Chipping Away at the Public Trust Doctrine: Mauna Kea and the Degradation Principle

William N. K. Crowell[*]

I. INTRODUCTION

The public trust doctrine, as articulated in Hawai‘i law, is firmly grounded in Native Hawaiian values and perspectives.[1] In large part, the

[*] **University of Hawai‘i at Mānoa, William S. Richardson School of Law, J.D. Candidate, 2020.** **I am especially grateful to APLPJ, Professor Melody Kapilialoha MacKenzie, Professor Eric K. Yamamoto, and Professor Troy J.H. Andrade for their invaluable input and guidance.**

[1] ***See e.g.*, the preamble to the Hawai‘i State Constitution states: "We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the [Hawai‘i] State motto, Ua mau ke ea o ka [‘ā]ina i ka pono'" (the life of the land is perpetuated in righteousness); HAW. CONST. PREAMBLE; HAW. CONST. art. XII, § 4 (establishing that lands granted to the State of Hawai‘i under Section 5(b) of the Admission Act are to held in trust for Native Hawaiians and the general public); HAW. CONST. art. XII, § 7 ("The State reaffirms**

doctrine "evolved from the traditional public rights of navigation, commerce, fishing, recreational uses, and scenic viewing to include resource protection as an important underlying responsibility of the trust."[2]

Hawai'i's precious natural resources, however, did not always receive the protections of the public trust doctrine. Chief Justice William S. Richardson ("CJ"), an instrumental figure in the acknowledgement of the public trust, began his tenure on the Hawai'i Supreme Court in 1966, and remained on the Court until 1982.[3] Importantly, CJ Richardson realized that some of the State laws were not reflective of the people or values of Hawai'i, and adopted "fundamental principles of the past and br[ought] them into focus with the present."[4] Most notably, CJ "[reincorporated] Native Hawaiian tradition and custom into [S]tate law and expanded public rights."[5] Moreover, he "strongly reaffirm[ed] the role of the public trust doctrine in both traditional Hawaiian and modern usage."[6]

The Hawai'i Supreme Court, over three decades later, in *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res.* (*Mauna Kea II*), held that allowing a Thirty Meter Telescope (TMT) to be built on Mauna Kea would not violate the public trust doctrine.[7] The court

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and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 . . . ."); HAW. CONST. art. XV, § 4 ("English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law."); HAW. REV. STAT. § 1-1 ("The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of [Hawai'i] in all cases, except as 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 . . . .").

[2] **D. KAPUA'ALA SPROAT, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW: A TREATISE 553 (MacKenzie et al., eds., 2015).**

[3] **Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No'eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6 (2011) [hereinafter *Ka Lama Kū O Ka No'eau*].**

[4] ***Id.*; *see infra* notes 289 and 291 and accompanying text.**

[5] ***Id.***

[6] ***Id.* ("In 1982, [] Robinson v. Ariyoshi . . . . reiterated that the McBryde[v. Robinson] decision clarified ambiguous aspects of Hawai'i water law and did not depart from settled legal principles. It was also instrumental in affirming the role of the riparian doctrine in Hawai'i water law."); *see infra* note 183 and accompanying text; *infra* note 265.**

[7] ***See* discussion *infra* Sections II.A–II.B; *generally In re* Contested Case Hearing re Conservation Dist. Use Application Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res., 143 Hawai'i 379, 431 P.3d 752 (2018) [hereinafter *Mauna Kea II*].**

justified its decision by citing mitigation measures and looking only narrowly at the impacted area[8]—not taking into consideration the entire summit of Mauna Kea.[9]

The Hawai‘i Supreme Court, in *Mauna Kea II*, used the "degradation principle" to circumvent longstanding precedent.[10] The degradation principle, as depicted in this case, is the concept that cultural and natural resources lose legal protection when the ‘āina (land) has previously suffered a "substantial adverse impact" (i.e., degradation) and, therefore, any future impact cannot be considered substantial and adverse.[11]

Notwithstanding the majority's holding, this "incremental" ideology does not warrant the Board of Land and Natural Resources' (BLNR) granting of a Conservation District Use Permit (CDUP) to build TMT.[12] Moreover, the degradation principle has broader policy impacts

[8] ***See infra* note 159 and accompanying text.**

[9] ***See id.* at 401–02, 431 P.3d at 774–75 (citing mitigation measures that will be taken by TMT).**

[10] ***See id.* at 421–22, 431 P.3d at 794–95 (Wilson, J., dissenting) ("The Board of Land and Natural Resources (BLNR) grounds its analysis on the proposition that cultural and natural resources protected by the Constitution of the State of Hawai‘i and its enabling laws lose legal protection where degradation of the resource is of sufficient severity as to constitute a substantial adverse impact."); discussion *infra* Parts V–VI.**

[11] The Board of Land and Natural Resources (BLNR) found and the majority agreed that,

> **[t]he Board of Land and Natural Resources (BLNR) grounds its analysis on the proposition that cultural and natural resources protected by the Constitution of the State of Hawai‘i and its enabling laws lose legal protection where degradation of the resource is of sufficient severity as to constitute a substantial adverse impact. Because the area affected by TMT was previously subjected to a substantial adverse impact, [] BLNR finds that the proposed TMT project could not have a substantial adverse impact on the existing natural resources. Under this analysis, the cumulative negative impacts from development of prior telescopes caused a substantial adverse impact; therefore, TMT could not be the cause of a substantial adverse impact.**

***Mauna Kea II*, 143 Hawai‘i at 421–22, 431 P.3d at 794–95 (Wilson, J., dissenting).**

[12] As argued by the dissent,

> **[t]he Majority states that the 'BLNR does not have license to endlessly approve permits for construction in conservation districts, based purely on the rationale that every additional facility is purely incremental. It cannot be the case that the presence of one facility necessarily renders all additional facilities as an 'incremental' addition.' However, the increment with the greatest**

that could encourage further desecration of public trust and conservation lands.[13] Prior to *Mauna Kea II*, Hawai'i's courts carefully applied the public trust doctrine's high standards.[14] Moreover, in those previous cases, the courts did not apply the contradictory degradation principle to circumvent the State's high fiduciary duties under the doctrine.[15]

TMT has been a highly contested issue since September 2010, when the University of Hawai'i (UH) initially submitted a CDUA to build a telescope on Mauna Kea.[16] The controversy over the entire Astronomy Precinct,[17] however, stems back to 1968 when UH "promised to act as a steward for Mauna Kea—a dormant volcano that rises 4,205 m (13,796 ft) above sea level on the Island of Hawai'i, the highest point in the [S]tate—in exchange for the right to build an observatory there."[18] Thirty years later, in 1998, the University's failure to properly manage Mauna Kea was documented in a report by the Auditor of the State of Hawai'i.[19] Notwithstanding this report, UH submitted a CDUA for at least forty new telescopes in 2002 and applied for another permit to build the TMT in 2010.[20]

> **impact of all telescopes, TMT, is deemed to not cause a substantial adverse impact because prior increments of telescope construction cumulatively caused a substantial adverse impact.**

***Id.* at 423 n.4, 431 P.3d at 796 n.4 (citation omitted).**

[13] ***See id.* at 433, 431 P.3d at 806 (arguing that the majority is permitting "backsliding on legal protection[s] of the environment . . . . regress[ing] to a time prior to 1994").**

[14] ***See infra* Section II.B.**

[15] ***See supra* note 10 and accompanying text; *infra* Section II.B and note 248 and accompanying text.**

[16] ***See* Marie Alohalani Brown, *Mauna Kea: Hoʻomana Hawaiʻi and Protecting the Sacred*, 10 J. STUDY OF RELIG. NATURE & CULTURE, 151, 151 (2016).**

[17] In 1968,

> **BLNR entered into a General Lease with the University of Hawai'i [] for the Mauna Kea Science Reserve ("MKSR"); the General Lease is scheduled to terminate on December 31, 2033. The MKSR totals 11,288 acres, consisting of a 10,763-acre cultural and natural preserve and a 525-acre Astronomy Precinct, and includes almost all of the land on Mauna Kea above the 12,000-foot elevation, except for certain portions that lie within the Mauna Kea Ice Age Natural Area Reserve ("MKIANAR").**

***See Mauna Kea II*, 143 Hawai'i at 385, 431 P.3d at 758.**

[18] **Brown, *supra* note 16, at 151 (citation omitted).**

[19] ***Id.* (citation omitted).**

In 2014, the controversy escalated when a groundbreaking ceremony for the TMT was "disrupted and ultimately stopped" by protesters attempting to protect the sacred mountain.[21] Following which, the Mauna Kea controversy was tied up in administrative contested case hearings and in Hawai'i's high court for another four years.[22] The contention over TMT climaxed in 2019 when about "300 demonstrators . . . halt[ed] construction" of the telescope by physically blocking the only access road to the summit of Mauna Kea.[23] As of this writing, the TMT development continues to be delayed, and while the COVID-19 outbreak largely put protests to a halt, peaceful demonstrations have continued to ensue.[24]

While the Native Hawaiian[25] community initially won the battle in *Mauna Kea Anaina Hou v. Board of Land & Natural Resources* (*Mauna Kea I*),[26] the Hawai'i Supreme Court began chipping away at the public trust doctrine in subsequent cases.[27] *Kilakila 'O Haleakalā v. Board of*

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[20] ***Id.***

[21] ***Id.***

[22] ***See generally*** **Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res. (*Kilakila*), 138 Hawai'i 383, 382 P.3d 195 (2016).**

[23] **Vanessa Romo, *Hawaii Protesters Block Access Road to Stop Construction of Massive Telescope*, NPR (July 15, 2019, 6:27 PM), https://www.npr.org/2019/07/15/741990200/hawaii-protesters-block-access-road-to-stop-construction-of-massive-telescope.**

[24] ***See*** **Michael Brestovansky, *Despite pandemic, some continue camping on Maunakea*, WEST HAWAII TODAY (Apr. 26, 2020, 12:05 AM), https://www.westhawaiitoday.com/2020/04/26/hawaii-news/despite-pandemic-some-continue-camping-on-maunakea/ ("Even with the COVID-19 pandemic shutting down businesses and gatherings worldwide, a few holdouts are still camping alongside the Maunakea Access Road.").**

[25] **Native Hawaiian is defined as "those whose ancestors were natives of the Hawaiian Islands prior to 1778, without regard to blood quantum." Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 528 (2017); *see also* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 1 n.1 (2008) (referring to "all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain James Cook arrived in 1778").**

[26] ***See*** **Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 363 P.3d 224 (2015) (vacating the judgment of the circuit court, vacating the permit granted by BLNR, and remanding the cases for another contested case hearing).**

[27] ***See Mauna Kea II*****, 143 Hawai'i at 402, 431 P.3d at 775 ("We therefore hold that [] TMT comports with Article XI, Section 1 public trust principles and that [] BLNR met its duties as trustee under the Article XI, Section 1 public land**

Land & Natural Resources (*Kilakila*)—a case dealing with a CDUA for a telescope on Haleakalā, another sacred mountain—ostensibly played a role in the *Mauna Kea II* court's analysis and foreshadowed the Court's affirmation of BLNR's second issuance of a CDUP to TMT.[28]

This Comment suggests that the court's analysis of the public trust doctrine falls short of strong precedent, and has effectively chipped away at special protections provided to public natural resources. In Associate Justice Richard W. Pollack's concurrence, he explained that the majority did not "fully apply" the public trust doctrine and only "partially" adopted its precedents.[29] Additionally, Justice Michael D. Wilson's dissent contended that the use of the "degradation principle" was a "contrary standard" to longstanding precedent set by the Hawai'i courts.[30] Moreover, as Justice Wilson opined, the degradation principle circumvents the CDUP applicant's "burden to prove no substantial adverse impact—if the resource is already substantially adversely impacted."[31] This Comment argues that if the *Mauna Kea II* court had properly applied the public trust doctrine, it should have found that the construction of TMT posed a substantial adverse impact to the summit of Mauna Kea and should have reversed BLNR's issuance of TMT's CDUP. Finally, this Comment concludes that the majority's misapplication of the public trust doctrine could have a broader and more harmful effect as a policy matter.

