawatt wind turbines and are expected to generate about eighty-three million kilowatt-hours annually. *Id.* First Wind plans to sell the electricity to HECO at a fixed price of 19.9 cents per kilowatt-hour under a purchase power agreement approved by the State Public Utilities Commission. *Id.* Although the wind farm's thirty megawatt output is a small part of HECO's islandwide peak load, it is part of the incremental move toward reaching the state's clean energy goals. *Id.* Before the construction and operation of the Kahuku wind farm, MECO and HELCO were the only divisions of the Hawaiian Electric Companies that had wind generation on their systems. *Id.; see also* Matsuura, *supra* note 158, at 63.

[174] "Daily Peak Load" refers to the peak of electric consumption. *See* Matsuura, *supra* note 158. "Minimum" refers to the lowest amount of electric consumption. *Id.* These rates reflect daily usages. *Id.*

[175] *Id.*

[176] Lingle Announces Agreement, *supra* note 13.

First Wind Hawai‘i had planned to develop a 300-400 megawatt wind farm on Moloka‘i.[177] These companies are hoping to negotiate contracts to sell their energy to HECO on O‘ahu.[178] Ultimately, these wind farms would feed into the interisland undersea cable system that would transmit renewable energy power and ultimately connect the major Hawaiian Islands.[179]

2. Routes of Contention: Linking the islands of O‘ahu, Maui, Moloka‘i & Lāna‘i)

The Hawai‘i Department of Business, Economic Development & Tourism ("DBEDT"),[180] as the agency proposing the Interisland Undersea Cable, contracted with the University of Hawai‘i's School of Ocean and Earth Science and Technology ("SOEST")[181] to conduct a technical report on the feasibility of preferred and alternate undersea cable routes connecting the islands of O‘ahu, Maui, Moloka‘i, and Lāna‘i; their final

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[177] *Id.*

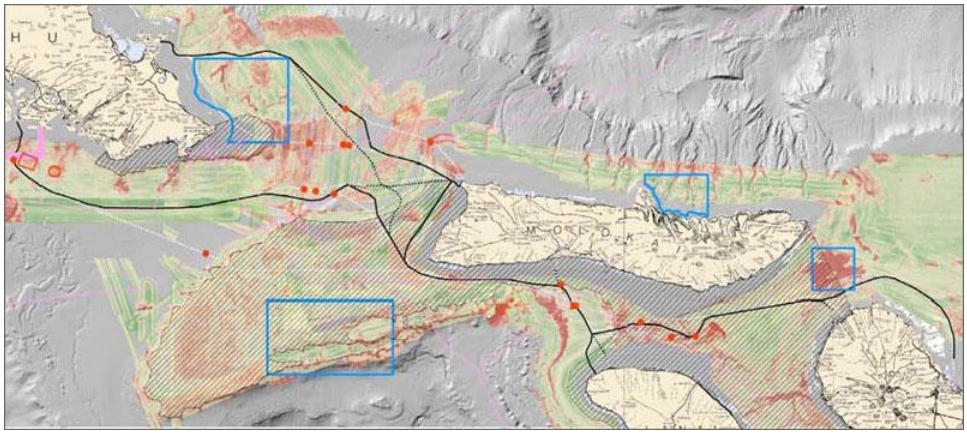
[178] *Id.*

[179] DBEDT Colloquium, *supra* note 159. In the 1980s, Puna Geothermal proposed a similar undersea cable project to connect the various islands and provide geothermal energy generated on Hawai‘i Island to O‘ahu; however, the plan fell through before being implemented. *See generally* Tonya L. Boyd, Geo-Heat Center, *Hawaii and Geothermal: What has been Happening*, GHC Bulletin (2002).

[180] Hawai‘i State Dept. of Econ Dev. & Tourism, *Aloha from DBEDT!*, http://hawaii.gov/dbedt (last visited Nov. 21, 2011). DBEDT provides the economic and statistical expertise that guides State economic development efforts. *Id.* It generates important information for business and industry about their markets and the economic forces shaping the future. *Id.*

[181] SOEST was established in 1988 in recognition of the need to realign and further strengthen the education and research resources available within the University of Hawai‘i. *About the School*, SCHOOL OF OCEAN AND EARTH SCIENCE AND TECHNOLOGY AT THE UNIVERSITY OF HAWAI‘I AT MĀNOA (Nov. 21, 2011, 7:51 PM), http://www.soest.hawaii.edu/soest_web/soest.school.htm. Its vision is to "serve society by acquiring and disseminating new knowledge about the Ocean, Earth and Planets, and to enhance the quality of life in the State and the Nation by providing world-class education, contributing to a high-tech economy, and promoting sustainable use of the environment." *Id.*; School of Ocean and Earth Science and Technology at the University of Hawai‘i at Mānoa, *Hawaii Inter-island Cable Project Ocean Floor Survey Task 2d Technical Final Report* (Nov. 2009) *available at* http://www.hawaiicleanenergyinitiative.org/storage/interisland_cable.pdf (last visited Nov. 21, 2011) [hereinafter SOEST Report]. SOEST was contracted by DBEDT to conduct a feasibility study by determining whether laying a power transmission cable on the ocean floor between the islands would be physically possible. *Id.* at 3-4.

report was issued in November 2009.[182] The preferred and alternative routes identified by SOEST are depicted below.



The figure above identifies the preferred (black) and alternate (dashed) cable routes. White dashed lines show other routes surveyed. Pink denotes the existing telecom cables; red dot denotes any observed cable crossing. The blue boxes are the bottom fish refuges. Red boxes or circles indicate dump areas. The ruled areas denote the humpback whale sanctuary.[183]

As originally identified in the SOEST report, the recommended route connecting the islands of Oʻahu and Molokaʻi is via a Kāneʻohe to Northwest Molokaʻi route.[184]

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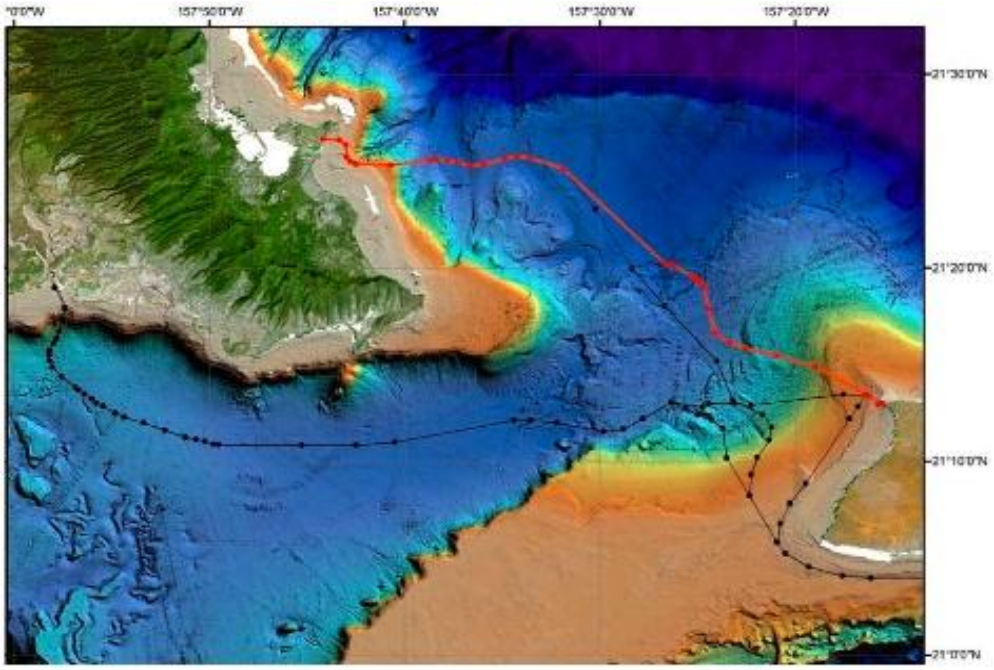
[182] *See generally*, SOEST Report, *supra* note 181.

[183] Picture taken from the SOEST Report, *supra* note 181, at 2.

[184] SOEST Report, *supra* note 181, at 14.



This recommended cable route (shown above)[185] comes ashore on O‘ahu at the Kāne‘ohe Marine Air Station where a transmission cable would connect to HECO’s Ko‘olau substation.[186] The Moloka‘i landing station for the cable would be at ‘Īlio Point on the northwestern point of the island.[187] While SOEST concluded that the cable is feasible, it raised concerns about environmental and engineering challenges.[188]

D. *Proposed Permitting & Approvals’ Processes: Working Through the HEIS Process*

The State of Hawai‘i, HECO, and the developers of the proposed wind farms on the islands of Lāna‘i and Moloka‘i have pledged to do a

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[185] Image taken from SOEST Report, *supra* note 181, at 14. This route will be the focus of the Environmental and Cultural Concerns section, *see infra* Part IV, III.B; *see also infra* Part V.A.

[186] SOEST Report, *supra* note 181, at 14.

[187] *Id.* at 15. Other alternative routes were also identified and analyzed. An alternative route from Kāne‘ohe to NW Moloka‘i was considered but would cross the Waimanalo-Makapu‘u Shelf which is subject to intense fishing and anchoring, crosses the SE O‘ahu portion of the Humpback Whale Sanctuary, and precious coral beds. In the event that NW Moloka‘i is excluded, a route from Kāne‘ohe to Lāna‘i is recommended. The Kāne‘ohe to NW Moloka‘i route appears to be the favored route by proponents of the Interisland Cable Project because it is the “easiest” and “less intrusive.” *Id.*

[188] *Id.* at 18.

"complete and thorough environmental review of all parts of the project."[189] Developers of the Interisland Wind Project plan to do a "programmatic EIS"[190] to analyze the cumulative effects of the project's three individual components.[191] In addition, DBEDT is planning on using the programmatic approach to help finalize the details regarding the cable's ultimate route and placement.[192] However, it should be noted that there are currently no statutes, administrative rules, or agency guidance directing the programmatic EIS process for Hawai'i.[193] Moreover, there has been no Hawai'i case law to help guide programmatic EISs.[194]

Because a programmatic EIS covers broad impacts over a larger region, and in this case, dozens of possible alternative routes, it is common

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[189] Ted Liu & Robbie Alm, *Environmental Review will Extend Beyond Ocean Cable*, HONOLULU ADVERTISER, Dec. 30, 2009, *available at* http://www.honoluluadvertiser.com/print/article/20091230/OPINION03/912300312/Environmental-review-will-extend-beyond-ocean-cable (last visited Apr. 24, 2010).

[190] "Programmatic" and "tiered" documents are commonly used by federal agencies under NEPA. *See* Karl Kim et al., *Report to Leg on HI Environmental Review System* 61 (Jan. 1, 2010) (on file with the author). To introduce the concepts of programmatic and tiered documents to Hawai'i, legal scholars propose the following definitions:

A "programmatic environmental impact statement" is defined as meaning "a comprehensive . . . environmental impact statement, respectively, of a program, policy, plan, or master plan." *Id.* Programmatic review is encouraged for large-scale programs and plans by agencies in order to promote an integrated consideration of environmental effects and greater efficiency in the later project-specific environmental review documents. *Id.*

"Tiering" should be defined to mean "the process of addressing general matters in broader . . . environmental impact statements with subsequent narrower . . . environmental impact statements that incorporate by reference the general discussions and concentrate solely on the issue specific to the . . . environmental impact statements subsequently prepared." *Id.* at 61-62.

The purpose of providing for a programmatic and tiering process is to streamline both the overall planning process and the project planning process by informing decision markers of large-scale actions and provide context for later actions that stem from the former action. *Id.* at 62. Such a process would help facilitate early consideration of environmental effects and greater efficiency in the later project-specific environmental review documents.

[191] Interview with Allen Kam, Gen. Council, Dept. of Bus. Econ. Dev. & Tourism, in Honolulu, Haw. (Jan. 15, 2010)

[192] *Id.*; *see also* Liu & Alm, *supra* note 189.

[193] Interview with Allen Kam, *supra* note 191.