Part II states why Mauna Kea is sacred and important to Native Hawaiians, it lays out the history of the public trust doctrine, and gives a synopsis of the relevant cases leading up to *Mauna Kea II*. Part III explains the majority's application of the public trust doctrine in *Mauna Kea II*, analyzes the majority's view in terms of the public trust doctrine applied to the TMT site, and sheds light on the State's duty as a trustee to conserve and protect trust lands. Part IV reviews the existing public trust framework and critiques the mitigation factors that the majority used to justify TMT. Part V explains how the degradation principle was applied in

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trust . . . ."); *see also Kilakila*, 138 Hawai'i at 408, 382 P.3d at 220 (holding that the Advanced Technology Solar Telescope (ATST) telescope on Haleakalā was "not inconsistent with the purposes of the conservation district").

[28] ***See generally Kilakila*, 138 Hawai'i 383, 382 P.3d 195 (2016); *see* discussion *infra* Section II.C.3.**

[29] ***See Mauna Kea II*, 143 Hawai'i at 410, 431 P.3d at 783 (Pollack, J., concurring) ("Although the majority acknowledges the applicability of the public trust doctrine to conservation land, it does not fully apply its principles. In only partially adopting our precedents that set out public trust principles applicable to [S]tate water resources, the majority effectively determines that the natural resources the constitution entrusts to the State for the benefit of the people are governed by different measures of protection.").**

[30] ***Id.* at 433–34, 431 P.3d at 806–07 (Wilson, J., dissenting).**

[31] ***Id.***

Mauna Kea II and argues that the majority misapplied the public trust doctrine. This Section then elucidates how the degradation principle—as applied in *Mauna Kea II*—is bad policy and could have broader impacts such as larger environmental concerns and disincentivizing the protection of natural resources. Finally, Part VI concludes that the Hawai‘i Supreme Court should have overturned BLNR's decision because precedent suggests that the use of the degradation principle is improper, and instead, the existing public trust framework should have been applied.

II. BACKGROUND

Mauna Kea has been subject to voluminous litigation over recent years concerning the proper care of the sacred mountain.[32] Native Hawaiian advocates and practitioners allege that the building of TMT violates the public trust doctrine, as well as other rights recognized by the Hawai‘i State Constitution, statutes, and current regulations.[33] Further, Native Hawaiians maintain that the area of the future TMT site remains sacred notwithstanding decisions by hearing officers or members of the judiciary.[34] The cases that led up to *Mauna Kea II*, however, have effectively chipped away at the public trust doctrine despite these claims.

A. *Mauna Kea is Sacred to Native Hawaiians*

Native Hawaiians "trace their ancestry to the ‘āina [and] are related in a deep and profound way that infuses Hawaiian thought and is expressed in all facets of Hawaiian life."[35] In the context of *Mauna Kea II*, it is worth noting that BLNR found the summit of Mauna Kea to be of great cultural importance to Native Hawaiians because the Board ultimately granted TMT a CDUP. Specifically, BLNR found:

> [T]he majority of Native Hawaiian cultural practitioners on Mauna Kea conduct their practices at the summit of Mauna Kea (Pu‘u Wēkiu), Lake Waiau, Pu‘u Līlīnoe, or Kūkahau‘ula. Cultural practices at Mauna Kea include solstice and equinox observations on Pu‘u Wēkiu, burial

[32] ***See e.g.*, *Mauna Kea I*, 136 Hawai‘i 376, 363 P.3d 224 (2015); *Kilakila*, 138 Hawai‘i 383, 382 P.3d 195 (2016); *Mauna Kea II*, 143 Hawai‘i 379, 431 P.3d 752 (2018).**

[33] ***See e.g.*, HAW. ADMIN. R. §§ 13-5 (regulating the use of conservation land districts); *Mauna Kea II*, 143 Hawai‘i at 395, 431 P.3d at 768 (discussing whether BLNR fulfilled its duties to protect Native Hawaiian traditional and customary rights pursuant to Article XII, [S]ection 7 of the Hawai‘i Constitution and Kā Pa‘akai o Ka ‘Āina v. Land Use Commission, 94 Hawai‘i 31, 7 P.3d 1068 (2000)); *supra* note 1 and accompanying text.**

[34] ***See* discussion *infra* Section II.A.**

[35] **MELODY KAPILIALOHA MACKENZIE, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE 6 (MacKenzie et al., eds., 2015).**

> blessings, depositing of piko (umbilical cord) near Lake Waiau as well as collection of its water for use in healing and ritual practices, the giving of offerings and prayers at the ahu lele (sacrificial altar or stand), behind the visitor center adjacent to Hale Pōhaku, monitoring or observing the adze quarry, or observing stars, constellations, and the heavens.[36]

The sacredness of ʻāina to Hawaiʻi, in general, has also been constitutionally recognized. In *Mauna Kea II*, Justice Pollack emphasized:

> [T]he fundamental importance of land to Hawaiʻi and its people is manifest in King Kamehameha III's enduring statement, which was included in our constitution as the official [S]tate motto at the same time that Article XI, Section 1 was adopted: 'Ua mau ke ea o ka ʻāina i ka pono,' translated by statute to mean, 'The life of the land is perpetuated in righteousness.'[37]

Moreover, the practice of regarding certain mountains or iconic landmarks as sacred are not uncommon in cultures throughout the world.[38] As Professor Williamson B.C. Chang explained, the "'āina and Mauna Kea are sacred to Hawaiians. Action and attitude show it is sacred. Nobody has to prove Arlington, Ground Zero, or Calvary are sacred to the West—these are the hushed places of enormous sacrifice."[39] Hawaiʻi courts have also recognized the significance of ʻāina, such as Mauna Kea, to Native Hawaiians.

The Hawaiʻi Supreme Court concluded:

> The Native Hawaiian [p]eople continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices and institutions. The health and well-being of the Native [H]awaiian people is intrinsically tied to their deep feelings and attachment to the land. ʻĀina, or land, is of crucial importance to the Native Hawaiian [p]eople—to their culture, their religion, their economic self-sufficiency and

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[36] ***Mauna Kea II*, 143 Hawai'i at 396, 431 P.3d at 769.**

[37] ***Mauna Kea II*, 143 Hawai'i at 410, 431 P.3d at 783 (Pollack, J., concurring) (citing HAW. CONST. art. XV, § 5; HAW. REV. STAT. § 5–9 (2009)).**

[38] ***See* Brown, *supra* note 16, at 164 (citation omitted) (explaining that "people from many different cultures throughout the world, indigenous and otherwise, consider certain mountains to be sacred").**

[39] ***See* Williamson B.C. Chang, *Respecting the Host Culture: Why Are Guests Values More Important?*, HONOLULU CIVIL BEAT (June 11, 2015) https://scholarspace.manoa.hawaii.edu/bitstream/10125/36063/Respecting%20the%20Host%20Culture%20%20Civil%20Beat%20June%2011%202015.pdf.**

> their sense of personal and community well-being. *ʻĀina is a living and vital part of the Native Hawaiian cosmology and is irreplaceable*. The natural elements-land, air, water, ocean-are interconnected and interdependent. To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The ʻāina is part of their ʻohana, and they care for it as they do for other members of their families. For [Native Hawaiians], the land and the natural environment is alive, respected, treasured, praised, and even worshiped.[40]

Native Hawaiians trace their origins back to the ancient story of Papa and Wākea, the earth-mother and the sky-father—the parents of the Hawaiian islands and the ancient ancestors of the Native people of Hawaiʻi.[41] The story of Papa and Wākea teaches that the first human offspring was a daughter named Hoʻohōkūkalani.[42] Wākea and Hoʻohōkūkalani had an offspring named Hāloa-naka, born prematurely and buried in the earth.[43] From Hāloa-naka grew the first kalo[44] plant and Hawaiians' intimate relationship to the ʻāina.[45] Hāloa-naka, along with their second child, Hāloa, the first Hawaiian aliʻi nui (high chief), are the elder siblings and ancestors of Native Hawaiians.[46]

The summit of Mauna Kea, also known as "Mauna a Wākea (the mountain [son] of Wākea) is the makahiapo kapu nā Wākea (the sacred firstborn of Wākea)—the very mountain that Kānaka Maoli and their supporters strive to protect from further desecration."[47] To Native

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[40] ***OHA v. HCDCH II*, 121 Hawaiʻi at 333, 219 P.3d at 1120 (alterations in original) (emphasis added) (citation omitted).**

[41] **LILIKALĀ KAMEʻELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 23 (1992).**

[42] ***Id.***

[43] ***Id.* at 24.**

[44] **Native Hawaiians "trace their ancestry to the ʻāina (land), to the natural forces of the world, and to kalo (taro), the staple food of the Hawaiian people. All are related in a deep and profound way that infuses Hawaiian thought and is expressed in all facets of Hawaiian life." *See* MACKENZIE, *supra* note 35, at 6.**

[45] ***See* KAMEʻELEIHIWA, *supra* note 41, at 24 ("The first lesson [of Papa and Wākea] is of man's familial relationship to the Land, that is, to the islands of Hawaiʻi and Māui, and to the *kalo* Hāloa-naka, who are the elder siblings of the Hawaiian Chiefs and people[.]"). *Id.* at 25.**

[46] ***Id.* at 24.**

[47] ***See* Brown, *supra* note 16, at 156 (internal citation and quotation marks omitted) (diacritical added).**

Hawaiians, "all aspects of natural and cultural resources are interrelated. All are culturally significant. Thus, when speaking of Mauna Kea—the first born child of Hawai'i, abode of the gods—[*its*] *integrity and sense of place depends on the well-being of the whole entity, not only a part of it*."[48] The entire summit of Mauna Kea, therefore, is sacred—not just areas limited to the four-corners of cultural practice.

From the ancient teachings of Papa and Wākea grew the Hawaiian culture, tradition, and practices such as mālama 'āina (to care for the land) and the duty of reciprocity.[49] Put simply, ancient Hawaiian culture embodied the precept that,

> it is the 'āina, the kalo, and the ali'i nui who are to feed, clothe, and shelter their younger brothers and sisters, the Hawaiian people. So long as the younger Hawaiians love, serve, and honor their elders, the elders will continue to do the same for them, as well as to provide for all their physical needs.[50]

As Mauna Kea is seen as an elder and ancient brother of Native Hawaiians, the tradition of Papa and Wākea continues today. Instead of the ali'i nui caring for the land and the people, however, it is the State who now acts as sovereign and trustee.[51] The State must likewise utilize the land in accordance with the provisions of the Hawai'i Constitution, such as traditional and customary practices and the public trust doctrine—that are rooted in Native Hawaiian values.[52] Accordingly, because Mauna Kea is considered the "citadel" of Hawaiian culture, TMT should not be allowed to defile the sacred mountain.[53]

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[48] **KEPĀ MALY, MAUNA KEA, KA PIKO KAULANA O KA 'ĀINA = MAUNA KEA, THE FAMOUS SUMMIT OF THE LAND 10 (KUMU PONO ASSOCIATES, LLC 2006) (emphasis added).**

[49] **The story of Papa and Wākea established "traditional patterns from which all of Hawaiian society flows and the metaphor around which it is organized." *See* KAME'ELEIHIWA, *supra* note 41, at 24–25.**

[50] ***Id.* at 25 (emphasis omitted) (alterations in original).**

[51] ***See supra* note 1 and accompanying text.**

[52] ***See supra* note 1 and accompanying text.**

[53] ***See Mauna Kea II*, 143 Hawai'i 379, 422, 431 P.3d 752, 795 (2018) (Wilson, J., dissenting) ("[W]hile conceding that Mauna Kea receives constitutional and statutory protection commensurate with its unchallenged position as the citadel of the Hawaiian cultural pantheon, [] BLNR applies what can be described as a degradation principle to cast off cultural or environmental protection.").**

B. *The Public Trust Doctrine*

The public trust doctrine has been firmly rooted in Hawaiian culture and history.[54] Article XI, Section 1 of the Hawai'i Constitution provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect [Hawai'i's] natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.[55]

In 2000, the Hawai'i Supreme Court held that both Article XI, Section 1 and Article XI, Section 7[56] of the Hawai'i Constitution "adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[57] The public trust doctrine, however, "has never been understood to safeguard rights of exclusive use for private commercial gain."[58] The court explained in *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i* (*Kaua'i Springs*) that the "very meaning of the public trust is to recognize separate and enduring public rights in trust resources superior to any private interest . . . . [A] higher level of scrutiny is therefore employed

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[54] ***See supra*** **note 1 and accompanying text.**

[55] **HAW. CONST. art. XI, § 1.**

[56] **According to the Hawai'i Constitution:**

> **The State has an obligation to protect, control and regulate the use of [Hawai'i's] water resources for the benefit of its people.**
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> **The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of [Hawai'i's] water resources.**

HAW. CONST. art. XI, § 7.

[57] **In re Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000).**

[58] ***Id.*** **at 138, 9 P.3d at 450.**

when considering proposals for private commercial use."[59] Historically, plaintiffs have utilized and Hawai'i courts have deployed the public trust doctrine to restore access to critical water resources. In *Mauna Kea II*, the Hawai'i Supreme Court took the opportunity to apply the public trust doctrine to land. Justice Pollack in his *Mauna Kea II* concurrence correctly stated that "our precedents governing the constitutional public trust obligations of agencies and applicants may readily be adapted to conservation land, and the history and text of Article XI, Section 1 indicate that they should be so applied."[60]

As Article XI, Section 1 of the Hawai'i Constitution affirms, all "public natural resources are held in trust by the State for the benefit of the people."[61] This principle stems from the ancient Hawaiian perspective that the sovereign or mō'ī "did not exercise personal dominion, but channeled dominion . . . . [H]e was a trustee."[62] Later, when Native Hawaiian "traditions and customs were codified in writing, kingdom laws continued to recognize what we now describe as public trust principles."[63] Kamehameha III, in 1840, proclaimed in Hawai'i's first constitution,

> KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I, was the head, and had the management of the landed property.[64]

Subsequently, the public trust doctrine was adopted by the people of Hawai'i and included in the Hawai'i Constitution.[65] In addition to the constitutional mandate, Hawai'i case law also affirmed this responsibility

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[59] **Kauai Springs, Inc. v. Planning Comm'n of Kaua'i (*Kaua'i Springs*), 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014) (internal quotation marks omitted) (citing *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454); *Kaua'i Springs* established a framework for adjudicating water cases under the public trust doctrine. *See infra* discussion Section IV.A.**

[60] ***Mauna Kea II*, 143 Hawai'i 379, 414, 431 P.3d 752, 787 (2018) (Pollack, J., concurring).**

[61] **HAW. CONST. art. XI, § 1.**

[62] ***See* VAN DYKE, *supra* note 25, at 12.**

[63] **D. KAPUA'ALA SPROAT, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW: A TREATISE 529 (MacKenzie et al., eds., 2015).**

[64] ***Mauna Kea II*, 143 Hawai'i at 410–11, 431 P.3d at 783–84 (Pollack, J., concurring) (emphasis omitted) (quoting State by Kobayashi v. Zimring, 58 Hawai'i 106, 111, 566 P.2d 725, 729 (1977) (quoting Fundamental Law of Hawaii 3)).**

[65] ***See* HAW. CONST. art. XI, §§ 1, 7.**

of the State. For example, in *Kelly v. 1250 Oceanside Partners*, the Hawai‘i Supreme Court explained that the "duties imposed upon the [S]tate are the duties of a trustee and not simply the duties of a good business manager."[66]

In cases such as *Mauna Kea I* and *II*, "duties under the public trust [are] independent of the permit requirements, including the duty to place the burden on the applicant to demonstrate . . . . the propriety of the proposed use[.]"[67] Therefore, as Justice Pollack stated in *Mauna Kea II*, the TMT project should "be considered in light of our existing public trust framework rather than ascribing differing types of constitutional protections depending on the particular public natural resource at issue."[68]

C. *The Cases Leading Up to Mauna Kea II*

Mauna Kea has been at the center of controversy for many years. As far back as 1892, the "summit of Mauna Kea . . . was noted as a site of importance for modern astronomical observations."[69] In 1964, the first observatory was constructed on the top of Pu‘u Poli‘ahu on Mauna Kea.[70] Soon after, the "scientific community recognized the value of Mauna Kea as a setting for development of multiple observatories," prompting the University of Hawai‘i to found the Institute for Astronomy in 1967.[71] And in 1968, BLNR "leased the entire summit of Mauna Kea to the Institute by Lease No. S-4191."[72] This lease is at the heart of the Mauna Kea controversy today.

The summit of Mauna Kea currently hosts thirteen telescopes.[73] In 1998, the State Auditor released a comprehensive report pointing to the mismanagement of Mauna Kea.[74] Notwithstanding this report, UH

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[66] **Kelly v. 1250 Oceanside Partners, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011 (2006) (citing *Waiāhole I*, 94 Hawai‘i 97, 143, 9 P.3d 409, 456 (2000)).**

[67] ***Kaua‘i Springs*, 133 Hawai‘i at 177, 324 P.3d at 987 (citing *Waiāhole I*, 94 Hawai‘i at 132, 162, 9 P.3d at 444, 474; *In re* Contested Case Hearing on the Water Use Permit Application Filed by Kukui (*Kukui (Moloka‘i), Inc.*), 116 Hawai‘i 481, 490, 174 P.3d 320, 329 (2007)).**

[68] ***Mauna Kea II*, 143 Hawai‘i at 414, 431 P.3d at 787 (Pollack, J., concurring).**

[69] ***See* Maly, *supra* note 48, at 10.**

[70] ***Id.* at 16.**

[71] ***Id.***

[72] ***Id.***

[73] ***See* Brown, *supra* note 16 at 151.**

developed a proposal in 2002 for at least forty new telescopes and applied for a CDUP for TMT in 2010.[75]

If built, TMT would be the "most extensive construction project yet" on the summit of Mauna Kea.[76] The proposed observatory would be a "180-foot high structure, dug 21 feet into the earth, 600 feet below the summit" of the mountain.[77] BLNR, despite strong opposition by the Native Hawaiian community, granted the initial CDUP and sparked the continuing controversy over Mauna Kea.[78] This prompted a "group known as the Mauna Kea Hui [to] file[] its petition for a contested case on the TMT-CDUA."[79] This petition eventually made its way to the Hawai'i Supreme Court in *Mauna Kea I*.[80]

1. Mauna Kea I

On December 2, 2015, the Hawai'i Supreme Court decided *Mauna Kea I*.[81] The court, in part, dealt with the validity of the CDUP issued by BLNR for TMT. Proponents of the telescope argued that the "next generation large telescope would facilitate cutting-edge scientific research that could not be conducted as effectively anywhere else."[82] Opponents argued that the "summit area was sacred in Native Hawaiian culture and that the construction of the eighteen-and-one-half-story high observatory would be a desecration."[83] The specific issue before the court was whether BLNR could decide on the issuance of a permit before a contested case hearing was held.[84]

Holding that the CDUP could not stand, the *Mauna Kea I* court concluded that BLNR denied the Appellants their due process rights.[85] The court boldly stated: "Quite simply, the Board put the cart before the horse

[74] ***Id.***

[75] ***Id.***

[76] ***Mauna Kea II*, 143 Hawai'i 379, 423, 431 P.3d 752, 796 (2018) (Wilson, J., dissenting).**

[77] ***Id.* at 433, 431 P.3d at 806.**

[78] ***See infra* Section II.C.1.**

[79] ***See* Brown, *supra* note 16, at 151.**

[80] **Mauna Kea Anaina Hou v. Bd. of Land and Nat. Res. (Mauna Kea I), 136 Hawai'i 376, 363 P.3d 224 (2015).**

[81] ***See generally id.***

[82] ***Id.* at 379–80, 363 P.3d at 227–28 (internal quotation marks omitted).**

[83] ***Id.* at 380, 363 P.3d at 228.**

[84] ***Id.* (citing HAW. CONST. art. I, § 5).**

when it issued the permit before the request for a contested case hearing was resolved and the hearing was held."[86] Thus, the court ordered another contested case hearing for the CDUA.[87]

2. Flores v. BLNR

Contemporaneously, in *Flores v. Board of Land and Natural Resources*, Native Hawaiian cultural practitioner E. Kalani Flores requested a contested case hearing before deciding on TMT's CDUA.[88] BLNR denied the request and Flores appealed.[89] The Environmental Court of the Third Circuit heard the appeal and ruled that "based upon [the] court's opinion in [*Mauna Kea I*] . . . BLNR infringed upon Flores's constitutional rights by rejecting his request for a contested case hearing."[90] The Hawai'i Supreme Court, however, reversed the Environmental Court's ruling and held, in August 2018, that Flores "was not entitled to a contested case hearing . . . [because] such a hearing was not required by statute, administrative rule, or due process" and Flores had "already been afforded a full opportunity to participate in a contested case hearing and express[ed] his view and [] ha[d] not persuaded [the court] that the provision of an additional contested case hearing [was] necessary to adequately safeguard against erroneous deprivation in th[e] case."[91]