[194] *Id.* Although there is no guidance on programmatic EISs at the state level, there is guidance on programmatic EISs at the federal level. *See* Kim et al., *supra* note 190, at 61 (noting that "programmatic and tiered documents are a common 'best practice' used by federal agencies under NEPA").

for more specific components within the larger project to prepare individual EISs that focus on site-specific impacts with reference to the larger programmatic EIS's findings.[195] The wind farm developers, HECO, and the State of Hawai'i will perform site-specific environmental studies for their respective project components.[196] These site-specific EISs will be tiered[197] under the programmatic EIS for the Interisland Wind Project.[198] While the "programmatic approach" is routinely done on the federal level, the lack of specific statues and guidance at the state level will prove challenging to undergo for such a large the first time around.[199]

Recently, however, the Hawai'i Supreme Court ruled that "for an EIS to meet its intended purpose, it must assess a particular project at a given location based on an explicit or implicit time frame."[200] Based on this approach, because the exact scope and location of the Interisland Wind Project has not yet been clearly defined, it will be even more crucial for developers and state agencies to fully analyze the environmental and cultural concerns regarding the proposed project's impacts on the State's natural and cultural resources.[201]

IV. "NĀNĀ I KE KUMU":[202] LOOKING AT THE PAST TO ADDRESS THE FUTURE

> In Hawaiian, the past is referred to as *Ka wā mamua*, or "the time in front or before." Whereas the future, when thought of at all, is *Ka wā mahope*, or "the time which

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[195] Liu & Alm, *supra* note 189.

[196] *Id.*

[197] *See* Interview with Strickler, *supra* note 144.

[198] Liu & Alm, *supra* note 189; DBEDT is relying on the results from the programmatic EIS to select their final route for the undersea cable. *Id.* Due to budgeting and time constraints, DBEDT is likely to complete the site-specific EIS concurrent with the programmatic EIS. Interview with Kam, *supra* note 191. If this is the case, it would result in a slew of problems that may ultimately result in litigation. Interview with Curtis, *supra* note 9. The Superferry and the rail transit proposals indicate how short-circuiting the state's EIS law often leads to disaster. *Id.*

[199] *See* Interview with Curtis, *supra* note 9.

[200] Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Hawai'i 150, 231 P.3d 423 (2010) [hereinafter "Local 5"].

[201] *See* Interview with Curtis, *supra* note 9.

[202] MARY KAWENA PŪKU'I *et al*., NĀNĀ I KE KUMU ("Look to the Source") Vol. I, 112 (1972). "Nānā i ke kumu" is defined as "look to the source." *Id.*

> comes after or behind." It is as if the Hawaiian stands firmly in the present, with his back to the future, and his eyes fixed upon the past, seeking historical answers for present-day dilemmas.[203]

Kānaka Maoli believe that "ka wā mamua" is a time rich in knowledge.[204] Applying this Kānaka Maoli mindset, it is only when we fully inform ourselves by having a firm grasp of the history of Kānaka Maoli and their past that we may address present and future dilemmas. To address present-day environmental dilemmas, we must understand the evolution of Hawai'i's environmental protections – and the things these protections seek to achieve – so that we may make a fully informed decision as to how they should be addressed and applied to present and future situations. Such a review should include the federal roots of the environmental review process through to the steady expansion of environmental protections for natural and cultural resources prescribed by the Hawai'i courts.

A. *Setting the Tone for Environmental Review: The National Environmental Policy Act*

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 – 4370h (2006), originally became law on January 1, 1970 and now requires all federal agencies to consider every potential environmental impact of proposed actions that may affect the quality of the environment.[205] In addition, agencies must engage the public and address their concerns as part of the decision-making process.[206]

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[203] KAME'ELEIHIWA, *supra* note 3, at 22-23.

[204] *See id.*

[205] *See* 42 U.S.C. § 4331 (2006), providing that it would be Congress' national environmental policy:

> to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4332(a) (2006). Furthermore, Congress mandated that in order to carry out this policy, "it is the continuing responsibility of the Federal Government to use all practicable means," consistent with NEPA to improve and coordinate Federal plans, functions, programs, and resources such that the Nation may:

> (1) fulfill the responsibilities of each generation as trustee of the environment for

NEPA established a framework enabling the federal government to lead the nation in preventing continued environmental degradation due to technological advances.[207] NEPA has two parts: first, it establishes a national environmental policy of protecting and maintaining the environment for present and future generations, and second NEPA requires that federal agencies prepare a detailed statement, known as an EIS, for major federal actions significantly affecting the quality of the human environment.[208]

Following NEPA's enactment, many states adopted "little NEPAs," which mandate similar environmental reviews for proposed actions permitted or funded by state and local governments.[209] There is wide variation between little NEPAs, and unlike NEPA, several State

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succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4331(b)(2006). *See also* 42 U.S.C. §§ 4321 – 4370h (2009).

[206] *See* 42 U.S.C. § 4332(2)(C) (providing that statements and comments must "be made available to the President, the Council on Environmental Quality *and to the public*."); Sierra Club v. Clark, 774 F.2d 1406, 1411 (9th Cir. 1985) ("The purpose of [42 U.S.C. § 4332(2)(C)] is twofold: it provides the decision-maker with sufficiently detailed information to decide whether to proceed on a project in light of potential environmental consequences *and it furnishes the public with relevant environmental information*."); Citizens for Better Henderson v. Hodel, 768 F.2d 1051, 1056 (9th Cir. 1985) (noting that one of the purposes of the environmental impact statement is "to provide the public with information and an opportunity to participate in gathering information.") (citing Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1461 (9th Cir. 1984); *see also* 1-1 FOGLEMAN ET AL., ENVIRONMENTAL LAW PRACTICE GUIDE § 1.01 (2009).

[207] *See* FOGLEMAN ET AL., *supra* note 206, at § 1.01.

[208] *See* 42 U.S.C. §§ 4331, 4332 (2006); THOMAS F. KING, CULTURAL RESOURCE LAW & PRACTICE 55-58 (3d ed. 2008);

[209] 1-1 FOGLEMAN, ET AL., *supra* note 206, at §§ 1.01, 1.15 (citing states that have enacted "little NEPAs," which include California, Connecticut, Delaware, District of Columbia, Georgia, Hawai'i, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New York, North Carolina, Puerto Rico, South Dakota, Virginia, Washington, and Wisconsin).

equivalents have substantive as well as procedural provisions.[210] The Hawai‘i State Environmental Policy Act[211] is an example of a little NEPA that possesses procedural provisions only.[212] NEPA's fundamental purpose is to declare a national policy, which will "encourage productive and enjoyable harmony between man and his environment."[213] NEPA governs major federal actions affecting natural resources and seeks to "preserve important historic, cultural, and natural aspects of our national heritage."[214] Although NEPA provides only procedural safeguards to cultural resources at the federal level, additional safeguards may be

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[210] 1-1 FOGLEMAN, ET AL., *supra* note 206, at § 1.05 (2009). Substantive laws are notably and manifestly different from procedural ones. Sierra Club v. Hawai‘i Tourism Auth., 100 Hawai‘i 242, 266, 59 P.3d 877, 901 (2002). "Substantive rights are generally defined as rights which . . . create a new obligation, impose a new duty . . . as distinguished from remedies or procedural law which merely prescribed methods of enforcing or giving effect to existing rights." *Id.* (citing Clark v. Cassidy, 64 Hawai‘i 74, 77, 636 P.2d 1344, 1347 (1981) (citations and internal quotation marks omitted).

[211] The Hawai‘i Environmental Policy Act ("HEPA") is codified under Chapter 343 of the Hawai‘i Revised Statutes. *See supra* note 135; *infra* Part IV.B.

[212] Sierra Club v. Dep't of Transp., 115 Hawai‘i 299, 325 (2007) (noting that HEPA "is a procedural statute that accords procedural rights."). Additionally, the Hawai‘i Supreme Court has noted that "[t]here is evidence that the legislature may have understood HEPA to be procedural in nature," *id.* at 326, and found that:

> [t]he main thrust of HEPA is to require agencies to consider the environmental effects of projects before action is taken . . . . The legislature explained that HEPA provides an 'environmental review process [that] will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions[,]' . . . . Consequently, HEPA does not confer substantive rights or remedies.

Id. at 326-27 (citing Sierra Club v. Hawai‘i Tourism Auth., 100 Hawai‘i 242, 266-67) (footnotes omitted) [hereinafter "HTA"]). The Court also noted the *HTA* Court's dissent, which expressed a similar view of HEPA in providing that

> "[T]he provisions of chapter 343 are procedural, not substantive – *i.e.* under chapter 343, the agency must consider the potential environmental consequences of its actions and allow public participation in the review process, but chapter 343 neither compels the agency to undertake, nor bars the agency from undertaking, any particular substantive action."

Id. (citing *HTA*, 100 Hawai‘i at 272, 59 P.3d at 907 (Moon, J., dissenting)).

[213] 42 U.S.C. § 4321 (2009).

[214] 42 U.S.C. § 4331 (2009).

imposed by the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470-470x-6.[215]

NHPA establishes the federal government's policy, in cooperation with the States, local governments, Indian tribes, private organizations, and individuals, to "provide leadership in the preservation of the prehistoric and historic resources of the United States . . . and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments."[216] While NHPA focuses on federal or federally assisted undertakings, the NHPA applies to state and county lands via State Historic Preservation Programs.[217] Amongst other responsibilities, the State Historic Preservation Officers are required to administer the State program in cooperation with Federal and State agencies, local governments, and private organizations and individuals, identify and nominate eligible properties to the National Register, prepare and implement a comprehensive statewide historic preservation plan, and provide public information, education, training, and technical assistance in historic preservation.[218] Section 106 of NHPA's review process is the "doorway through which consultation between federal agencies and Native Hawaiian individuals and organizations occur regarding the effects of an agency's

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[215] 16 U.S.C. §§ 470 – 470x-6. (2006). The NHPA is the primary federal law governing the preservation of cultural and historic resources. The law establishes a national preservation program and a system of procedural protections, which encourage the identification and protection of cultural and historic resources of national, state, tribal and local significance. *See generally, id.* In recognizing historic preservation as an important policy, the act directs the federal government to "actively promote" the preservation of prehistoric and historic resources by administering the national preservation program in partnership with state and local governments, Indian tribes, and Native Hawaiians, and by helping such entities expand and accelerate their historic programs and activities. *See* 16 U.S.C. § 470-1 (2006); 1-2 JULIA HATCH MILLER & DOROTHY M. MINDER, ENVIRONMENTAL LAW PRACTICE GUIDE § 2.02 (2009).

[216] 16 U.S.C. § 470-1.

[217] *See* 16 U.S.C. § 470a(b) (2006) (providing that the Secretary of the Interior "shall promulgate or revise regulations for State Historic Preservation Programs," and shall conduct periodic fiscal audits of approved State programs "as needed," to "ensure that such programs meet applicable accountability standards."). Chapter 6E of the Hawai'i Revised Statues is the principal statutory framework for historic preservation at the state level, and implements the State's public policy to "provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property." Baldauf, *supra* note 138, at 179 (quoting HAW. REV. STAT. § 6E-1 (2009)).

[218] 16 U.S.C. § 470a(b)(3) (2006).

undertaking and potential mitigation."[219] A federal agency must consult with any Kānaka Maoli organization "that attaches religious and cultural significance to historic properties that may be affected by an undertaking."[220] Specifically, the "agency official shall ensure that consultation in the section 106 process provides the . . . Native Hawaiian organization a reasonable opportunity" to "identify its concerns about historic properties[,]" provide advice on the "identification and evaluation of historic properties, including those of traditional and cultural importance[,]" "articulate its views on the undertaking's effect on such properties[,]" and "participate in the resolution of adverse effects."[221] Both the state and federal historic preservation frameworks, and the state and federal environmental protection frameworks, if utilized property, can be useful tools to protect Kānaka Maoli cultural and historical sites, however the failure to strictly adhere to NHPA's and NEPA's procedural mandates "brings to life the continuing struggle between the "needs" of development and infrastructure and the legal protections afforded to [Kānaka Maoli resources]."[222]

B. *Hawai'i's Stance on Environmental Protections: The Hawai'i Environmental Policy Act*

The Hawai'i Environmental Policy Act ("HEPA"), Chapter 343 of the Hawai'i Revised Statutes, was adopted in 1974 and patterned after NEPA.[223] HEPA was enacted to "establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with the economic and technical considerations."[224] Chapter 343 requires the disclosure of a proposed action's potential environmental effects, as well as the effects on the economic welfare, social welfare, and cultural practices of the affected community.[225] HEPA further requires an analysis of alternatives and the measures proposed to mitigate adverse effects.[226] The law also assures the

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[219] Carl Christensen, *Historic Preservation Laws*, in NATIVE HAWAIIAN LAW 17-3 (NATIVE HAWAIIAN RIGHTS HANDBOOK 2d ed. n.p.), (Melody MacKenzie et al. eds., forthcoming).

[220] *See* 36 C.F.R. § 800.2(c)(2)(ii) (2010).

[221] 36 C.F.R. § 800.2(c)(2)(ii)(A).

[222] *See* Baldauf, *supra* note 138, at 184-85; Part V.A, *infra*.

[223] *See supra* note 138.

[224] HAW. REV. STAT. § 343-1 (2010); HAW. ADMIN. R. § 11-200-1 (2010).

[225] HAW. REV. STAT. § 343-2 (2010).

public the right to participate in planning projects that may affect their communities.[227] The legislature described the need for HEPA in the following way:

> The quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.[228]

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[226] HAW. ADMIN. R. § 11-200-10 (2010) (mandating that an environmental assessment include an "identification and summary of impacts and alternatives considered," and "proposed mitigation measures"); HAW. ADMIN. R. § 11-200-17 (2010) (mandating that a Draft EIS "consider mitigation measures proposed to avoid, minimize, rectify, or reduce impact," and a "[d]escription of any mitigation measures included in the action plan to reduce significant, unavoidable, adverse impacts to insignificant levels"). Section 11-200-14 of the Hawai'i Administrative Rules ("HAR") further provides that the "EIS process shall involve at a minimum: identifying environmental concerns, obtaining various relevant data, conducting necessary studies, receiving public and agency input, evaluating alternatives, and proposing measures for avoiding, minimizing, rectifying or reducing adverse impacts." HAW. ADMIN. R. § 11-200-10 (2010). Moreover, HAR § 11-200-14 declares:

> An EIS is meaningless without the conscientious application of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action. Agencies shall ensure that statements are prepared at the earliest opportunity in the planning and decisionmaking process. This shall assure an early open forum for discussion of adverse effects and available alternatives, and that the decisionmakers will be enlightened to any environmental consequences of the proposed action.

HAW. ADMIN. R. § 11-200-14 (2010). *But see*, David Callies, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 323 (2d ed. 2010) ("[An EIS] requires no action to mitigate, only to note and record alternatives.").

[227] HAW. ADMIN. R. § 11-200-9.1(b) (2010); HAW. ADMIN. R. § 11-200-9.1(d) (2010).

[228] HAW. REV. STAT. § 343-1 (2010).

HEPA was designed to integrate environmental concerns into the planning process[229] and requires certain "actions"[230] that significantly affect Hawai'i's environment to undergo an environmental review designed to reveal the proposed action's potential environmental effects.[231]

1. HEPA's Environmental Review Process

The first step in HEPA analysis is to determine whether a project is subject to the environmental review process.[232] A project is subject to HEPA if: (1) it is either initiated by a government agency ("agency actions") or by a private party that requires government approvals for the project to proceed ("applicant actions"),[233] and (2) if the project proposes

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[229] *Id.*

[230] *See* HAW. REV. STAT. § 343-5(a)(1)-(9) (2010) (listing actions that "trigger" HEPA's environmental review process). Such actions include: (1) the use of state or county lands or the use of state or county funds; (2) any use within any land classified as a conservation district; (3) any use within a shoreline area; (4) any use within any historic site as designated in the National Register or Hawaii Register; (5) any use within the Waikiki area of Oahu; (6) any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or amendments to any existing county general plan initiated by a county; (7) any reclassification of any land classified as a conservation district; (8) the construction of new or the expansion or modification of existing helicopter facilities within the State that may affect land classified as a conservation district, a shoreline area, or any historic site as designated in the National Register or the Hawaii Register; and (9) the proposal for any wastewater treatment unit (excepting individual wastewater systems or a treatment unit serving fewer than fifty single-family dwellings or the equivalent), waste-to-energy facility, landfill, oil refinery, or power-generating facility. HAW. REV. STAT. § 343-5(a)(1)-(9) (2010).

[231] *See* HAW. REV. STAT. § 343-5 (2010); Jordan J. Kimura, *The Environmental Assessment: Issues Surrounding the Exclusion of Projects Significantly Affecting Hawai'i's Fragile Environment* 10 ASIAN-PAC. LAW & POL'Y J. 169 (2008) (citing Office of Environmental Quality Control, State of Hawai'i, A *Guidebook for the Hawaii State Environmental Review Process* 7 (2004), *available at* http://oeqc.doh.hawaii.gov/Shared Documents/HOW TO PREPARE AN ENVIRONMENTAL ASSESSMENT/Guidebook For The Environmental Review Process 202004.pdf (last visited Apr. 25, 2010)).

[232] Section 343-5 of the Hawai'i Revised Statutes specifies that environmental assessments are required for certain "actions." *See* HAW. REV. STAT. § 343-5 (2010); *see also supra* note 233 (listing the actions that "trigger" the environmental review process). An "action" is defined under HEPA to mean "any program or project to be initiated by any agency or applicant." HAW. REV. STAT. § 343-2 (2010). Consequently the subject of the environmental review process may be referred to as an "action," "project," or a "program." *See* Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 306 n.6, 167 P.3d 292, 299 n.6 (2007).

[233] HEPA covers both "agency" actions and "applicant" actions. An "agency"

one or more of the nine enumerated land uses or administrative acts, known as "triggers."[234] Once subject to environmental review, an Environmental Assessment ("EA") is required so that "environmental policies of the legislature are given appropriate consideration in decision-making along with economic and technological considerations."[235] An EA is an "informational document prepared by either the agency proposing an action or a private applicant, which is used to evaluate the possible environmental effects of a proposed action,"[236] and its fundamental purpose is to determine whether an action may have a significant impact.[237] An agency or applicant that proposes a project that "triggers" HEPA must prepare an EA for that project at the earliest practicable time to determine whether an EIS will be required;[238] however, an agency or applicant that knows that their project will have a significant impact may skip the EA and proceed directly to preparing an EIS.[239] If one of the

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refers to "any department, office, board, or commission of the state or county government which is a part of the executive branch of that government. HAW. REV. STAT. § 343-2 (2010). "Applicant" refers to "any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action." *Id.* HEPA lists the applicability and requirements for agency actions and applicant actions separately, *see* Hawai'i Revised Statutes § 343-5(b) and (c), respectively; however, the steps that must be taken in the environmental review process are generally the same under both subsections. Because the Interisland Wind Project is proposed by DBEDT, a state agency, further explanations of the HEPA environmental review process will be tailored to those regulations specific to proposed agency actions. *See* HAW. REV. STAT. § 343-5(b) (2010).

[234] *Sierra Club*, 115 Hawai'i at 306, 167 P.3d at 299 (citing HAW. REV. STAT. §§ 343-5(a)(1)-(9) (2010)); *see also supra* note 233 (listing the actions that "trigger" HEPA applicability).

The Interisland Undersea Cable Project meets the trigger requirement under Hawai'i Revised State section 343-5(a)(1) because it proposes the "use of state or county lands." HAW. REV. STAT. § 343-5(a)(1) (2010). Although not required for environmental review under HEPA, the Interisland Cable Project may also be subject to HEPA under other triggers such as section 343-5(a)(3) which includes projects, which "propose any use within a shoreline area." HAW. REV. STAT. § 343-5(a)(3) (2010).

[235] H. Stand. Comm. Rep. No. 127-74, in 1974 House Journal, at 612.

[236] *Sierra Club*, 115 Hawai'i at 307, 167 P.3d at 300.

[237] *See* HAW. REV. STAT. § 343-2 (2010) (defining "environmental assessment" as "a written evaluation to determine whether an action may have a significant effect.").

[238] HAW. REV. STAT. § 343-5(b) (2010).

[239] *See e.g.*, HAW. REV. STAT. § 343-5(c) (2010). Pursuant to section 343-5(c), "for an action that proposes the establishment of a renewable energy facility, a draft environmental impact statement shall be prepared at the earliest practicable time." HAW. REV. STAT. § 343-5(c). This provision mandates that proponents of a renewable energy facility may skip the initial environmental assessment requirement and go directly to the preparation of an environmental impact statement.

triggers is satisfied, an EA must be prepared unless the project is declared exempt.[240]

Environmental review usually begins with the development of a draft EA.[241] The EA "must give a detailed description of the proposed action or project and evaluate direct, indirect, and cumulative impacts, as well as consider alternatives to the proposed project and describe any measures proposed to minimize potential impacts."[242] When a draft EA ("DEA") is completed, the public has thirty days to review the draft and provide comments.[243] The agency must respond in writing to all comments received during public review and may then prepare a final EA to determine whether an EIS is required.[244] If the agency determines that there will be minimal or no significant environmental impact resulting from the proposed project, it issues a Finding Of No Significant Impact ("FONSI"),[245] which allows the project to proceed without further study.[246] If the agency anticipates a FONSI, the agency proposing the project must file notice of such determination with the Office of Environmental Quality Control ("OEQC");[247] if a conflict of interest exists

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[240] *Sierra Club*, 115 Hawai'i at 306, 167 P.3d at 299. For more information on exemptions, *see* HAW. ADMIN. R. §§ 11-200-8(1)-(11) (2010). The administrative rules direct agencies to develop their own lists of specific types of actions that fall within the exempt classes. HAW. ADMIN. R. § 11-200-8(D) (2010). Exemption classes do not apply however "when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment." HAW. ADMIN. R. § 11-200-8(b) (2010).

[241] *Sierra Club*, 115 Hawai'i at 307, 167 P.3d at 300.

[242] *Id.*

[243] HAW. REV. STAT. § 343-5(c)(1) (2010); *Sierra Club*, 115 Hawai'i at 307-08, 167 P.3d at 300-01.

[244] HAW. REV. STAT. § 343-5(c)(3) (2010); *Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301.

[245] A FONSI determination may be challenged. *Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301; HAW. REV. STAT. § 343-7(b) ("Any judicial proceeding, the subject of which is the determination that a[n environmental impact] statement is not required for a proposed action, shall be initiated within thirty days after the public has been informed of such determination pursuant to section 343-3.").

[246] A "finding of no significant impact" or "FONSI" means "a determination based on an environmental assessment that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement." HAW. REV. STAT. § 343-2.

[247] The Office of Environmental Quality Control ("OEQC") was established in 1970 "to help stimulate, expand and coordinate efforts to maintain the optimum quality of

because the proposing agency and the agency making the determination are the same, OEQC may review the agency's determination, consult the agency, and advise the agency of potential conflicts.[248] On the other hand, if the agency determines that the project may have a significant impact on the environment, a more detailed EIS must be prepared.[249]

EIS preparation begins with "scoping." Scoping is a notice and comment period to define the scope of the draft EIS.[250] Following this, a draft EIS must be prepared and filed with OEQC and is made available for review and comment by the public and other government agencies for a forty-five day period.[251] The applicant must respond in writing to all comments received during the review and prepare a final EIS that includes the written responses to comments.[252] Either the Governor or the Mayor of the respective county (for agency actions), or the county planning department or agency initially receiving and agreeing to process the request for approval (for applicant actions), must accept the final EIS.[253]

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the State's environment." OEQC is responsible for implementing Chapter 343 of the Hawaii Revised Statutes. Office of Environmental Quality Control, Hawaii State Department of Health, *Health Topics*, http://hawaii.gov/health/environmental/oeqc.index.html (last visited Nov. 23, 2011).

[248] HAW. REV. STAT. § 343-5(b)(1)(E) (2010).

[249] HAW. REV. STAT. § 343-5(b); *Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301; *see also* Kepo'o v. Kane, 106 Hawai'i 270, 103 P.3d 939 (2005). In *Kepo'o*, the Hawai'i Supreme Court interpreted the language in section 343-5(c) which provides that an "[environmental impact] statement shall be required if the agency finds that the proposed action *may* have a significant effect on the environment." HAW. REV. STAT. § 343-5(c)(3) (2010) (emphasis added). In adopting a "common parlance" construction of the term "may," the *Kepo'o* court held that "[t]he proper inquiry for determining the necessity of an EIS based on the language of HRS § 343-5(c), then, is whether the proposed action will "*likely*" have a significant effect on the environment." *Kepo'o*, 106 Hawai'i at 288-89, 103 P.3d at 957-58 (emphasis added). The same language is found in section 343-5(b), which applies specifically to agency actions. *See* HAW. REV. STAT. § 343-5(b) (2010) (providing that an environmental impact statement "shall be required if the agency finds that the proposed action may have a significant effect on the environment").

[250] *Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301.

[251] HAW. REV. STAT. § 343-5(b)(2010); *see also Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301.

[252] HAW. REV. STAT. § 343-5(b).