3. Kilakila v. BLNR

While the second contested case hearing—resulting from the *Mauna Kea I* remand—was being held, the Hawai'i Supreme Court also decided *Kilakila 'O Haleakalā v. Board of Land & Natural Resources* on October 6, 2016.[92] Similar to the *Mauna Kea* cases, *Kilakila* "concern[ed] a [CDUA] for construction of the Advanced Technology Solar Telescope (ATST) on the island of Maui, in an area at the summit of Haleakalā[.]"[93]

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[85] ***Id.* at 381, 363 P.3d at 229.**

[86] ***Id.***

[87] ***Id.***

[88] **Flores v. Bd. of Land & Nat. Res., 143 Hawai'i 114, 116, 424 P.3d 469, 471 (2018).**

[89] ***Id.***

[90] ***Id.* at 116, 424 P.3d at 471 (internal citation omitted); *see generally Mauna Kea I*, 136 Hawai'i 376, 363 P.3d 224 (2015).**

[91] ***Flores*, 143 Hawai'i at 128, 424 P.3d at 483.**

[92] **Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res., 138 Hawai'i 383, 382 P.3d 195 (2016).**

[93] ***Id.* at 386, 382 P.3d at 198; *see generally Mauna Kea II*, 143 Hawai'i 379,**

This area is commonly known as the Haleakalā High Altitude Observatory (HO).[94] In discussing the significance of Haleakalā, the court stated:

> The summit of Haleakalā has important cultural significance to Native Hawaiians[,] . . . is one of the most sacred sites on Maui, and the Haleakalā Crater is known as where the gods live. The summit was traditionally used by Native Hawaiians as a place for religious ceremonies, for prayer to the gods, to connect to ancestry, and to bury the dead. Native Hawaiians continue to engage in some of these practices at the summit.[95]

The appellant, a group of Native Hawaiian cultural practitioners called Kilakila ʻO Haleakalā, advanced arguments similar to those made by the appellants in *Mauna Kea I* and *II*. The group contended, *inter alia*, that the Hawaiʻi Intermediate Court of Appeals (ICA) "erred in affirming BLNR's finding under [the Hawaiʻi Administrative Rules (HAR)] Sections 13-5-30(c)(4), (5), and (6)"[96] and that the "ICA erred in determining that the ATST is consistent with the purposes of the conservation district" lands.[97] The court, as described below, considered each regulation separately.

Under HAR Section 13-5-30(c)(4), the State or its delegated agency has a duty to ensure that the "proposed land use will not cause [a] substantial adverse impact to existing natural resources within the surrounding area, community, or region" in conservation districts.[98] Kilakila argued that the ICA "erred in rubberstamp[ing] BLNR's findings of no substantial adverse impact on existing natural resources, specifically, cultural and visual resources."[99]

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431 P.3d 752 (2018); *Mauna Kea I*, 136 Hawaiʻi 376, 363 P.3d at 229 (2015).

[94] In 1961,

> **Hawaiʻi Governor William Quinn set aside 18,166 acres on the third volcanic cone, Puʻu Kolekole, as the site of the Haleakalā High Altitude Observatory [(HO)] . . . . The HO currently consists of eight research facilities 'for advanced studies of astronomy and atmospheric sciences' owned by UH and managed by the UH Institute of Astronomy (UHIfA).**

***Kilakila*, 138 Hawaiʻi at 387, 382 P.3d at 199.**

[95] *Id.* (internal quotation marks omitted).

[96] *Id.* at 402, 382 P.3d at 214.

[97] *Id.* at 407–08, 382 P.3d at 219–20.

[98] HAW. ADMIN. R. § 13-5-30(c)(4).

[99] *Kilakila*, 138 Hawaiʻi at 402, 382 P.3d at 214 (internal quotation marks

The Hawai‘i Supreme Court, in its analysis of HAR Section 13-5-30(c)(4), took into account that mitigation measures were considered in BLNR's process of determining whether the ATST would substantially and adversely impact natural resources.[100] BLNR cited mitigating measures such as:

> replacing or providing substitute resources or environments . . . . creating a Native Hawaiian Working group to address issues concerning Native Hawaiians, setting aside [an] area within the HO site solely for use by Native Hawaiians, removing unused facilities . . . decommissioning the ATST within 50 years, the expected scientific economic, and educational benefits of the ATST . . . . [the] BLNR noted that the ATST was designed to be as small as possible . . . . [and] added permit conditions that would mitigate impacts on cultural resources[.][101]

The court, after reviewing the mitigation measures and other considerations, held that BLNR's treatment of the Final Environmental Impact Statement (FEIS) and "its analysis under HAR § 13-5-30(c)(4) w[ere not] clearly erroneous."[102]

Under HAR Section 13-5-30(c)(5), the suggested land use must be consistent with the conservation district and surrounding areas.[103] Kilakila argued that the ICA "erred in affirming BLNR's interpretation of 'locality and surrounding areas' . . . [and] that 'surrounding areas' includes Haleakalā National Park, and that there is no evidence that the ATST is compatible with the Park."[104] Kilakila, in support, cited BLNR's "recogni[tion] that Haleakalā National Park was part of the 'surrounding area'[.]"[105] The court, however, concluded that the referenced "quote does not demonstrate any such recognition . . . . [and] [r]egardless, the fact that BLNR used the term 'surrounding area' in describing a site visit does not bind BLNR to this exact definition when interpreting HAR § 13-5-30(c)(5)."[106]

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omitted).

[100] ***Id.* at 403, 382 P.3d at 215.**

[101] ***Id.* at 403–04, 382 P.3d at 215–16.**

[102] ***Id.* at 402, 382 P.3d at 214.**

[103] **HAW. ADMIN. R. § 13-5-30(c)(5).**

[104] ***Kilakila*, 138 Hawai‘i at 406, 382 P.3d at 218.**

[105] ***Id.* at 407, 382 P.3d at 219.**

[106] ***Id.***

HAR Section 13-5-30(c)(6) states that the "existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon" in conservation districts.[107] Kilakila argued that HAR Section 13-5-30(c)(6) was "not satisfied because UH admitted that the ATST does not improve natural beauty or open space characteristics, and because [the] BLNR failed to point to any evidence that ATST preserves natural beauty and open space" in the conservation district.[108]

With respect to HAR Section 13-5-30(c)(6), BLNR noted that because the HO already contains astronomy facilities, "ATST will be consistent with and will preserve the existing physical and environmental aspects of the land."[109] BLNR also considered mitigation measures such as "consulting a wildlife biologist, monitoring invertebrates, flora, and fauna, and following washing and inspection protocol to prevent the introduction of alien invasive species."[110] The court concluded that "similar to its analysis of HAR § 13-5-30(c)(4), BLNR articulated with reasonable clarity why the ATST would preserve the existing physical and environmental aspects of the land."[111]

In sum, the Hawai'i Supreme Court found Kilakila's arguments unconvincing and held that BLNR properly granted the CDUP to ATST.[112] The high court—as it would subsequently do in *Mauna Kea II*—considered a plethora of mitigation measures which, in *Kilakila*, ostensibly led to the development of the ATST, which opened in 2019.[113] The *Mauna Kea II* court seemingly used the same reasoning to "rubber stamp" the TMT Project and reach its conclusion.[114]

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[107] **HAW. ADMIN. R. § 13-5-30(c)(6).**

[108] ***Kilakila,* 138 Hawai'i at 407, 382 P.3d at 219 (internal quotation marks omitted).**

[109] ***Id.* at 407, 382 P.3d at 219.**

[110] ***Id.***

[111] ***Id.* (internal quotation marks omitted) (citing *Waiāhole I*, 94 Hawai'i at 164, 9 P.3d at 476).**

[112] ***Id.* at 387, 382 P.3d at 199 ("Accordingly, we conclude that [the] BLNR properly granted the permit and affirm the ICA's judgment.").**

[113] **Ilima Loomis, *How the World's Largest Solar Telescope Rose on Maui While Nearby Protests Derailed a Larger Scope*, SCIENCE (Aug. 1, 2017, 9:00 AM), https://www.sciencemag.org/news/2017/08/how-world-s-largest-solar-telescope-rose-maui-while-nearby-protests-derailed-larger.**

[114] ***See In re Water Use Permit Applications* (*Waiāhole I*), 94 Hawai'i 97, 144, 9 P.3d 409, 456 (2000).**

Arguably, it was the court's reasoning in *Kilakila* that set the stage for the majority decision in *Mauna Kea II*. As described below, however, the mitigation measures cited in *Mauna Kea II* are insufficient to overcome the high burden that the Hawai'i Constitution and conservation district regulations place on the State and its agencies.

III. *MAUNA KEA II*: MAJORITY DECISION

The *Mauna Kea II* court affirmed BLNR's administrative decision to authorize a CDUP to build TMT.[115] As indicated previously, Article XI, Section 1 of the Hawai'i Constitution states, *inter alia*, that the "State and its political subdivisions shall conserve and protect [Hawai'i's] natural beauty and all natural resources, including land . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."[116] The court held, in part, that "TMT comports with Article XI, Section 1 public trust principles and that BLNR met its duties as trustee under the Article XI, Section 1 public land trust through its Decision and Order."[117]

The court, to justify its controversial holding, distinguished *Mauna Kea II* from *Waiāhole I* and other public trust doctrine cases dealing with water rights. The court cited mitigation measures and stated, "with respect to the Article XI, Section 1 public trust as to conservation lands, we do not wholesale adopt our precedent setting out public trust principles as applied to [S]tate water resources trust and its progeny. Rather the dimensions of this trust remain to be further demarcated."[118] In doing this, the court declined to utilize Justice Pollack's suggested public trust framework, based on the court's 2014 decision in the *Kaua'i Springs* case, which should have served as precedent in *Mauna Kea II*.[119]

In the landmark case *In re Water use Permit Applications* (*Waiāhole I*), the Hawai'i Supreme Court held that "[A]rticle XI, [S]ection 1 and [A]rticle XI, [S]ection 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii."[120] The court further affirmed that "the public trust doctrine applies to all water

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[115] ***Mauna Kea II*, 143 Hawai'i 379, 384, 431 P.3d 752, 757 (2018).**

[116] **HAW. CONST. art. XI, § 1 (emphasis added).**

[117] ***Mauna Kea II*, 143 Hawai'i at 402, 431 P.3d at 775 (internal citation omitted).**

[118] ***Id.* at 401 n.24, 431 P.3d at 752 n.24.**

[119] ***Id.* at 401 n.25, 431 P.3d at 752 n.25; *see* discussion *infra* Section IV.**