[253] HAW. REV. STAT. § 343-5(b)(2), (c); *Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301. A project that is initiated by a government agency is an "agency action" whereas a project that is initiated by a private party who requires government approvals for the project to proceed is referred to as an "applicant action." *See* HAW. REV. STAT. § 343-2 (2010). Depending on the proposed action, the authority to accept a final environmental impact statement rests with those people or agencies that are specifically

Accepting a final EIS is a condition precedent to approving the request and commencing the proposed action; once the EIS is accepted, the action may be implemented.[254] Acceptance of the EIS is a formal determination that the EIS "fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review [period]."[255] A statement that is accepted will satisfy HEPA's requirements, and no other statement for the proposed project will be required.[256]

HEPA provides opportunities for judicial review at various stages of the environmental review process.[257] Judicial review is available: (1) when no EA is prepared; (2) when an agency determines that an EIS will or will not be required; and (3) when an EIS is accepted.[258] Thus, through section 343-7, the legislature authorized judicial review of actions that can only be carried out by state agencies or political subdivisions of the State.[259] Judicial review of these state-authorized actions promotes agency transparency and accountability, and furthers the broad objectives of HEPA to facilitate informed decision-making, enhanced environmental consciousness, cooperation and coordination, and public participation.[260]

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authorized under the provisions of HEPA. *See* HAW. REV. STAT. §§ 343-5(b)(2), (c).

[254] HAW. REV. STAT. §§ 343-5(b), (c) (2010); *see Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301.

[255] HAW. REV. STAT. § 343-2 (2010).

[256] *Id.* § 343-5(g)

[257] *Id.* §§ 343-7(a)-(c); *Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301.

[258] HAW. REV. STAT. §§ 343-7(a)-(c) (2010); *Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301. With respect to section 343-7(c), a court's review of the sufficiency of an accepted EIS is limited to those concerns that a person raised in his or her comments to the draft EIS. HAW. REV. STAT. § 343-7(c) ("Affected agencies and persons who provided written comment to such statement during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment."); Price v. Obayashi Haw. Corp., 81 Hawai'i 171, 183, 914 P.2d 1364, 1376 (1996).

[259] *See* HAW. REV. STAT. § 343-7; Sierra Club v. Dept. of Trans., 120 Hawai'i 181, 228, 202 P.3d 1226, 1273 (2009).

[260] *See e.g.*, Sierra Club v. Hawai'i Tourism Auth., 100 Hawai'i 242, 267, 59 P.3d 877, 902 (2002) (Nakayama, J., concurring). In *Sierra Club*, Justice Nakayama opined that in order to "preserve both the purpose and intent of HEPA," a party may seek judicial review under section 343-7 by proving that it has procedural standing. *See id.* at 268, 59 P.3d at 903. Justice Nakayama ultimately agreed with the plurality that a party asserting a grievance pursuant to HEPA may assert procedural standing, but concluded

2. Protecting Natural and Cultural Resources at the State Level

Over the last decade, environmental considerations, and cultural impacts in particular, have played a significant role in the land use planning process.[261] As discussed below, the Hawai'i State Constitution, statutes, and case law safeguard cultural resources that may not otherwise be protected under federal regimes. Article IX, section 7 of the Hawai'i State Constitution gives the State the power to "conserve . . . places of historic or cultural interest."[262] Article IX, section 9 further mandates that the State "shall have the power to preserve and develop cultural, creative and traditional arts of its various ethnic groups."[263] Article XII, section 7 of the Hawai'i State Constitution declares that "[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians."[264] Section 7-1 of the Hawai'i Revised Statutes further guarantees access to traditional and

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that the Sierra Club failed to show it had procedural standing in that case. *Id.* at 270, 59 P.3d at 905. In reaching this conclusion, Justice Nakayama reasoned that if a party were required to prove it has substantial standing, judicial review of compliance with HEPA would only occur after the necessary stages of a proposed project had been completed and, as a result, considerable expenses consumed. *Id.* at 903, 59 P.3d at 268. (Nakayama, J., concurring) ("Thus, if a particular project does in fact entail serious but nonobvious environmental impacts, agency failure to prepare and EIS may mean that the last opportunity to eliminate or minimize these impacts, in accordance with NEPA's broad objectives, has been lost." (citing City of Davis v. Coleman, 521 F.2d 661, 670 (9th Cir. 1975))). Therefore, by broadly interpreting HEPA's judicial review statute to allow for the assertion of procedural standing, the objectives of HEPA, to facilitate informed decision-making *before* a proposed action is commenced, is realized.

[261] S*ee, e.g.*, Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Hawai'i 150, 231 P.3d 423 (2010) (requiring proponents of a hotel expansion to conduct a supplemental EIS to replace the previous EIS completed in 1985 because while the plans itself had not changed, "substantial questions" regarding changes in the project area and its impact on the surrounding communities as well as the increased use of the beaches and near shore waters by endangered and threatened species rendered the previous EIS no longer valid); County of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 235 P.3d 1103 (2010) (holding that article XI, section 9 of the Hawai'i State Constitution – the right to a "clean and healthful environment" – creates a private right of action to enforce rights pursuant to state land use and environmental laws).

[262] HAW. CONST. art. IX, § 7.

[263] HAW. CONST. art. IX, § 9.

[264] HAW. CONST. art. XII, § 7; Based on this constitutional mandate, the State and its agencies are also "obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 79 Hawai'i 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995) [hereinafter "PASH"].

cultural resources by granting native tenants[265] gathering and access rights to cultural resources, rights of way, and watercourses.[266] Moreover, article XII, section 1-1 of the Hawai‘i Revised Statutes establishes the common law of the State of Hawai‘i but provides for exceptions where "otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage*."[267]

Within the last twenty years or so, Hawai‘i courts have taken these constitutional mandates to heart and have been consistently expansive in interpreting and protecting Kānaka Maoli rights to cultural resources.[268] The first case decided by the Hawai‘i Supreme Court in defining the scope of Kānaka Maoli rights to natural and cultural resources was *Oni v. Meek* in 1858.[269] In that case, the Kānaka Maoli plaintiff claimed he was entitled to pasturage according to tradition and custom.[270] In looking at prior legislation[271] and the Kuleana Act of 1850,[272] the Hawai‘i Supreme

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[265] The author notes that within this comment, the use of "native tenant" is synonymous with the use of Kānaka Maoli.

[266] HAW. REV. STAT. § 7-1 (2009). Subsequent case law later expanded the reach of these access and gathering rights to items not otherwise enumerated in the statute as well as to areas beyond the ahupua‘a in which one resides. *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 9-10, 656 P.2d 745, 750-51 (1982) (noting a range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others and which were not found in Hawai‘i Revised Statutes § 7-1, and holding that Hawai‘i Revised Statutes § 1-1 insures the continuance of the enduring practices "for so long as no actual harm is done thereby."); Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992) (holding that "native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua‘a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner").

[267] HAW. REV. STAT. § 1-1 (2009).

[268] *See* Oni v. Meek, 2 Haw. 87 (1858); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982); Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); *PASH*, 79 Hawai‘i 425, 903 P.2d 1246 (1995); Ka Pa‘akai o ka ‘Āina v. Land Use Comm'n, 94 Hawai‘i 31, 7 P.3d 1068 (2000).

[269] *See Oni*, 2 Haw. at 88.

[270] *Id.* at 89-90.

[271] The court analyzes and cites to the law referred to as the "joint resolutions on the subject of rights in lands, and the leasing, purchasing and dividing of the same," passed on November 7, 1846. *Oni*, 2 Haw. at 91-92. The court also notes the "Principles adopted by the Board of Commissioners to quiet land titles, in their adjudication of claims presented to them." *Id*. at 92-93.

[272] Section 7 of the Kuleana Act of 1850 was subsequently codified as HAW. REV. STAT. § 7-1 in 1993.

Court ruled that although prior legislation allowed Kānaka Maoli the right to pasturage, the guarantees provided in the later Kuleana Act of 1850 did not provide the same rights.[273] The Hawai‘i Supreme Court limited the extent to which Kānaka Maoli had access to natural and cultural resources and ultimately determined that only the specifically enumerated rights enumerated in section 7[274] were granted to Kānaka Maoli.[275]

One hundred and ten years later, in 1968, the Hawai‘i Supreme Court first recognized Maoli tradition and custom in the modern era in *Palama v. Sheehan*.[276] In *Palama*, the Hawai‘i Supreme Court looked at the language of section 7-1 and examined ancient Hawaiian tradition, custom and usage.[277] The *Palama* Court ruled that Maoli custom can evolve over time and rejected the argument that if a right was based on Maoli tradition and custom it should be limited to the point of which the grant was made.[278]

Shortly after *Palama*, in 1982, the Hawai‘i Supreme Court further expanded the rights granted to Kānaka Maoli in *Kalipi v. Hawaiian Trust Company*.[279] The *Kalipi* Court determined that section 7-1 provides two

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[273] *Oni*, 2 Haw. at 94.

[274] Section 7-1 of the Hawai‘i Revised Statutes provides:

> 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 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; providing that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HAW. REV. STAT. § 7-1 (2009).

[275] *Id.* at 93.

[276] Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968)

[277] *Id.* at 300, 400 P.2d at 97.

[278] *See id.* at 303, 440 P.2d at 99.

[279] *Kalipi* was the first case dealing with Kānaka Maoli traditional and customary rights that was decided by the Hawai‘i Supreme Court after the Constitutional Convention of 1978. *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982). At the 1978 Constitutional Convention, the Hawai‘i State Legislature enacted article XII, section 7 of the Hawai‘i State Constitution, recognizing the State's obligation to preserve and enforce traditional rights as a part of our Hawai‘i State Constitution. *See* HAW. CONST. art. XII, § 7; *Kalipi*, 66 Haw. at 4-5, 656 P.2d at 748. The *Kalipi* court spoke to this constitutional amendment and said that they would be guided by it. *Id.* at 5, 656 P.2d

types of rights to Kānaka Maoli: gathering rights and access rights.[280] The Court remained consistent with the holding in *Oni v. Meek*, and interpreted *Oni* to stand for the proposition that section 7-1 expresses all commoners' rights statutorily insured at the time of the Māhele.[281] Inasmuch as the *Oni* court did not expressly preclude the possibility that the doctrine of custom might be utilized as a vehicle for the retention of some such rights, the *Kalipi* Court determined that while the rights to gather natural and cultural resources are limited to the items delineated in section 7-1, section 1-1 "may be used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others."[282] As such, the *Kalipi* court determined that section 1-1 works to protect practices *not* specifically delineated in section 7-1.[283] While this expanded the narrow scope of the traditional and customary rights as defined in *Oni v. Meek*, it limited the practice of these rights.[284] The limits imposed by the Court required (1) residency within the ahupua'a;[285] (2) no actual harm caused to the landowner; (3) the practice must take place on undeveloped lands within the ahupua'a; and (4) that practices and rights to cultural

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at 748. *Kalipi* was foundational in setting the tone for future cases with respect to article XII, section 7.

[280] *Kalipi*, 66 Haw. at 5, 656 P.2d at 748.

[281] *Id.* at 11, 656 P.2d at 751.

[282] *Id.* at 11-12, 656 P.2d at 751-52. The *Kalipi* court did not explore in detail the scope of any gathering and access rights and maintained that "[t]he precise nature and scope of the rights retained by § 1-1 would, of course, depend upon the particular circumstances of each case." *Id.* at 12, 656 P.2d at 752.

[283] *See id.* at 10, 656 P.2d at 751-52 (noting that the court "perceive[s] the Hawaiian usage exception [section 1-1] to the adoption of the English common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law."). The *Kalipi* court also noted that "the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area," but that where practices not found in section 7-1 "have, without harm to anyone, been continued, we are of the opinion that the reference to Hawaiian usage in § 1-1 insures their continuance for so long as no actual harm is done thereby." *Id.* at 10, 656 P.2d at 751.

[284] *Id.* at 12, 656 P.2d at 752 ("For, as with gathering rights of § 7-1, there is an insufficient basis to find that such rights would, or should, accrue to persons who did not actually reside within the ahupuaa [sic] in which such rights are claimed.").

[285] Ahupua'a is defined as a "land division usually extending from the uplands to the sea." PŪKU'I & ELBERT, *supra* note 5, at 9.

resources are limited to those items and practices enumerated in section 7-1, unless established by custom.[286]

The courts have continued to extend the scope of native tenant rights to include cultural resources not enumerated by statute and further expanded the reach of access and gathering rights beyond a native tenant's ahupuaʻa.[287] The 1992 Hawaiʻi Supreme Court case, *Pele Defense Fund v. Paty*, marked a departure from, and extension of, *Kalipi* rights by further expanding Kānaka Maoli rights to natural and cultural resources outside of one's ahupuaʻa.[288] The *Pele Defense Fund* court grounded its ruling in section 1-1 as well as committee reports from the 1978 Constitutional Convention, which were used as evidence that the constitutional convention delegates had considered the fact that people might go out of their ahupuaʻa and that they did not want this provision to be narrowly construed.[289] Essentially, while the *Pele* Court reiterated the holding in *Kalipi* – that the scope of Kānaka Maoli rights includes those customarily practiced rights that may be broader than those items enumerated in section 7-1 – the *Pele* court also expanded the *Kalipi* holding such that

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[286] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8-13, 656 P.2d 745, 749-52 (1982) (for the undeveloped land requirement, the limitation to items specifically enumerated unless established by custom, the no actual harm requirement, and the residency within an ahupuaʻa requirement, respectively).

[287] *See e.g.*, Pele Def. Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992) (holding that "native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupuaʻa in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner").

[288] *Id.*

[289] *Id.* at 619-20, 837 P.2d at 1271-72. Specifically, the court cites to the Committee on Hawaiian Affairs' committee report which states, in relevant part, that:

> Your Committee also decided that it was important to eliminate specific categories of rights so that the courts or legislature would not be constrained in their actions. Your Committee did not intend to remove or eliminate any statutorily recognized rights or any rights of native Hawaiians from consideration under this section, but rather your Committee intended to provide a provision in the Constitution to encompass all rights of native Hawaiians such as access and gathering. Your Committee did not intend to have the section narrowly construed or ignored by the Court.

Id. at 619-20, 837 P.2d at 1271 (citing Stand. Comm. Rep. No. 57, reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, 640). Additionally the court noted that the committee reported "although a tenant may not own any land in the ahupuaʻa, since these rights are personal in nature, as a resident of the ahupuaʻa, he may assert any traditional and customary rights necessary for subsistence, cultural or religious purposes." *Id.* at 619 n.33, 837 P.2d at 1271 n.33 (citing 1 Proceedings, *supra*, at 640).

traditional and customary practices may extend beyond the boundaries of one's ahupua'a.[290]

In 1995, the Hawai'i Supreme Court in *Public Access Shoreline Hawai'i v. Hawaii County Planning Commission* ("*PASH*") built upon the rulings in *Kalipi* and *Pele* and determined that land titles in Hawai'i confirm only a "limited property interest as compared with typical land patents governed by Western concepts of property" so that Kānaka Maoli would retain rights with regard to undeveloped land, to pursue traditional activities.[291] *PASH* thus reaffirmed the preeminence of Hawaiian custom and usage in State law by recognizing that Kānaka Maoli possess an interest in retaining rights to pursue traditional and customary activities that is "clearly distinguishable from that of the general public."[292] The Court determined that as long as a custom was established,[293] abandonment of a particular site or practice did not automatically lead to the extinguishment of the right to continue that practice at a later time.[294] The *PASH* Court acknowledged that this might conflict with some individual's understanding of property rights in Hawai'i and set forth four requirements to determine if a Kanaka Maoli would be eligible to claim such a practice: (1) the claimant must be Native Hawaiian;[295] (2) the conduct must occur on undeveloped or "less than fully developed" property;[296] (3) the claimed practice must be an established custom;[297] and

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[290] *Kalipi*, 66 Haw. at 617-18, 620, 837 P.2d at 1270-71, 1272.

[291] Pub. Access Shoreline Hawai'i v. Hawai'i Cnty. Planning Comm'n, 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1995), *cert. denied,* 116 S. Ct. 1559 (1996) (Mem.) [hereinafter "PASH"]; D. Kapua'ala Sproat, *The Backlash Against PASH: Legislative Attempts To Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321, 321 (1998).

[292] *PASH*, 79 Hawai'i at 434, 903 P.2d at 1255; Sproat, *supra* note 291, at 321.

[293] The *PASH* court determined that because "HRS § 1-1 represents the codification of the doctrine of custom *as it applies in our State*," the "passage of HRS § 1-1's predecessor fixed November 25, 1892 as the date Hawaiian usage must have been established in practice." *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268. November 25, 1892 marks the date that section 1-1 was adopted by the Kingdom of Hawai'i.

[294] *See id.* at 450, 903 P.2d at 1271.

[295] *PASH*, 79 Hawai'i at 449, 903 P.2d at 1270. The *PASH* Court refused to imply an endorsement of a fifty percent blood quantum requirement for claims based upon traditional and customary Hawaiian rights, finding instead that "those persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778,' and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1, are entitled to protection regardless of their blood quantum. *Id.* (citing HAW. CONST. art. XII, § 7).

[296] Though the *PASH* court refused to "scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed,'" the court

(4) the conduct must be a reasonable use.[298] The *PASH* Court also ruled that state agencies must protect the reasonable exercise of traditional and customary rights by giving cultural interests asserted "full consideration" in issuing land use permits.[299] Taken together, these cases indicate the supportive stance that the State legislature and judiciary has taken to preserve and protect Kānaka Maoli rights to natural and cultural resources.

In recognition of these reaffirmed rights, in 2000, both the State Legislature as well as the State Judiciary mandated that agencies independently assess impacts on cultural resources before development occurs.[300] In 2000, the Hawai'i State Legislature passed Act 50,[301] which amended HEPA to clarify that impacts on traditional and customary native Hawaiian rights and "cultural practices of the community and the State" must be assessed as part of the EIS process.[302] The legislature acknowledged that "although the Hawaii State Constitution and other state laws mandate the protection and preservation of the traditional and

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affirmed the holding in *Kalipi* that guarantees access to undeveloped land. *PASH*, 79 Hawai'i at 450-51, 903 P.2d at 1271-72. The *PASH* court further stated that "the State is authorized to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed," however, "the State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence." *Id*. at 450, 903 P.2d at 1272.

[297] *See PASH's* explanation of custom, *supra* note 296.

[298] PASH, 79 Hawai'i at 442, 903 P.2d at 1263 (noting that while the "balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices or exercising otherwise valid customary rights in an *unreasonable* manner . . . the *reasonable* exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7.").

[299] *See id.* at 435, 903 P.2d at 1256 (imposing a firm obligation upon state and county planning commissions to give "full consideration" to cultural and historic values in implementing their objectives, policies, and guidelines).

[300] *See* 2000 Haw. Sess. Laws Act 50, at 93-94 (amending HAW. REV. STAT. § 343-2); Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 47 n.28, 7 P.3d 1068, 1084 n.28, (2000) (noting the legislature's observation, in enacting Act 50, that "the past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture."). The *Ka Pa'akai* court also found that "state agencies such as the LUC may not act without independently considering the effect of their actions on Hawaiian traditions and practices." *Ka Pa'akai*, 94 Hawai'i at 46, 7 P.3d at 1083. The court thus provided an analytical framework to effectuate the State's obligation, which is described *infra*. *See Ka Pa'akai*, 94 Hawai'i at 47, 7 P.3d at 1084.

[301] 2000 Haw. Sess. Laws Act 50, at 93-94 (amending HAW. REV. STAT. § 343-2).

[302] *Id.*

customary rights of native Hawaiians, the failure to require environmental impact statements to disclose the effect of a proposed action on cultural practices has resulted in the loss of important cultural resources."[303] To remedy the obvious discord between the State's mandate to protect cultural resources and the lack of a process to implement this requirement, the Legislature enacted Act 50.[304] Act 50 requires a more thorough consideration of an action's potential to adversely impact Kānaka Maoli culture and traditions to better ensure the culture's protection and preservation.[305]

Following the passage of Act 50, the Hawai'i Supreme Court in *Ka Pa'akai O Ka 'Āina v. Land Use Commission* provided government agencies with an analytical framework to help ensure that a "careful balance between native Hawaiian rights and private interests" is maintained.[306] The Court looked at Act 50 and acknowledged, "[t]he past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture."[307] The Court determined that although the state constitution, statutes and case law protect Kānaka Maoli rights, "in order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable."[308] Further, the Court determined that "[i]n order for native Hawaiian rights to be enforceable, an appropriate analytical framework for enforcement is needed."[309] The *Ka Pa'akai* court thus provided a framework to effectuate the State's obligation to protect Kānaka Maoli traditional and customary practices.[310] This framework requires that agencies, at a minimum, make specific findings and conclusions regarding:

> (1) The identity and scope of "valued cultural, historical, or natural resources"[311] in the petition area, including the

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[303] H. Stand. Comm. Rep. No. 3298, in 2000 House Journal, at 1378.

[304] *Id.*; 2000 Haw. Sess. Laws Act 50, at 93-94 (amending HAW. REV. STAT. § 343-2).

[305] *Id.*

[306] *See* Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 35, 7 P.3d 1068, 1072 (2000).

[307] *See id.* at 47 n.28, 7 P.3d at 1084 n.28.

[308] *Ka Pa'akai*, 94 Hawai'i at 46, 7 P.3d at 1083.

[309] *Id.*

[310] *Id.* at 46-47, 7 P.3d at 1083-84.

> extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
>
> (2) The extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and
>
> (3) The feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.[312]

Beginning in the 1970s, the stance taken by the state judiciary and legislature leave no question that State and County agencies are obligated to protect the reasonable exercise of Kānaka Maoli traditional and customary rights. Despite the fact that the Hawai‘i state legislature and courts have adopted progressive standards that allow Kānaka Maoli and other organizations to challenge land use decisions and assert environmental and traditional and customary rights, the far-reaching 1978 amendments to the state constitution prescribed an idealized, self-sufficient, and environmentally sensitive approach to government that we have not been able to fully implement. The time has come reevaluate the state's implementation of these objectives and affirmations and adopt a culturally-sensitive holistic approach to the use of our state's limited natural and cultural resources.

V. EMPLOYING THE FRAMEWORK TO ANALYZE THE INTERISLAND UNDERSEA CABLE PROJECT

Despite broad protections, the loosely regulated commercialization of environmental and cultural resources continues to have negative impacts on Hawai‘i's unique ecosystems.[313] By examining past legislative and judicial history, it is clear that the trend of the Hawai‘i State Courts has been to expand the rights and protections afforded to Kānaka Maoli natural and cultural resources.[314] The State has acknowledged that despite strong mandates requiring the protection and preservation of traditional and customary rights, the failure to require an EIS to properly disclose the effects of a proposed action will result in the loss of important cultural

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[311] The Court declined to define the term "cultural resources" and found that it is a "broad category of which native Hawaiian rights is only one subset." *Id.* at 47 n.27, 7 P.3d at 1084 n.27.

[312] *Ka Pa‘akai*, 94 Hawai‘i at 46-47, 7 P.3d at 1083-84.

[313] *See infra* Part V.A.

[314] *See supra* Part IV.B.

resources.[315] The desire to move the State towards a greener future puts Hawai'i's indigenous resources in jeopardy; however, by approaching environmental protections as a form of restorative justice for Kānaka Maoli communities, these resources may be utilized in a way that will both benefit Hawai'i's future generations as well as ensure future political and cultural survival for Kānaka Maoli communities. In order to do so, we must adopt an approach that is culturally tailored to Hawai'i's unique needs.

A. *The "Environmental Injustice": Innovative Change vs. Continued Degradation*

There have been myriad projects that have caused residents and Kānaka Maoli communities alike to question the veracity of Hawai'i's environmental review process, with specific regard to the protections given to Hawai'i's natural and cultural resources.[316] It is this history of

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[315] H. Stand. Comm. Rep. No. 3298, in 2000 House Journal, at 1378; 2000 Haw. Sess. Laws Act 50, at 93-94 (amending HAW. REV. STAT. § 343-2).