[120] ***In re* Water use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000) (citations omitted).**

resources without exception or distinction."[121] However, the court did not "define the full extent of [A]rticle XI, [S]ection 1's reference to 'all public resources'" under the Hawai'i State Constitution.[122]

The court in *Mauna Kea I* acknowledged that it had not defined the full scope of the public trust doctrine.[123] As of this writing, the Hawai'i Supreme Court has never decided a case—aside from *Mauna Kea II*—that applied the public trust doctrine to conservation land. Consequently, the *Mauna Kea II* court—in an unprecedented action—took the opportunity to delineate the public trust doctrine pertaining to conservation lands and held that "conservation district[124] lands owned by the State, such as the lands in the summit area of Mauna Kea, are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1."[125]

The court further explained that the "plain language of Article XI, Section 1 . . . requires a balancing between the requirements of *conservation and protection* of public natural resources, on the one hand, and the *development and utilization* of these resources on the other in a manner consistent with their conservation."[126] The majority, however, tipped the scales in favor of development and utilization, rather than striking a balance with conservation and protection of public natural resources. The court justified its "balancing" by downplaying its duty to "conserve and protect" and overemphasizing mitigation measures.[127] The court did this under the guise of furthering the "self-sufficiency of the State" and effectively distorted the State's duty under Article XI, Section 1.[128]

TMT may further the self-sufficiency of the State. The constitutional mandate under Article XI, Section 1, however, is not an *or*

[121] ***Id.* at 133, 9 P.3d at 445.**

[122] ***Id.***

[123] ***Mauna Kea I*, 136 Hawai'i 376, 404, 363 P.3d 224, 252 (2015) (Pollack, J., concurring).**

[124] **Conservation district is defined as "those lands within the various counties of the State and state marine waters bounded by the conservation district line, as established under provisions of Act 187, Session Laws of Hawaii, 1961, and Act 205, Session Laws of Hawaii 1963, or future amendments thereto." HAW. ADMIN. R. § 13-5.**

[125] ***Mauna Kea II*, 143 Hawai'i 379, 400, 431 P.3d 752, 773 (2018) (footnotes omitted).**

[126] ***Id.* (emphases added).**

[127] ***Mauna Kea II*, 143 Hawai'i at 400–01, 431 P.3d at 773–74 (citing *Waiāhole I*, 94 Hawai'i 97, 139, 9 P.3d 409, 451 (2000)); *see* HAW. CONST. art. XI, § 1.**

[128] ***Mauna Kea II*, 143 Hawai'i at 400–01, 431 P.3d at 773–74 (citing *Waiāhole I*, 94 Hawai'i 97, 139, 9 P.3d 409, 451 (2000)); *see* HAW. CONST. art. XI, § 1.**

clause.[129] Namely, it states, the State shall "conserve and protect" *and* shall "promote the development and utilization" of Hawai'i's natural resources in a "manner consistent with their conservation and in furtherance of the self-sufficiency of the State."[130] While it can be argued that TMT furthers "self-sufficiency,"[131] the *conservation and protection* of public trust resources are still mandated and demand more regard in this case.[132] The *Mauna Kea II* court acknowledged that under *Waiāhole I*,

> the constitutional requirements of 'protection' and 'conservation,' the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the 'zero-sum' game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment.[133]

Appellants in *Mauna Kea II* argued that the use of the land by Native Hawaiians should be preferred because it is a public use.[134] The majority, however, found that there was "no actual evidence of use of the TMT Observatory site and Access Way area by Native Hawaiian

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[129] *See* HAW. CONST. art. XI, § 1.

[130] *Id.*

[131] The majority concluded that TMT is "in furtherance of the self-sufficiency of the State" opining:

> TMT is an advanced world-class telescope designed to investigate and answer some of the most fundamental questions regarding our universe . . . . Native Hawaiians will also be included in other direct benefits from the TMT. Use of the land by TMT will result in a substantial community benefits package, which has already provided over $2.5 million for grants and scholarships for STEM education benefitting Hawai'i students. The package also includes an additional commitment to provide $1 million annually for this program. . . . [and TIO will pay sublease rent to the University[.]

Mauna Kea II, 143 Hawai'i at 402, 431 P.3d at 775.

[132] *See* HAW. CONST. art. XI, § 1.

[133] *In re Water Use Permit Applications* (*Waiāhole I*), 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000). (citing State by *Kobayashi v. Zimring*, 58 Hawai'i 106, 121, 566 P.2d 725, 735 (1977)) ("[T]he State as trustee has the duty to protect and maintain the trust [resource] and regulate its use. Presumptively, this duty is to be implemented by devoting the [resource] to actual public uses, e.g., recreation."); *see Mauna Kea II*, 143 Hawai'i 379, 401, 431 P.3d 752, 774 (2018) ("We have also indicated that any balancing between public and private purposes must begin with a presumption in favor of public use, access and enjoyment.") (citing *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454).

[134] *Mauna Kea II*, 143 Hawai'i at 402, 431 P.3d at 775.

practitioners."[135] The majority's finding, however, construed actual evidence too narrowly.

A. *Conservation and Protection Extend to TMT Site Land*

As discussed earlier, Article XI, Section 1 provides that the State conserve and protect Hawai'i's natural resources, including land.[136] The *Mauna Kea II* court held that "conservation district lands owned by the State, such as the lands in the summit area of Mauna Kea, are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1."[137] Under Hawai'i Revised Statutes (HRS) Section 183C-2, conservation district lands "means those lands within the various counties of the State bounded by the conservation district" lines.[138] TMT is proposed to be built on conservation land.[139] TMT site land, therefore, is a "public resource[] held in trust for the benefit of the people pursuant to Article XI, Section 1."[140] As described below, the mitigation measures the majority cited do not pass muster under the Hawai'i Constitution.

The majority in *Mauna Kea II* cited mitigation measures to evade the plain and unambiguous language of Article XI, Section 1 to "conserve and protect [Hawai'i's] natural beauty and *all* natural resources, including *land*[.]"[141] In particular, the court identified the following factors:

> TMT [] does not involve the irrevocable transfer of public land to a private party. TMT is to be decommissioned at the end of its anticipated 50 year useful life or at the end of the lease, whichever comes first, pursuant to the Decommissioning Plan, and the land must then be restored. []BLNR also imposed as conditions of the CDUP various measures that will help protect the land in the area, such as requiring compliance with all laws as well as representations made regarding measures designed to reduce the negative impact of the project, requiring funding of the re-naturalization of the closed access road on Pu'u Poli'ahu, and permanent decommissioning of three

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[135] ***Id.***

[136] **HAW. CONST. art. XI, § 1. Deleted (emphasis added) to match ATL.**

[137] ***Mauna Kea II*, 143 Hawai'i at 401, 431 P.3d at 774 (footnotes omitted).**

[138] **HAW. REV. STAT. § 183C-2 (2011).**

[139] ***See Mauna Kea II*, 143 Hawai'i at 384, 431 P.3d at 757 (affirming "BLNR's decision authorizing issuance of a CDUP").**

[140] ***Id.* at 401, 431 P.3d at 774 (footnote omitted).**

[141] **HAW. CONST. art. XI, § 1 (emphasis added).**

> telescopes as soon as possible and two additional telescopes by December 31, 2033.[142]

TMT undoubtedly makes a good business case, but no amount of mitigation can overcome the constitutional guarantee and mandate to "conserve and protect" public natural resources, especially when such conservation and protection is of significant importance to Hawaiian culture and history.[143] TMT is only "600 feet below the summit ridge" and is a "large telescope . . . roughly 180 feet above the ground surface, with an exterior radius of 108 feet and a dome shutter 102.5 feet in diameter."[144] While the *Mauna Kea II* court limited its analysis to the four corners of TMT, the entire summit is sacred to Native Hawaiians.[145] Moreover, TMT will deny future generations the protections of both cultural and natural resources within its footprint.[146]

The "decommissioning" of TMT or "restor[ation]" of the land at the TMT site denotes that trust land will be harmed or destroyed under the "most extensive construction project yet" and violates the State's duty to "conserve and protect" public natural resources.[147] Further, because TMT is not a protected public use under the existing *Kaua'i Springs* framework, a "higher level of scrutiny is therefore employed when considering proposals for private commercial use."[148] As described below, the State's

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[142] ***Mauna Kea II*, 143 Hawai'i at 401, 431 P.3d at 774.**

[143] ***See* HAW. CONST. art. XI, § 1; discussion *supra* Sections II.A–II.B.**

[144] ***Mauna Kea II*, 143 Hawai'i at 387–88, 431 P.3d at 760–61.**

[145] ***See supra* Section II.A and note 48.**

[146] ***See infra* note 300 and accompanying text.**

[147] **As argued by the dissent:**

> **It is noteworthy that the party responsible for the substantial adverse impact to this protected resource is the [State]. It is uncontested that the State authorized previous construction within the Astronomy Precinct of the MKSR that created a substantial adverse impact. Thus, the party that caused the substantial adverse impact is empowered by the degradation principle to increase the damage. Now the most extensive construction project yet proposed for the Astronomy Precinct—a 180-foot building 600 feet below the summit ridge of Mauna Kea—is deemed to have no substantial adverse impact due to extensive degradation from prior development of telescopes in the summit area.**

***Mauna Kea II*, 143 Hawai'i at 423, 431 P.3d at 796 (Wilson, M., dissenting); *see* HAW. CONST. art. XI, § 1; *Mauna Kea II*, 143 Hawai'i at 401, 431 P.3d at 774 ("TMT is to be decommissioned at the end of its anticipated 50 year useful life or at the end of the lease, whichever comes first, pursuant to the Decommissioning Plan, and the land must then be restored.").**

role in protecting natural resources is that of a trustee and not just a mere administrator.

B. *The State's Duty is that of a Trustee*

In the 1977 case *State by Kobayashi v. Zimring*, Chief Justice William S. Richardson wrote that under "public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use."[149] A year later, the "delegates to the 1978 Hawai'i Constitutional Convention adopted [A]rticle XI, [S]ection 1" establishing the constitutional hierarchy and foundation of the public trust doctrine.[150] As *Waiāhole I* explained, the State's duty is that of a trustee and not just a business manager.[151] While a court may give deference to an agency, the "ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this [S]tate."[152]

As discussed above, prior to *Mauna Kea II*, the public trust doctrine had not been applied to conservation lands.[153] The court, however, had the ultimate responsibility to prevent BLNR from running afoul of the law. Moreover, the court is not a "rubber stamp for agency or legislative

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[148] ***Kaua'i Springs*, 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014) (internal quotation marks omitted) (citing *Waiāhole I*, 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000)).**

[149] **State by Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) (footnote omitted).**

[150] ***Mauna Kea II*, 143 Hawai'i at 411, 431 P.3d at 784.**

[151] ***Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455 (internal quotations omitted) (citing Kadish v. Arizona State Land Dep't, 747 P.2d 1183, 1186 (Ariz. 1987), aff'd, 490 U.S. 605 (1989)).**

[152] ***Id.* (citing State v. Quitog, 85 Hawai'i 128, 130 n.3, 938 P.2d 559, 561 n.3 (1997) (recognizing the Hawai'i Supreme Court as the "ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution")).**

[153] **The majority stated:**

> **In [*Waiāhole I*], in ruling that under Article XI, Sections 1 and 7 and the sovereign reservation, water is a public trust resource, we stated that '[w]e need not define the full extent of [A]rticle XI, [S]ection 1's reference to 'all public resources' at this juncture.' Since then, '[t]his court has never precisely demarcated the dimensions of the public trust doctrine as incorporated in Article XI, Section 1.'**

***Mauna Kea II*, 143 Hawai'i at 400, 431 P.3d at 773 (citing *Waiāhole I*, 94 Hawai'i at 133, 9 P.3d at 445 ; *Mauna Kea I*, 136 Hawai'i at 404, 363 P.3d at 252 (Pollack, J., concurring, in which McKenna and Wilson, JJ., joined).**

action."[154] Ultimately, while TMT may be a good business decision for the State, the State's duty is that of a trustee, who must "conserve and protect [Hawai'i's] natural beauty and all natural resources, including land . . . ."[155]

The State—by way of BLNR—could make the argument that TMT is more than just a business decision; however, the State's duty is two-fold. *Waiāhole I* acknowledged that the dual mandate under Article XI, Section 1, requires the State to both protect its natural resources and promote its use and development—ensuring the most reasonable and beneficial uses of the resource.[156] *Kaua'i Springs* further described this burden on the State:

> As the public trust arises out of a constitutional mandate, the duty and authority of the [S]tate and its subdivisions to weigh competing public and private uses on a case-by-case basis is independent of statutory duties and authorities created by the legislature. [T]he public trust doctrine at all times forms the outer boundaries of permissible government action[.] Therefore mere compliance by agencies with their legislative authority may not be sufficient to determine if competing uses are properly balanced in the context of uses protected by the public trust and its foundational principals.[157]

TMT has proffered copious mitigation factors in an attempt to counteract the harm.[158] The damage that the telescope poses, compared to its benefits, however, tips the scales in favor of business interests and falls short of the State's trust duty. For example, the majority concluded that education and monetary benefits will offset the injury to the land,[159] but such benefits are not sufficient to justify the construction of TMT because while the "useful life" of TMT will be approximately 50 years, damage to the 'āina will be permanent.[160] Article XI, Section 1 mandates that natural resources, including land, be available for future generations.[161] However, the 'āina

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[154] ***Waiāhole I*, 94 Hawai'i at 144, 9 P.3d at 456 (citations omitted).**

[155] **HAW. CONST. art. XI, § 1; *see supra* note 133 and accompanying text.**

[156] ***Waiāhole I*, 94 Hawai'i at 138–39, 9 P.3d at 450–51.**

[157] ***Kaua'i Springs*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014) (internal citations and quotation marks omitted).**

[158] ***See supra* text accompanying note 142.**

[159] ***See supra* note 131.**

[160] ***Mauna Kea II*, 143 Hawai'i 379, 401, 431 P.3d 752, 774 (2018).**

[161] **HAW. CONST. art. XI, § 1.**

will never be the same after it has been destroyed by the construction of TMT.[162] As a result, TMT will preclude future generations from benefits such as the "protection of [a] cultural resource in the future because past substantial adverse impacts render[ed] it unnecessary to determine the future impacts from TMT."[163] In part, this may have been remedied with a proper analysis of the public trust doctrine—informed by precedent.

IV. *MAUNA KEA II*: JUSTICE POLLACK'S CONCURRENCE

Justice Pollack did not agree with the majority's approach to the public trust doctrine, but concurred with the majority's decision to affirm BLNR's decision to issue a CDUP to TMT.[164] Justice Pollack, joined by Justice Wilson as to parts I-III,[165] held in part I that "public lands have long been regarded as a public natural resource held in trust by the [S]tate for the benefit of the people."[166] And, in part II, Justice Pollack held that the existing public trust framework should be applied in this case because it deals with public lands.[167]

According to Justice Pollack, the majority did not "fully apply" the principles of the public trust doctrine.[168] Moreover, as he pointed out, by "only partially adopting [the court's] precedents that set out public trust principles . . . the majority effectively determine[d] that the natural resources the constitution entrusts to the State for the benefit of the people are governed by different measures of protection."[169] The associate justice continued, stating that Article XI, Section 1 does not provide "for differing levels of protection for individual natural resources, such as water as compared to land, and [the] court should not establish artificial

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[162] ***Id.*; *but see Mauna Kea II*, 143 Hawai'i at 410, 431 P.3d at 774 (explaining that TMT will not cause substantial adverse impact because "TMT is to be decommissioned at the end of its anticipated 50 year useful life or at the end of the lease . . . and [then] the land must then be restored").**

[163] ***Mauna Kea II*, 143 Hawai'i at 428, 431 P.3d at 801 (Wilson, J., dissenting).**

[164] ***Id.* at 384, 431 P.3d at 757.**

[165] **Part III is not included in this paper but states that the "approaches taken by the hearing examiner and the board, are inconsistent with the law, and the majority offers little guidance to correct these missteps." *Mauna Kea II*, 143 Hawai'i at 414, 431 P.3d at 787 (Pollack, J., concurring) (alterations in original).**

[166] ***Id.* at 410, 431 P.3d at 783 (alterations in original).**

[167] ***See id.* at 410–14, 431 P.3d at 783–87.**

[168] ***Id.* at 410, 431 P.3d at 783.**

[169] ***See id.* (referring to *Mauna Kea II*, 143 Hawai'i at 401 n.25, 431 P.3d at 774 n.25).**

distinctions without a compelling basis for doing so."[170] Accordingly, without a "clear framework for agencies and courts to employ in future cases when applying public trust principles . . . . wh[at] will result i[s] incorrect interpretations and unequal treatment of protected resources."[171] Justice Pollack opined,

> a clear alternative to this unstructured approach exists in this court's precedents. Our case law setting forth public trust principles governing water resources provides a uniform standard that may easily be applied to other natural resources with only minor alterations. By identifying a general framework for evaluating the impact of State actions, we ensure that all of the public natural resources entrusted to the State for the benefit of the people are afforded the same degree of protection as the text and history of [A]rticle XI, [S]ection 1 attest that the drafters intended.[172]

A. *The Existing Public Trust Framework Should Be Applied to Conservation District Lands*

Justice Pollack, in his concurrence, stated that the Hawai'i Supreme Court "has thus far declined to demarcate the outer limits of the public trust doctrine as incorporated by [A]rticle XI, [S]ection 1, instead of applying the fundamental principles inherent in the concept of a public trust through case-by-case adjudication."[173] He further explained that the existing public trust framework—as traditionally applied to water—should apply to conservation lands.[174] Justice Pollack acknowledged that the majority applied some of the public trust principles and did so "without stating whether or explaining how these considerations fit within a larger legal framework that can be employed in future cases."[175] Seemingly, the majority's omission in *Mauna Kea II* will leave uncertainty in the law regarding other public trust doctrine resources besides water that are not yet defined under a unified public trust doctrine framework.

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[170] ***Mauna Kea II*, 143 Hawai'i at 410, 431 P.3d at 783 (Pollack, J., concurring).**

[171] ***Id.***

[172] ***Id.***

[173] ***Id.* at 412, 431 P.3d at 785 (citing *Mauna Kea I*, 136 Haw. 376, 404–05, 363 P.3d 224, 252–53 (2015) (Pollack, J., concurring, in which McKenna and Wilson, JJ., joined)).**

[174] ***Id.* at 412–13, 431 P.3d at 785–86.**

[175] ***Id.* at 413 n.5, 431 P.3d at 786 n.5 (Pollack, J., concurring).**

Justice Pollack offered as the correct alternative, the use of the existing public trust framework under *Kaua'i Springs*.[176] The associate justice maintained that "constitutional public trust principles . . . collected and summarized by this court in [*Kaua'i Springs*]" should be applied in this case.[177] Justice Pollack explained,

> [t]he framework initially sets forth general principles relating to the agency's affirmative duty to fulfill its constitutional trust obligations. Next, the framework provides the agency with evidentiary guides to assist it in addressing these obligations. Lastly, the framework informs the applicant as to what must be shown in order to obtain a permit. *All of these principles may be applied to* [S]tate *conservation land with relatively little alteration*.[178]

Justice Pollack then detailed how this adapted framework would be deployed. The first principle, distilled from *Kaua'i Springs*, is originally derived from the landmark case *Robinson v. Ariyoshi*.[179] *Robinson* was decided shortly after the public trust doctrine was codified in the 1978 Hawai'i Constitution.[180] In *Robinson*, the court determined that,

> the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.[181]

The court in *Kaua'i Springs* reaffirmed this trust principle and held that "[t]he agency's duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use."[182] In terms of conservation district land, Justice Pollack wrote,

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[176] ***See id.*** **at 412–13, 431 P.3d at 785–86 (concluding that all the *Kaua'i Springs* "principles may be applied to [S]tate conservation land with relatively little alteration").**

[177] ***Id.***

[178] ***Id.*** **at 413, 431 P.3d at 786 (internal citation omitted) (footnote omitted).**

[179] ***Id.*** **at 413, 431 P.3d at 786 (Pollack, J., concurring);** ***see generally*** **Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982).**

[180] ***See*** **HAW. CONST. art. XI, § 1.**

[181] **Robinson v. Ariyoshi, 65 Haw. at 674, 658 P.2d at 310.**

[182] ***Kaua'i Springs*****, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014) (citing *Waiāhole I*, 94 Hawai'i 97, 138, 9 P.3d 409, 450 (2000)).**

> that duty is to ensure that a contemplated use of conservation land will not result in long-term damage to the land where the project is to occur or compromise the public's continued use of other natural resources. Additionally, agencies must verify that the use of the land will further a public purpose and that the project is not unreasonable considering possible alternate uses of the conservation land . . . . by consider[ing] the proposed use of conservation land in relation to the public trust purposes that this court has identified.[183]

The four trust purposes set forth in *Kaua'i Springs* are:

1. the maintenance of waters in their natural state;
2. the protection of domestic water use;
3. the protection of water in the exercise of Native Hawaiian and traditional and customary rights; and
4. the reservation of water enumerated by the State Water Code.[184]

Justice Pollack analogizes these four trust purposes to similarly read:

1. "the maintenance of *conservation land* in its natural state";
2. the protection of *conservation land* use;
3. the protection of *conservation land* in the exercise of Native Hawaiian and traditional and customary rights; and
4. "consideration of the various dedications and regulations of land set forth in federal, state, and local law."[185]

The following set of principles from *Kaua'i Springs* would also remain substantially the same:

1. The "agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection."[186]
2. The "agency should evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water."[187]

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[183] ***Mauna Kea II*, 143 Hawai'i at 413, 431 P.3d at 786 (Pollack, J., concurring) (citing *Kaua'i Springs*, 133 Hawai'i at 174, 324 P.3d at 984).**