[316] The Hawai'i Superferry ("HSF") is a prime example of a project that highlighted the inadequacies of Hawai'i's EIS process. *See* KOOHAN PAIK & JERRY MANDER, THE SUPERFERRY CHRONICLES: HAWAII'S UPRISING AGAINST MILITARISM, COMMERCIALISM AND THE DESECRATION OF THE EARTH (2009). HSF executives rejected any prospect of environmental review complaining that it would take too long to complete and would prevent them from securing funding because environmental review would need to be fulfilled prior to funding. *Id.* Despite protest from cultural practitioners and residents from across the State, Governor Lingle and the State Legislature intervened to categorically exempt HSF from the need to complete an environmental review before operations began. *Id.* It wasn't until the Hawai'i courts stepped in that HSF was required to halt operations until after these reviews were completed. *Id.* The HSF project demonstrates that with the right political powers at play, nearly any project can escape proper environmental review and reinforces the importance of tightening unchecked agency discretion in the approval of projects that have an adverse impact on cultural resources as well as the environment in general. *Id.*

The Mauna Kea Thirty-Meter-Telescope ("TMT") project is another project that threatens to devastate cultural resources. In 1968 the state Land Board issued a general lease to the University of Hawai'i (University) to build an observatory on Mauna Kea. *Sacred Summits: Timeline of Events*, KAHEA: THE HAWAIIAN-ENVIRONMENTAL ALLIANCE, http://kahea.org/issues/sacred-summits/timeline-of-events (last visited Nov. 25, 2011). Multiple telescopes were subsequently constructed and in 1998 the Hawai'i State Auditor released a critical report documenting thirty years of mismanagement of Mauna Kea by the Land Board and the University. *Id.* In 1999, developers proposed four to six more telescopes finding "no significant impact" in an environmental assessment completed for the project. *Id.* In 2000 the University developed a "Master Plan," for the summit allowing for at least 40 new telescopes and support structures. *Id.* In 2005 a court-ordered EIS concluded that the cumulative impact of thirty years of astronomy activity has caused "significant, substantial and adverse harm," and after a protracted legal battle, the Third Circuit Court revoked the University's development

continued cultural harms, despite broad environmental protections, that

permit and invalidated the "Master Plan," requiring a new plan to be developed and approved. *Id.* In April 2009, the Hawai'i State Board of Land and Natural Resources approved the University's subsequent "Comprehensive Management Plan" for Mauna Kea, which paves the way for an unlimited number of new telescope and support structures. *Id.* In 2010, developers for the largest, most controversial "Thirty Meter Telescope" applied for a permit to build in the summit conservation district. *Id.*; Interview with Lehua Kauhane, Cultural Surveys Hawaii, in Honolulu, Haw. (Mar. 25, 2010). A consultant report on the risk of building the TMT on Mauna Kea warned that the project would run a gauntlet of possible challenges, including some that would be "potential showstoppers." Interview with Lehua Kauhane. Cultural specialists working on the Cultural Impact Assessment for the project have recommended that the only way to have no significant impact on the cultural resources atop Mauna Kea would be no action. *Id.* The BLNR's decision to deny a group of Kānaka Maoli practitioners' request for a contested case hearing is currently before the Intermediate Court of Appeals.

In 2005, the Hawai'i State Legislature approved Act 247, which allowed the City to create a tax fund to move forward with a rail transit system. *See generally* Baldauf, *supra* note 138. The City of County of Honolulu Department of Transportation Services is proposing the *Honolulu High-Capacity Transit Corridor Project* on the island of O'ahu. *Id.* The City and County of Honolulu is proposing an elevated, electrically powered, fixed-guideway transit system with an approximate length of twenty miles. *Id.* In addition to the transit rail itself, the project will require the construction of approximately 21 stations and supporting facilities, including maintenance and storage facilities, transit centers, park-and-ride lots, and traction power substations. *Id.* The City has proposed to split the Rail Project into four construction phases: (1) from East Kapolei to Pearl Highlands, (2) Pearl Highlands to Aloha Stadium, (3) Aloha Stadium to Middle Street, and (4) Middle Street to Ala Moana Center. *Id.* Phase four is the most hotly contested phase as it passes through Kaka'ako, a well-known area for Kānaka Maoli burials. *Id.* The areas that will be excavated to support Rail infrastructure are estimated to contain eighty-one known historic resources; it has been determined that it will have an adverse effect on thirty-three of those resources. *Id.* Further, the final EIS submitted for the rail project proposal states that the project will not affect any *known* archaeological resources. *Id.* What is most troublesome about this finding is that the phased approach proposed by the City in developing and construction the Rail project. The City proposes to hold off on an archeological impact survey of Phase 4, which encompasses Kaka'ako until after Phases 1 and 2 are completed, and Phase 3 is under construction. *Id.* A Cultural Resources Technical Report was issued on August 15, 2008 and intended to "provide sufficient information on cultural practices located within the study corridor and to permit a well-reasoned analysis and informed decision on preserving and protection native Hawaiian and other cultural rights to the extent feasible" as required by HEPA, Act 50 Cultural Impact Assessment Law, and *Ka Pa'akai*. *Id.* Although the report maintains that the "Project Team has gathered sufficient information on cultural practices to permit an adequate analysis" in an effort to "ensure that the State's obligation to protect native Hawaiian customary and traditional practices is satisfied," the mere fact that Phase 4 will not undergo an AIS until after construction of Phases 1-3 are completed demonstrates that the environmental mandates are not fully complied with. *Ka Pa'akai* requires that specific "valued cultural, historical, or natural resources" be identified in the study *before* permitting for a project may be issued. This mandate cannot be complied with unless *all* such resources are identified prior to any construction. The phased approach taken by the City and the Rail Project Team directly frustrates the procedural protections offered by HEPA, Act 50, and *Ka Pa'akai* and further reiterates the need to incorporate more substantive provisions into Hawai'i's environmental review processes.

explains why these projects continue to symbolize an "injustice" to the Kānaka Maoli people, and to their cultural and natural resources. Given Hawai'i's current energy crisis, it is highly likely that island residents will continue to be confronted with renewable energy projects, like the Interisland Undersea Cable, as the State moves towards its renewable energy goals. Accordingly, the State should view this project as an opportunity to set the tone as to how environmental decisions regarding the conflict between Maoli values and economic values should be handled so that decisions impacting the future of Hawai'i may provide a sense of restorative justice to Kānaka Maoli.

As the agency proposing the Interisland Undersea Cable, DBEDT must comply with Hawai'i's environmental review process, and will be required to comply with the cultural protections mandated by Hawai'i's EIS law, Act 50, and *Ka Pa'akai*.[317] Projects such as the undersea cable often have political and economic roots, which tend to supersede environmental concerns.[318] The elimination of these environmental injustices to Kānaka Maoli natural and cultural resources is critical to the government's ability to allow Kānaka Maoli communities to work towards cultural resurrection and political nationalism.

1. Interisland Undersea Cable: Innovation or Degradation?

As a part of the HCEI, the Interisland Wind Project is projected to provide the island of O'ahu with 400 megawatts of renewable energy, contributing a modest amount towards the State's renewable energy goals.[319] Because the cable project is likely to impact a multitude of natural and cultural resources, it is important to fully consider adverse effects and any feasible alternatives.[320]

Each of the routes identified by SOEST intersect with some part of the Hawaiian Islands Humpback Whale National Marine Sanctuary.[321] There are also unanswered questions regarding the cable's possible effect on sharks, another revered deity in the Maoli culture.[322] Further, recent

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[317] *See* HAW. REV. STAT. § 343-5(b) (2010) (applying to agency proposed actions).

[318] *See e.g.*, discussion, *supra* note 316.

[319] *See Hawai'i Energy Agreement, supra* note 145.

[320] The author notes, that while not providing an exhaustive list, the discussion below is meant to explain various natural and cultural resources that may be adversely impacted by the cable, and to show the great need to properly assess cultural impacts.

[321] *See* SOEST Report, *supra* note 181.

[322] Manō was a spiritual creature and was the 'aumakua of certain Kānaka

studies show that the endangered Hawaiian Monk Seal feeds off of prey located in deeper waters and in sandy sea-floor environments, where the cable is likely to lay.[323] Concerns regarding impacts to sea life aside, the adverse effects on fishing and coral beds also alarm Kānaka Maoli communities.[324] Fishing was traditionally a great source of sustenance for Kānaka Maoli, and for certain island communities – particularly the Kānaka Maoli community on the island of Molokaʻi – fishing remains an integral part of Molokaʻi's subsistence-based culture.[325]

The cable landing sites are also likely to have severe adverse environmental impacts on Hawaiʻi's natural and cultural resources. The proposed landing site[326] on Oʻahu is Mōkapu Peninsula ("Mokapu").[327] Although Mōkapu is currently the site of the Kāneʻohe Marine Corp Base

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Maoli. Because of the spiritual and genealogical connection to manō, Kānaka Maoli took great care to ensure their protection. PŪKUʻI & ELBERT, *supra* note 5, at 239.

[323] Bishop Museum, *Natural Science Monk Seal Diet Research*, KA ʻELELE: JOURNAL OF THE BISHOP MUSEUM 8 (2010). The Hawaiian Monk Seal is in serious peril. *Id.* For many years, it was believed that Hawaiian Monk Seals got most of their food from shallow coral reefs, but recent studies suggest that their prey is actually found in deeper water and in sandy sea-floor environments. *Id.* Developers have proposed to lay the undersea cable on the sea floor between the islands of Oʻahu and Molokaʻi. Given this new research it is possible that the cable will adversely impact Hawaiian Monk Seal feeding habitats. DBEDT Colloquium, *supra* note 159.

[324] Catherine Cluett, *Homesteaders Say No to Wind Power*, THE MOLOKAI DISPATCH, Sept. 2, 2009, *available at* http://themolokaidispatch.com/homesteaders-say-no-wind-power.

[325] *See* Molokai Community, *Molokaʻi: Future of a Hawaiian Island* 19 (2008) (on file with author) [hereinafter *Molokaʻi: Future of a Hawaiian Island*]. Apart from environmental concerns, both the Lānaʻi and Molokaʻi island communities are concerned about the preservation of their self-sufficient and subsistent lifestyles. *See* Ilima Loomis, *Opposition 'very troubled' by 'big wind' planned for Lanai*, MAUI NEWS, Feb. 6, 2011, http://www.mauinews.com/page/content.detail/id/545854/Opposition--very-troubled--by--big-wind--planned-for-Lanai.html?nav=10. In addition to expressing concern over impacts to the environment, these communities are specifically concerned about impacts to cultural sites, scenic views, access to camping, fishing, gathering, and hunting grounds, and to culturally important areas, such as areas integral to the study of traditional Hawaiian navigation. *Id.*

[326] As part of the Interisland Wind Project, transmission lines, an AC/DC converter station, and maintenance sheds are needed. Interisland Wind, *Project Fact Sheet* (Nov. 4, 2009), *available at* www.interislandwind.com (last visited Mar. 1, 2010). Several possible converter station configurations are being considered; these stations range from one to eight acres in size and from one to nine stories tall. *Id.*

[327] Developers of the project are seriously considering Mōkapu as a landing site for the Molokaʻi to Oʻahu transmission cable. The name Mōkapu is derived from two Hawaiian words: Moku is a small island or peninsula, and kapu means sacred or keep out. ELSPETH P. STERLING & CATHERINE C. SUMMERS, SITES OF OʻAHU 216 (1978).

Air Station, it contains numerous cultural sites including heiau,[328] koʻa,[329] and loko iʻa.[330] It is an area known for rich fishing and an abundance of marine resources around the coast, which traditionally provided Kānaka Maoli communities with a major source of sustenance.[331] Mōkapu is also infamous for being the largest burial site on Oʻahu and one of the largest sites in Hawaiʻi.[332]

The proposed landing site on the island of Molokaʻi is located at ʻĪlio Point.[333] Because ʻĪlio Point is home to many rare and endangered species that are unique and worthy of additional protection, the area has been designated a Natural Area Reserve.[334] As one of the most species-

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[328] Heiau is defined as a "Pre-Christian place of worship, shrine." PŪKUʻI & ELBERT, *supra* note 5, at 64.

[329] Koʻa is defined as a "shrine, often consisting of circular piles of coral or stone, built along the shore or by ponds or streams, used in ceremonies as to make fish multiply." PŪKUʻI & ELBERT, *supra* note 5, at 156.

[330] Loko iʻa is defined as a "fishpond." PŪKUʻI & ELBERT, *supra* note 5, at 211.

[331] *See* STERLING & SUMMERS, *supra* note 327.

[332] Mōkapu is the largest known Hawaiian burial ground on Oʻahu. STERLING & SUMMERS, *supra* note 327, at 216. Within the last 30 years, over 500 burials have been unearthed. *Id.*; *see also* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 127, at 245, which provides that 1,504 ʻiwi kūpuna were exhumed from Mōkapu. This becomes problematic when considering the landing site of the cable. Between 1938-1940, 1300 remains were excavated. *See* June Noelani Cleghorn, *Repatriation of Human Remains at Marine Corps Base Hawaii* (2001) (on file with author). In 1972, the Mōkapu sand dunes were listed on the National Register of Historic Places. *Id.* The Mōkapu burial dunes were likely established burial grounds used by the inhabitants of windward Oʻahu villages. *Id.* Proposing to use Mōkapu as a landing site for the undersea cable would have serious impacts on the resources and cultural beliefs of Kānaka Maoli. Because of the prevalence of ʻiwi in the Mōkapu area, developers will likely run into ʻiwi while landing the cable and constructing the necessary infrastructure. For Kānaka Maoli, beliefs and customs associated with death are deeply ingrained in the Hawaiian culture, calling for utmost respect and reverence.

[333] Also known as Kalaeokaʻīlio, this state owned parcel of land is currently being designated as a Natural Area Reserve. *See* Laura H. Thielen, Chairperson, News Release, Dep't of Land and Natural Res., DLNR Holds Public Hearing on Proposed ʻĪlio Point Natural Area Reserve (Oct. 29, 2009) [hereinafter "Natural Area Reserve News Release"] (on file with author).

[334] The State of Hawaiʻi created the Natural Area Reserves System "to preserve and protect representative samples of Hawaiian biological ecosystems and geological formations." Natural Area Reserve News Release, *supra* note 332, at 1. ʻĪlio Point has long been known for its significant biological and geological features. *Id.* at 2. The proposed 261-acre reserve is meant to protect and help restore a coastal ecosystem that is part of a larger wilderness area. *Id.* at 1. This type of ecosystem merits conservation and restoration because coastal areas have been severely modified by human activity and development in Hawaiʻi. *Id.* The coastal vegetation contains twenty-three native plant

rich coastal ecosystems in Hawai‘i, this area contains numerous plants and animals that Kānaka Maoli traditionally collected for practical, medicinal, and spiritual uses.[335]

While Kānaka Maoli concern is tangentially related to adverse environmental impacts, the heart of the environmental injustice with regard to the Interisland Undersea Cable is largely grounded in the exploitation and degradation of Maoli natural and cultural resources.[336] For these small island communities, specifically those of Moloka‘i and Lāna‘i, the appropriate management and preservation of Maoli natural and cultural resources can mean the difference between whether or not their families will have food on their tables; largely, it is the difference between cultural preservation or cultural cessation.

2. The Cultural Perspective: Understanding Specific Environmental Justice Problems from a Maoli Perspective

Policymakers often ignore "cultural assumptions [that] affect environmental protection standards."[337] In implementing environmental protections, it is important to realize that indigenous communities, like Kānaka Maoli, have different understandings of "the environment" and possess unique spiritual, cultural, and economical connections to these natural and cultural resources.[338] Environmental concern for this project from the Kānaka Maoli perspective is not merely about protecting coral reef beds, fishing refuges, and the whale sanctuary; rather, it is about yet another attempt to circumvent laws which can be properly utilized to restore the "injustice" committed against Kānaka Maoli and Maoli culture by ensuring that rights of gathering and access to cultural resources are ensured. Kānaka Maoli concerns about this project stem from the goals that the Maoli people have for the betterment of their island communities, culture, and lāhui.[339]

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species, some of which are extremely rare and only found in Moloka‘i. *Id.* It is a resting point for the endangered Hawaiian Monk Seal (*Monachus schauinslandi*) and the sand dunes and cliffs are predicted to be able to support abundant seabird populations. *Id.*

[335] This area is said to contain fishing shores, heiau, burials, and basalt quarries, important fishing areas, bird habitat and nesting locations, and it is frequented by endangered Hawaiian Monk Seals. *Id.*

[336] *See e.g.*, Loomis, *supra* note 325. Moloka‘i and Lāna‘i communities have routinely expressed frustration over the plans to exploit their own island resources in order to feed O‘ahu's electricity demands. *Id; see also* Kanai, *supra* note 154.

[337] Yamamoto & Lyman, *supra* note 27, at 333.

[338] *Id.* at 329.

[339] Lāhui is defined as "nation," "race," "people." PŪKU‘I & ELBERT, *supra*

The Interisland Wind Project has the potential to impact the social, political, and economic landscapes of Hawai'i's island communities forever to the detriment of the Kānaka Maoli people and culture. Moloka'i is the least developed island in the State of Hawai'i.[340] As part of the Interisland Wind Project, the wind farm proposed for the island of Moloka'i calls for a multitude of wind turbines, each sitting "on a [forty-five[foot concrete foundation, and measure 400 feet tall, or about [forty] stories."[341] A group of Moloka'i Hawaiian homesteaders believe the wind project would be a "detriment to the environmental, cultural[,] and spiritual health of the proposed area, near Mo'omomi."[342] The addition of wind farms would not only impact Moloka'i's environmental landscape, but its social and economic landscapes as well.[343] Island residents, are also very concerned about what their island will look like if the Interisland Wind Project is completed.[344] Moreover, they worry about whether their rural community can handle the projected growth.[345] On the island of Lāna'i, the development of a wind farm threatens to consume one-quarter of the island's acreage, destroying archeological, cultural, and historical resources and significantly impeding traditional subsistence activities such as hunting and gathering.[346] Many Moloka'i and Lāna'i families supplement their regular household income through subsistence activities;

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note 5, at 190.

[340] *Moloka'i: Future of a Hawaiian Island, supra* note 325, at 14.

[341] Cluett, *supra* note 324.

[342] *Id.* The proposed area has been used for generations for subsistence fishing, and is home to many native and endangered plant, bird and animal species, including the endangered Hawaiian Monk Seal. *Id.* It is also rich in archeological artifacts. *Id.* The area is referenced as a preserve to the Department of Hawaiian Home Lands. *Id.* Residents are also concerned that the cables would damage the delicate ecosystem and fishing grounds of Mo'omomi and that the "creation of infrastructure would cause fragmentation of the ecosystem as well as limited access and restricted gathering rights" to the resource-rich area. *Id.*

[343] *See generally id.*

[344] Telephone interview with Walter Ritte, Native Hawaiian Cultural Practitioner and Activist (Jan. 15, 2010); *see also* Interview with Curtis, *supra* note 9.

[345] Telephone interview with Ritte, *supra* note 343.

[346] *See* Brenden Ka'aikala, *Lanai wind farm would be too expensive and harm island's environment*, HONOLULU STAR ADVERTISER, Sept. 20, 2010, http://staradvertiser.com/editorials/20100920_Lani_wind_farm_would_be_too_expensive_and_harm_islands_environment.html?id=103260534; Alan Yonan, Jr., *The price of wind*, HONOLULU STAR ADVERTISER, Mar. 27, 2011, http://www.staradvertiser.com/business/20110327_The_price_of_wind.html?id=118728874.

therefore, the continued availability and protection of the island's natural and cultural resources is essential to perpetuate these subsistence practices.[347] The further degradation of these resources will impair the ability of Kānaka Maoli communities, to continue their subsistence lifestyles, cultural practices, and the ability to provide for their families. The exploitation of Maoli resources directly conflicts with the goal of Kānaka Maoli communities to protect and preserve their cultural resources and traditional heritage, however, "indigenous communities are diverse and don't always agree on the impacts of an action."[348] Understanding specific cultural concerns, such as those stemming from the undersea cable project, allows those involved to better tailor "actual remedies to meet the needs and goals of [Kānaka Maoli] communities.[349]

B. *The Rights Claim: the Cultural Impact Assessment Process as a Foundation for Restorative Justice for Kānaka Maoli*

Despite the strong desire to protect cultural resources, these treasures continue to be lost due to the lack of guidance and the practical shortcomings of Hawai'i's EIS laws.[350] Cultural Impact Assessments are a broadly supported element of the Hawai'i EIS process.[351] To truly realize the goals articulated by the Legislature and the courts regarding the protection of cultural resources, practices, and beliefs, the State must take a more proactive approach to Hawai'i's EIS law and the implementation of Cultural Impact Assessments. Professor Yamamoto's "Racializing Environmental Justice" approach goes beyond merely identifying and

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[347] *Moloka'i: Future of a Hawaiian Island, supra* note 325, at 19. Subsistence is an important part of Moloka'i's hidden economy, and subsistence activities provide Moloka'i residents with thirty-eight percent of their food. *Id.* at 5. In ancient times, the people of Moloka'i were renowned for their ability to produce abundant quantities of food. *Id.* In honor of the great productivity of the island and its surrounding ocean, Moloka'i was frequently referred to as 'Āina Momona (abundant land). *Id.* at 13.

[348] Subsistence has also been critical to the persistence of traditional Hawaiian cultural values, customs, and practices. *Id.* at 19. Cultural knowledge has been passed down from one generation to the next through training in subsistence skills. *Id.*

[349] *See* Yamamoto & Lyman, *supra* note 27, at 329.

[350] *See e.g.*, discussion, *supra* note 316.

[351] *See supra* Part IV.B. Furthermore, the Hawai'i Supreme Court "has repeatedly recognized the public purpose served by HEPA to 'ensure that environmental concerns are given appropriate consideration in decision making' such that 'environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.'" Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Hawai'i 150, 231 P.3d 423 (2010)).

assessing Kānaka Maoli rights, but recognizes that the Kānaka Maoli community is differently situated according to its specific socio-economic needs, political power, cultural values, and group goals; therefore, these needs and goals should be better reflected in Hawai'i's environmental review process.[352]

The expanded idea of environmental justice demands a form of restorative justice for Kānaka Maoli, which can be accomplished by protecting the resources and values that are important to Maoli communities in the review and approval of projects that threaten to negatively impact the way Kānaka Maoli relate to their natural and cultural resources. Traditional and customary rights and other protections afforded to cultural resources (i.e., Act 50 and Hawai'i's EIS laws, as well as common law) are attempts to restore what was exploited, damaged, and taken from the Kānaka Maoli so that cultural practices and traditions may be preserved. This gives rise to the critical importance of the State's Cultural Impact Assessment process. As applied to environmental protections, the sense of restoration emanates from the maintenance of natural and cultural resources so that cultural traditions and practices may be preserved and protected for present and future generations. It is a form of cultural resurrection, restoring an indigenous people who continue to experience the degradation of their people, land, and culture.

The positions of both the judiciary and the legislature leave no question that the State and County agencies are obligated to protect the reasonable exercise of traditional and customary rights of Kānaka Maoli to the extent feasible.[353] To accomplish the goal of providing restorative justice through the preservation and protection of natural and cultural resources, we must view the legal protections afforded under HEPA, Act 50, and State common law as an enforceable right of Kānaka Maoli to be protected by projects that operate as a continuing harm to Maoli natural and cultural resources.[354] Proponents of projects that threaten to endanger Maoli traditional and cultural practices, such as the Interisland Wind proposal, must be required to more thoroughly analyze impacts to natural and cultural resources and practices, and implement measures to affirmatively protect these resources from further degradation. Even the best protections afforded to our natural and cultural resources cannot be ensured without specific substantive changes to Hawai'i's EIS law.

The practical requirements imposed on potential developers by Hawai'i's constitution, state laws, and the courts have become largely

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[352] *See* Yamamoto & Lyman, *supra* note 27.

[353] *See supra* Part IV.

[354] *See generally* Yamamoto & Lyman, *supra* note 27.

procedural, and the safeguards requiring the preservation of cultural resources are nearly obsolete.[355] Despite past attempts to enact Administrative Rules to guide the preparation of Cultural Impact Assessments during the EIS process, no rules have yet been adopted. In the mid-1990s, the Environmental Council unsuccessfully attempted to develop draft EIS rules that included a definition of cultural impacts and required their disclosure.[356] In 1996, the Governor disapproved of the Council's rules as "overstepping its authority," and suggested instead that the Legislature address the issue.[357] In 1997, the Council adopted guidelines for assessing cultural impacts; over a decade later, this remains the only guidance on cultural impact assessments.[358] Because this guidance lacks the full force of law, the Hawai'i State Legislature stepped in to specifically require that any adverse effects on cultural practices are assessed as part of the environmental review process,[359] but even this proved insufficient to fulfill the letter and spirit of the law.[360]

In passing Act 50, the Legislature determined that consideration of human impacts on Maoli culture is *necessary* to ensure its continued existence, development, and exercise.[361] Despite these amendments, the requirements imposed on potential developers have proven insufficient due to a lack of guidance on the assessment of cultural impacts,[362] and the absence of any mechanism to ensure that these impacts are actually mitigated results in the destruction of our island's natural and cultural resources and practices.[363] To strengthen HEPA's protections and policies, the State must incorporate a substantive foundation into the statute's procedural provisions. To protect Hawai'i's natural and cultural resources from further degradation, and remain a vehicle for restorative justice to

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[355] *See e.g.*, discussion, *supra* note 316; *see also supra* Part IV.

[356] H. Stand. Comm. Standing Com. Rep. No. 145-00, in 2000 House Journal, at 1378.

[357] *Id.*

[358] *See* OEQC, *Guidelines for Assessing Cultural Impacts* (Adopted by the Environmental Council, State of Hawai'i, Nov. 19, 1997) [hereinafter "CIA Guidelines"].

[359] H. Stand. Comm. Standing Com. Rep. No. 145-00, in 2000 House Journal, at 1378; *see also* 2000 Haw. Sess. Laws, Act 50 at 93-94 (amending in HAW. REV. STAT. § 343-2 (2009)).

[360] *See e.g.*, discussion, *supra* note 316.