[184] ***Kaua'i Springs*, 133 Hawai'i at 174, 324 P.3d at 984 (alterations in original) (footnotes omitted).**

[185] ***See Mauna Kea II*, 143 Hawai'i at 413, 431 P.3d at 786 (Pollack, J., concurring) (emphases added); *supra* text accompanying notes 98, 103, 107 (discussing some of the laws regulating the conservation land districts).**

[186] ***Kaua'i Springs*, 133 Hawai'i at 174, 324 P.3d at 984 (footnote omitted).**

3. If the "requested use is private or commercial, the agency should apply a high level of scrutiny."[188]
4. The "agency should evaluate the proposed use under a 'reasonable and beneficial use' standard, which requires examination of the proposed use in relation to other public and private uses."[189]

Under Justice Pollack's proposed conservation land framework, principles 1, 3, and 4 would remain the same and 2 would be adapted to read:

2. "Proposed uses for *conservation land* should be evaluated on a case-by-case basis . . . ."[190]

The final set of principles utilized in *Kaua'i Springs* places the burden on the applicant to "justify the proposed water use in light of the trust purposes."[191] Under Justice Pollack's formulation, these principles would also remain nearly identical. Under the *Kaua'i Springs* framework, permit applicants "have the burden to justify the proposed water use in light of the trust purposes." [192] In particular:

1. "Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs."[193]
2. "The applicant must demonstrate the absence of a practicable alternative water source."[194]
3. "If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial."[195]

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[187] ***Id.* (footnote omitted).**

[188] ***Id.* (footnote omitted).**

[189] ***Id.* (footnote omitted).**

[190] ***Mauna Kea II*, at 414, 431 P.3d at 787 (Pollack, J., concurring) (emphasis added) (internal footnote omitted) (citing *Kaua'i Springs*, 133 Hawai'i at 174, 324 P.3d at 984).**

[191] ***Kaua'i Springs*, 133 Hawai'i at 174, 324 P.3d at 984 (citing *Kukui (Moloka'i)*, Inc., 116 Hawai'i at 490, 174 P.3d at 329).**

[192] ***Id.***

[193] ***Id.* (citing *Waiāhole I*, 94 Hawai'i at 162, 9 P.3d at 474).**

[194] ***Id.* (citing *Waiāhole I*, 94 Hawai'i at 161, 9 P.3d at 473).**

4. "If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved."[196]

As amended by Justice Pollack for conservation lands, principles 1 and 2 would read:

1. "An applicant is required to demonstrate the need for a *conservation district use permit*, the propriety of using *conservation land* to fill that need, and
2. a lack of a practicable *alternative location* suitable for the project."[197]

And principles 3 and 4 would remain the same. Justice Pollack concluded his analysis of the framework by stating:

> In sum, our precedents governing the constitutional public trust obligations of agencies and applicants may readily be adapted to conservation land, and the history and text of [A]rticle XI, [S]ection 1 indicate that they should be so applied. TMT should therefore be considered in light of our existing public trust framework rather than ascribing differing types of constitutional protections depending on the particular public natural resource at issue.[198]

In advocating that the public trust doctrine framework should be applied to State conservation lands, Justice Pollack maintained that the court should adopt an analogous public trust framework for conservation lands but agreed nonetheless with the majority that BLNR and TMT "largely fulfilled" its obligations under *Kaua'i Springs*.[199]

Justice Pollack's analysis and framework are sound, yet his determination that "obligations under our existing public trust framework" were "largely fulfilled" remains controversial.[200] As Justice Wilson's dissent points out, the "mitigation measures adopted by [] BLNR and the

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[195] ***Id.*** **(citing *Kukui (Moloka'i)*, Inc., 116 Hawai'i at 499, 174 P.3d at 338).**

[196] ***Id.*** **(citing *Waiāhole I*, 94 Hawai'i at 161, 9 P.3d at 473).**

[197] ***Mauna Kea II*****, 143 Hawai'i 379, 414, 431 P.3d 752, 787 (2018) (Pollack, J., concurring) (emphases added).**

[198] ***Id.***

[199] ***Id.*** **at 416–17, 431 P.3d at 789–90 (alterations in original) (Pollack, J., concurring).**

[200] ***Id.*** **at 417, 431 P.3d at 790.**

[m]ajority do not constitute reasonable mitigation measures. They are illusory."[201]

B. *TMT's Mitigation Factors Are Not Sufficient*

The majority declined to apply the existing public trust framework in *Kaua'i Springs* and consequently reserved less protection to public trust conservation lands than to public trust water resources—a result not intended by the Hawai'i Constitution.[202] Justice Pollack, who did apply the *Kaua'i Springs* public trust framework, still concluded that "UH sufficiently carried its obligation to demonstrate that damage to public trust purposes will be offset by the implementation of reasonable mitigation measures."[203]

According to Justice Pollack, because BLNR's factual findings were supported with substantial evidence, the court was obliged to give the agency deference.[204] BLNR determined,

> that there will be at least some harm to the public trust purposes . . . [and it] acknowledged that, considered alone, the TMT would have an 'incremental' negative effect on natural resources at the project site and a temporary impact to recreational visitors who expect to traverse near the construction site during construction. UH was therefore required to demonstrate that reasonable mitigation measures would be undertaken to reduce the cumulative harm of TMT and other existing projects making use of conservation land on the public trust purposes.[205]

Under the *Kaua'i Springs* framework, if there is significant impact to the resource, the applicant must reasonably mitigate the damage before a permit is approved.[206]

UH and the permit applicant demonstrated that there will be an "extensive number of mitigation measures . . . and a host of other efforts intended to minimize the impact of [] TMT[.]"[207] Namely, UH and the

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[201] ***Id.* at 426 n.8, 431 P.3d at 799, n.8 (Wilson, J., dissenting).**

[202] ***See id.* at 433, 431 P.3d at 806.**

[203] ***Id.* at 420, 431 P.3d at 793.**

[204] ***Id.* at 416–17, 431 P.3d at 789–90 (citing *see* Leslie v. Bd. of Appeals of County of Hawai'i, 109 Hawai'i, 384, 391, 126 P.3d 1071, 1078 (2006)).**

[205] ***Id.* at 419, 431 P.3d at 792 (citing *Kaua'i Springs*, 133 Haw, 141, 175, 324 P.3d 951, 985 (2000)).**

[206] ***Kaua'i Springs*, 133 Hawai'i at 175, 324 P.3d at 985.**

[207] ***Mauna Kea II*, 143 Hawai'i at 419–20, 431 P.3d at 792–93 (Pollack, J.,**

permit applicant located TMT "below" the summit ridge, made adjustments to the building of the telescope, installed a zero-discharge wastewater system, implemented training, and imposed mandatory ride-sharing.[208]

As Justice Pollack pointed out, however, the factors stated are "*part of* the TMT project and merely reduce its impact but do not counterbalance the deleterious effects."[209] Meaning, agencies should not credit applicants for being in compliance with regulations because it would not damage the resource greater than it has been.[210] Moreover, if the "impact of the project on public trust purposes remains negative after accounting for [the] modifications, [then] applicants are additionally required to demonstrate that mitigations measures will be undertaken to offset this effect."[211]

BLNR "misconstrue[d] the mitigation analysis" by factoring in mitigation measures that do not actually alleviate damage to the land.[212] Nevertheless, Justice Pollack opined that notwithstanding the "Board's misapprehension as to what may constitute an appropriate mitigation action, substantial evidence was introduced that true mitigation measures will be undertaken that are sufficient to offset the harm from the project on public trust purposes."[213]

In particular, Justice Pollack noted that the project will fund the renaturalization of two areas around TMT, decommission and restore five existing observatories, and contribute funds to the maintenance of Mauna Kea.[214] He further concluded that, considered together, those "measures indicate[d] that UH sufficiently carried its obligation to demonstrate that damage to public trust purposes will be offset by the implementation of reasonable mitigation measures."[215] Justice Wilson disagreed with the proposition, stating that the degradation principle utilized by the majority

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concurring).

[208] ***Id.***

[209] ***Id.* at 420, 431 P.3d at 793 (emphasis in original) (footnote omitted).**

[210] ***See id.* at 420 n.13, 431 P.3d at 793 n.13 ("In assessing whether applicants have sufficiently demonstrated mitigation measures to offset the negative impact of a proposed project, an agency should not credit the applicant for simply complying with regulations and not causing even greater damage to public trust purposes.").**

[211] ***Id.* at 420, 431 P.3d at 793 (citing *c.f.* Morimoto v. Bd. of Land & Nat. Res., 107 Hawai'i 296, 299, 113 P.3d 172, 175 (2005)).**

[212] ***Mauna Kea II*, 143 Hawai'i at 419–20, 431 P.3d at 792–93 (Pollack, J., concurring).**

[213] ***Id.* at 420, 431 P.3d at 793.**

[214] ***Id.***

"substitute[d] a contrary standard" under the Hawai'i Constitution and public trust principles.[216]

V. JUSTICE WILSON'S DISSENT: THE DEGRADATION PRINCIPLE

Justice Wilson's dissenting opinion does not apply the degradation principle to the public trust doctrine specifically, but he does allude to the doctrine and its framework by stating that the majority ran afoul of the State's "constitutional" and "public trust duty" to protect its natural resources.[217] As noted above, Justice Wilson joined Justice Pollack in parts I-III of his concurrence. But while Justice Wilson agreed with the standard of using the existing public trust framework under *Kaua'i Springs*, he did not agree with part IV of Justice Pollack's concurrence that "BLNR and the permit applicant largely fulfilled their obligations under our existing public trust framework."[218] As described below, Justice Wilson's disagreement is due to the majority's use of the degradation principle to justify affirming BLNR's decision to issue a CDUP to TMT.[219] As the following sections discuss, Justice Wilson likely disagreed with the majority because the degradation principle is contrary to constitutional intent, violates the public trust doctrine, and promotes an adverse policy that could incentivize further desecration of natural and cultural resources.

A. *The Degradation Principle*

The degradation principle imposes a "threshold condition of damage" that "justifies significant future degradation if the degradation attains a substantial adverse degree."[220] In terms of TMT, the majority agreed with BLNR that notwithstanding the project, "the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea have resulted in impacts that are substantial, significant and adverse."[221] And because the subject land had already been damaged, TMT

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[215] ***Id.***

[216] ***Id.* at 433–34, 431 P.3d at 806–07 (Wilson, J., dissenting).**

[217] ***Id.* at 423, 431 P.3d at 796.**

[218] ***Id.* at 416, 431 P.3d at 789 (Pollack, J., concurring) (alterations in original).**

[219] ***See id.* at 421–22, 431 P.3d at 794–95 (Wilson, J., dissenting) ("[BLNR] grounds its analysis on the proposition that cultural and natural resources protected by the Constitution of the State of Hawai'i and its enabling laws lose legal protection where degradation of the resource is of sufficient severity as to constitute a substantial adverse impact.").**

[220] ***Id.* at 429–30, 431 P.3d at 802–03.**

[221] ***Id.* at 403, 431 P.3d at 776 (majority opinion).**

"will not cause substantial adverse impact to the existing natural resources within the surrounding area, community, or region."[222] In other words, TMT "could not be the cause of a substantial adverse impact on the existing resources because the tipping point of a substantial adverse impact had previously been reached."[223] Importantly, Justice Wilson opined in response:

> The degradation principle renders inconsequential the failure of the State to meet its constitutional duty to protect natural and cultural resources for future generations. It renders illusory the public trust duty enshrined in the Constitution of the State of Hawai'i and heretofore in the decisions of this court to protect such resources.[224]

Justice Wilson's point is that where degradation of the resource causes a substantial adverse impact to the resource, it loses constitutional protections.[225] The majority, however, interpreted the law contrarily.