[361] H. Stand. Comm. Rep. No. 2798, in 2000 House Journal, at 1378.

[362] *See generally CIA Guidelines*, *supra* note 358.

[363] *See e.g.*, discussion, *supra* note 316.

Kānaka Maoli communities, this substantive foundation must also be culturally sensitive.

C. *Possible "Justice" Prescriptions: Alternatives and Recommendations for Hawai'i's EIS Process*

Many states, including Hawai'i, have modeled their environmental protection laws after NEPA.[364] While HEPA remains wholly procedural, some states have sought to improve upon NEPA by holding their state agencies and municipalities to higher standards than those imposed by NEPA on their federal counterparts.[365] Without NEPA's substantive foundation, HEPA is nothing more than a process for fully disclosing future environmental degradation.

The Hawai'i EIS process needs to facilitate a more thorough examination of the cultural consequences of development.[366] Although commentators view the EIS process as a judicial backdoor to delay or derail proposed projects,[367] the sad reality is that Hawai'i's EIS laws do not require any action to be taken as a result of EIS' findings. Despite the fact that the State Legislature and judiciary have interpreted Hawai'i's EIS law broadly, much more must be done to further the goals and objectives that Hawai'i's EIS laws were meant to accomplish.[368]

In 2006, the Hawai'i State Legislature identified a need to conduct a comprehensive and scholarly review of the state's EIS process to evaluate its continued efficiency, the effectiveness of the amendments made by Act 50, and the possible need to revise Chapter 343 of the Hawai'i Revised Statutes.[369] This review sought to determine, amongst

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[364] Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 209 (1992).

[365] *Id.*

[366] *See e.g.*, discussion, *supra* note 316 (noting examples of projects that pose serious adverse environmental impacts but escape thorough environmental review).

[367] *See e.g.*, Callies, *supra* note 226, at 323 (discussing HEPA and Hawai'i's EIS process).

[368] *See supra* Part IV.

[369] Karl Kim et al., *supra* note 190. The Report found that "broad support for Hawaii's environmental review system across different stakeholder groups as well as in agencies and communities across the state," and concluded that "[t]he benefits of environmental review and balancing environmental, economic, *cultural*, and social goals are perceived as necessary and important to maintaining Hawaii's quality of life." *Id.* at

other things, whether the Hawai‘i EIS process includes appropriate consideration of the effects of a proposed action on the cultural practices of the State and community, as required by section 343-2 of the Hawai‘i Revised Statutes.[370] Further review of HEPA's practical shortcomings indicate that the State's natural and cultural resources, as well as the Kānaka Maoli communities that rely on those resources, would benefit greatly from incorporating substantive foundations into Hawai‘i's environmental review processes.

In order to realize restorative justice objectives, the Cultural Impact Assessment process must play a more prominent role in Hawai‘i's EIS laws to ensure that Maoli natural and cultural resources are protected for present and future generations.[371] Due consideration of human activities' effects on Maoli culture and practices is necessary to ensure its continued existence and development. Without substantive protections, the fundamental purpose of Act 50 is evaded.

Because HEPA currently has no mechanism to ensure mitigation, Hawai‘i's environmental review process offers only full disclosure of environmental degradation instead of assuring that environmentally sound choices are actually made in the planning process. In other states, such as California, substantive provisions to environmental protection laws have provided a mechanism in which the actual mitigation of identified harms and adverse environmental impacts is required. The California Environmental Quality Act ("CEQA") incorporates substantive policies into administrative activities and requires that agencies "shall mitigate or avoid the significant effects on the environment of projects . . . whenever it is feasible to do so."[372] This mandatory mitigation provision directs public agencies to reject or modify proposed projects "if there are feasible alternatives or feasible mitigation measures available."[373] This type of policy directive goes beyond merely disclosing environmental impacts; rather it requires agencies and applicants to actually modify their proposed project so that certain environmental impacts are dispelled.[374] If applied to

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52. Although the authors of the report identified "significant problems that need to be addressed," and provided a myriad of suggestions for Hawaii's EIS laws, there remains a large need to improve HEPA's Cultural Impact Assessments process to ensure that restorative justice goals are fully met and realized. *See id.*

[370] *Id.*

[371] Because Cultural Impact Assessments are not more rigidly regulated, Hawai‘i's natural and cultural resources continue to diminish. *See e.g.*, *supra* note 316.

[372] CAL. PUB. RES. CODE § 21,002.1(b) (LEXISNEXIS 2011).

[373] CAL. PUB. RES. CODE § 21,002 (LEXISNEXIS 2011).

[374] *See id.*

HEPA, state agencies would be required to go further than giving environmental concerns "appropriate consideration,"[375] and would instead require the modification of project proposals so that any alternatives or feasible mitigation mechanisms are carried out. Such a provision would give Hawai'i's state agencies a tool to ensure that HEPA's policy aspirations are actually achieved.[376] In doing so, projects that threaten Kānaka Maoli traditional and cultural practices and resources would be required to mitigate and adjust their proposals such that these practices and resources may be preserved and protected from further harm and degradation. In this way, Kānaka Maoli communities will gain greater control over the preservation of cultural resources, practices, and heritage.

Hawai'i's environmental review process could further benefit from agency accountability mechanisms. Except for the three avenues of judicial review currently available in Hawai'i's environmental review process,[377] state agencies have no obligation to inform either the public or applicants of the reasoning behind making determinations with respect to their environmental reviews.[378] Under HEPA, the Environmental Council is charged with prescribing procedures for informing the public of the acceptance or non-acceptance of environmental statements as well as establishing criteria to determine whether an EIS is acceptable.[379]. If the history of land development in Hawai'i is any indicator, nearly any project can be approved regardless of environmental impact if the right political

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[375] HAW. REV. STAT. § 343-1 (2010).

[376] Washington's State Environmental Policy Act ("SEPA") also gives its agencies the power to condition or deny agency actions on the basis of environmental concerns. Ferester, *supra* note 367. Although the Hawai'i Supreme Court has ruled that an EIS will be upheld only if, amongst other things, it "make[s] a reasoned choice between alternatives[,]" substantive foundations such as those found in CEQA and SEPA would provide Hawai'i's state agencies with more power to ensure that HEPA's goals are effectuated out so that Hawai'i's natural and cultural resources are appropriately protected. *See e.g.*, HAW. REV. STAT. § 343-7 (2010).

[377] *See* HAW. REV. STAT. § 343-7 (2010).

[378] *See* Ka Pa'akai o ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000). All that Chapter 343 of the Hawaii Revised Statutes requires is "specific findings and reasons for its determination." HAW. REV. STAT. § 343-5(c) (2010)..

[379] HAW. REV. STAT. § 343-6(a)(5) (2010); HAW. REV. STAT. § 343-6(a)(8) (2010). HEPA's implementing rules require that with regard to agency applicants, notice containing "specific findings and reasons" be provided for any *non-accepted EIS*. HAW. ADMIN. R. § 11-200-23(d) (2010). Moreover, for actions proposed by applicants, the approving agency must notify the applicant of its determination and provide "specific findings and reasons" for the acceptance *or* non-acceptance of the final EIS. HAW. ADMIN. R. § 11-200-23(c) (2010).

and economic powers are at play.[380] If agencies are not accountable for the decisions they make in approving projects, HEPA's policies are easily manipulated within the administrative bureaucracy.[381] What is most troubling about the acceptance requirements is that in the event an agency fails to make a determination of acceptance or non-acceptance of the final EIS within thirty-days of its receipt, then "the statement shall be deemed accepted," and the project may then proceed.[382] These provisions are insufficient to ensure that substantive determinations regarding a project's environmental impacts are made. In contrast, CEQA includes a procedure to encourage compliance with its substantive provisions.[383] For example, CEQA requires agencies to issue a "finding statement" when approving projects subject to environmental review.[384] This requirement forces agencies to disclose the rationale behind their decisions in a brief document.[385] Further, when agencies find alternatives or mitigation measures infeasible, they must specifically articulate which economic, social, or other considerations tipped the balance in favor of the unmitigated project despite its harmful environmental effects.[386] This mechanism goes beyond HEPA's requirement for "specific findings and reasons,"[387] and compels agencies to actually disclose the specific rationale behind administrative EIS decisions that pursue environmentally adverse options.[388]

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[380] *See e.g.*, discussion, *supra* note 316.

[381] Interview with Williamson Chang, Professor at Law, William S. Richardson School of Law, in Honolulu, Haw. (Apr. 23, 2010). Legislative and State agencies are often easily manipulated by political forces and economical backers. *Id.* Because these institutions are best suited for making political decisions regarding value choices it is important to have a process, which requires full transparency. *Id.*

[382] *See* HAW. ADMIN. R. § 11-200-23(d) (2010).

[383] Ferester, *supra* note 367, at 234.

[384] *Id.*

[385] *Id.*

[386] *Id. at 234-35.*

[387] HAW. ADMIN. R. §§ 11-200-23(c), (d) (2010).

[388] Ferester, *supra* note 367, at 234. Washington's SEPA also confers upon agencies the "substantive authority" to condition or deny agency actions on the basis of environmental concerns. *Id.* Section 43.21C.060 of SEPA provides that "any governmental action may be conditioned or denied pursuant to [SEPA.]" *Id.* The agency must follow certain procedures before exercising its substantive authority to deny a project such as find that the proposed action would result in significant adverse effects and must conclude that "reasonable mitigation measures are insufficient to mitigate the

Perhaps the most deficient area in Hawai‘i’s environmental review process is in the area of Cultural Impact Assessments (“CIA”).[389] Despite the fact that the CIA process remains the foundation for Kānaka Maoli restorative justice, guidance on the CIA process is sorely needed. The primary guidance document regarding CIA is an eight-page agency guidance document that was issued in 2000.[390] With respect to improving the HEIS process to better protect Hawai‘i’s natural and cultural resources, Yamamoto’s environmental justice framework is key. When the “racializing environmental justice” framework is employed, it recognizes that continual degradation to Hawai‘i’s natural and cultural resources directly impacts Kānaka Maoli communities and hinders attempts at fulfilling the State’s obligation towards restorative justice. Legislators, agencies, project proponents, and Kānaka Maoli communities alike must open the channels of communication to and recognize the importance of appropriately managing our island’s finite resources in a culturally sound manner.[391] The racializing environmental justice approach enables recognition of the importance of protecting natural and cultural resources as a form of restorative justice for Kānaka Maoli so that the CIA process can be improved to reflect the lofty goals and obligations that the State has in preserving these resources. By ensuring these protections to natural and cultural resources, Kānaka Maoli cultural practices, heritage, and legacy may be preserved and protected for present and future generations to come.

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identified impact.” *Id.* at 243. New York’s State Environmental Quality Review Act (“SEQRA”) also attempts to ensure that agencies focus their attention only on producing environmental documents, but also on the prevention of environmental damage” and imposes upon agencies the duty to choose an environmentally favorable alternative. *Id.* at 248-49. When an agency approves an action under SEQRA, it must “make explicit findings that it has met [SEQRA’s] requirements and that the disclosed adverse environmental effect will be minimized or avoided to the maximum extent practicable. *Id.* at 249-50. Therefore, while the proposed action remains the agency’s favored choice even after the study of the environmental impacts and feasible project alternatives in an EIS, the adverse impacts must be mitigated to the maximum extent practicable so that they are minimized or avoided. *Id.* at 250.

[389] *See*, *e.g.*, discussion, *supra* note 316 (noting examples that indicate the continual loss of natural and cultural resources despite HEPA applicability).

[390] *See* CIA Guidelines, *supra* note 358.

[391] A cornerstone of Hawai‘i’s environmental review process is public participation. *See e.g.*, HAW. REV. STAT. § 343-1. Not only must the public, including Kānaka Maoli communities, participate in the HEPA review process, they must also be heard and incorporated into the decisionmaking process in order to ensure that both environmental and cultural concerns are heard and acted upon.

VI. CONCLUSION

Hawai‘i’s unique cultural resources are in peril. As the State dives deeper into an energy crisis, renewable energy projects appear to be sprouting up in every nook and cranny of our island homes. While the transition from fossil fuels to renewable energy sources will benefit our environment and communities, the impacts of these developments must not be overshadowed by their potential to reduce reliance on imported energy sources. The rules and guidance governing HEPA’s CIA process must recognize and address restorative justice issues so that the unique heritage of Kānaka Maoli is given fair consideration in the planning and development of large scale projects that directly affect their livelihoods, such as the Interisland Undersea Cable. Only then can we truly begin to preserve these natural and culture treasures for present and future generations.

“Ua pau ka hana, kū‘ua nā ‘ōlelo;
The work is complete, release the words.”