B. *Interpretation of Article XI, Section 1*

The majority asserted that Article XI, Section 1 requires a balancing between of conservation and protection and development and utilization of the resource.[226] Balancing, however, should not diminish the State's duty to conserve and protect. Nor should it allow a lessee to damage public trust land under the pretext that it will "restore" various aspects of TMT damage later.[227] In any case, the majority's reasoning is unbalanced.

In *Kaua'i Springs*, the court took into consideration statutory—or in this case constitutional—interpretation. Thus, the court looked to the following rules under *Franks v. City and County of Honolulu*:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature which is to be obtained primarily from the language contained in the statute itself. We must read statutory

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[222] ***Id.* at 405, 431 P.3d 752, 778.**

[223] ***Id.* at 422, 431 P.3d at 795 (Wilson, J., dissenting).**

[224] ***Id.* at 423, 431 P.3d at 796.**

[225] ***See id.* at 422, 431 P.3d at 795 (summarizing BLNR's analysis and use of the degradation principle).**

[226] ***Id.* at 400, 431 P.3d at 773 (majority opinion).**

[227] ***See id.* at 404, 431 P.3d at 777 ("The Decommissioning Plan calls for all new telescopes and existing telescopes that renegotiate their subleases to develop decommissioning funding plans to provide assurances of funds to finance the removal of their facilities and restore sites when the time to decommission arrives.").**

> language in the context of the entire statute and construe it in a manner consistent with its purpose. When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute an ambiguity exists. If the statutory language is ambiguous or doubt exists as to its meaning, courts may take legislative history into consideration in construing a statute.[228]

Justice Wilson stated that "[c]orrectly applied—and consistent with the clear intent of Hawai'i's legislature and norms of environmental law—HAR § 13-5-30(c)(4) requires that the impacts of TMT be assessed with full recognition that the existing resource has already received cumulative impacts that amount to a substantial adverse impact."[229] As described below, the delegates to the 1978 Constitutional Convention and Hawai'i's legislature did not intend for the degradation principle to be applied to Article XI, Section 1 of the Hawai'i Constitution.

The Environment and Protection Section of Resolution No. 30 of the 1978 Constitutional Convention Reports, concerning Article XI, Sections 1 and 9, stated that the admendment:

- requires the State and counties to conserve and protect the natural beauty and natural resources of Hawaii.
- requires the State to promote the development and use of these resources in a manner consistent with conserving these resources and promoting the self-sufficiency of the State.
- requires the State to hold all public natural resources in trust for the benefit of the people of Hawaii.
- gives each person the right to a clean and healthful environment as defined by law . . . .[230]

Restated, the State is required to conserve and protect land, promote and develop land in a manner consistent with conserving Hawai'i's natural beauty and natural resources, and give everyone—both present and future generations—the right to a clean and healthful environment.[231]

In *Waiāhole I*, the court stated that "we have long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in

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[228] ***Kauai Springs, Inc. v. Panning Comm'n of Kaua'i* (*Kaua'i Springs*), 133 Hawai'i 144, 163, 324 P.3d 951, 973 (2014) (citing Franks v. City & Cnty. of Honolulu, 74 Hawai'i 328, 334–35, 843 P.2d 668, 671–72 (1993)).**

[229] ***Mauna Kea II*, 143 Hawai'i at 434, 431 P.3d at 807 (Wilson, J., dissenting).**

[230] **PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, Volume 1, 543–44 (1978).**

[231] ***See* HAW. CONST. art. XI, §§ 1,9.**

interpreting a constitutional provision is to give effect to that intent."[232] The framers of Article XI, Section I "deemed it necessary to define conservation and agreed on the following: the protection, improvement and use of natural resources according to principles that will assure their highest economic or social benefits."[233] And the mandate of Article XI, Section 1's "conservation-minded use recognizes protection as a valid purpose consonant with assuring the highest economic and social benefits of the resource."[234]

The framers also changed the initial language of the Article XI, Section 1 provision to expressly mandate protection.[235] In doing so, the Standing Committee on Environment, Agriculture, Conservation and Land noted:

> Much testimony was received expressing the opinion that the current language of Section 1 is contradictory and *places insufficient weight on the preservation or protection end of the balance that is implied in the word 'conservation.'* Your Committee agreed with this testimony and amended Section [1] to recognize this concern . . . . [T]he language of this [S]ection *mandates that the State and its political subdivisions provide for the conservation and protection* of natural beauty, as contrasted with the previous language which simply empowered the State to 'conserve and develop its natural beauty.'[236]

As evidenced above, the committee notes from the 1978 Constitutional Convention clearly evidenced that the intent of the change to Article XI, Section 1 was intended to place more emphasis on conservation and protection. Therefore, in the case of *Mauna Kea II*, the scale was

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[232] ***In re Water Use Permit Applications* (*Waiāhole I*), 94 Hawai'i 97, 131, 9 P.3d 409, 443 (2000) (citation omitted).**

[233] ***Id.* at 139, 9 P.3d at 451 (alterations in original) (internal quotation marks omitted) (citing *see* Stand. Comm. Rep. No. 77, in 1978 Proceedings, at 685–86).**

[234] ***Id.* (internal quotation marks omitted) (citation omitted).**

[235] ***See id.* at 139 n.36, 9 P.3d at 452 n.36 (citing Stand. Comm. Rep. No. 77, in 1 Proceedings 1978, at 686) (deleting "a prior draft of [A]rticle XI, [S]ection 1 merely stating that the '[t]he legislature shall promote the conservation development and utilization of . . . natural resources,' and replacing it with the present language expressly mandating 'protection'").**

[236] ***Id.* (emphases added) (citing Stand. Comm. Rep. No. 77, in 1 Proceedings, at 686).**

imbalanced when the court gave more weight to development and utilization than conservation and protection.[237]

Additionally, Justice Wilson explained that the "legislature did not intend that the rights of future generations to the protection of Mauna Kea be ignored by disregarding the impact of[] TMT[] on a resource already substantially adversely impacted by the construction of twelve telescopes."[238] Justice Wilson highlighted the first words of Article XI, Section 1—"[f]or the benefit of present and future generations"—because the degradation principle would deny future generations the protection of a cultural resource.[239]

Significantly, Justice Wilson opined that the "degradation principle removes the need to consider the impacts of TMT on the existing resource."[240] In particular, the associate justice stated that under the degradation principle, "once the existing cultural resource has been substantially adversely impacted, it is unnecessary to consider whether a future land use would cause a substantial adverse impact."[241] In sum, he concluded that the use of the degradation principle in *Mauna Kea II* "ignore[d] the rights of future generations to the protections specifically afforded them . . . ."[242]

As explained above, the title *Environment and Protection* Section of Resolution No. 30 of the 1978 Constitutional Convention Reports and the change by the committee are clear indicators that the delegates of the constitutional convention did not intend for the resources protected under Article XI, Section 1 to be subject to the degradation principle. Likewise, the degradation principle defeats the requirement that the State promote and develop natural resources, including land, in a manner consistent with conservation. Moreover, the destruction of land at the TMT site is the destruction of the right to a clean and healthful environment.[243] For these

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[237] ***See* discussion *infra* Section V.C.**

[238] ***Mauna Kea II*, 143 Hawai'i 379, 429, 431 P.3d 752, 802 (2018) (Wilson, J., dissenting).**

[239] ***See supra* note 165 and accompanying text; *infra* note 300 and accompanying text.**

[240] ***Mauna Kea II*, 133 Hawai'i at 429, 431 P.3d at 802 (Wilson, J., dissenting).**

[241] ***Id.***

[242] ***Id.***

[243] **The Hawai'i Constitution states:**

> **Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of**

reasons, the degradation principle clearly violates the purpose of the public trust doctrine.

C. *The Degradation Principle Violates the Public Trust Doctrine*

Utilizing the existing *Kaua'i Springs* framework, if the "impact [of TMT] is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved."[244] Under the adapted public trust framework—as described by Justice Pollack—when applied to conservations lands, an "applicant must demonstrate that there will be reasonable efforts undertaken to mitigate the negative impact on the public trust purposes discussed above from both the proposed undertaking and other existing projects that make use of conservation land."[245] The mitigation measures taken by the permit applicant here, however, are insufficient to warrant approval.

In *Mauna Kea II*, the majority circumvented the constitutional mandate to "conserve and protect" through a plethora of justifications that do not necessarily mitigate the damage to the actual resource.[246] As explained below, the majority's reasoning was misguided.

First, the majority, under its public trust and land use analysis, stated that TMT "does not involve the irrevocable transfer of public land to a private party."[247] While this may be a mitigating factor, it is not of much consequence because the sale or alienation of public lands, without a lengthy legislative review, would be unlawful in any case.[248]

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natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

HAW. CONST. art. XI, § 9.

[244] ***Kauai Springs, Inc. v. Planning Comm'n of Kaua'i* (*Kaua'i Springs*), 133 Hawai'i 141, 175, 324 P.3d 951, 985 (2014).**

[245] ***Mauna Kea II*, 143 Hawai'i at 414, 431 P.3d at 787 (Pollack, J., concurring).**

[246] **HAW. CONST. art. XI, § 1; *see Mauna Kea II*, 143 Hawai'i at 384–410, 324 P.3d at 757–83.**

[247] ***Mauna Kea II*, 143 Hawai'i at 401, 431 P.3d at 774.**

[248] **Act 176 was a "direct response" by the Hawai'i Legislature to the alienation of trust lands. MACKENZIE, *supra* note 35, at 120–21. The act was "intended to provide needed oversight by providing a more comprehensive process for the transfer of [S]tate-owned land, giving the legislature more supervision over such transfers, and ensuring that key information about sales or exchanges of land was shared with the legislature and the [Office of Hawaiian Affairs]." *Id.* Act 176 required a "two-thirds approval by the legislature for the sale or gift of public trust**

Second, the majority relied upon the argument that TMT will be decommissioned in approximately 50 years and the land will be restored.[249] But the desecration of a public natural resource cannot be justified under the guise of restoring it later, because excavating 21 feet into the summit of Mauna Kea is the direct opposite of the mandate to conserve and protect public trust land and would pervert the plain language of the constitutional text.[250]

Third, the majority concluded that the lack of evidence showing traditional and customary practices at the TMT site area by Native Hawaiian practitioners supports comporting with the public trust principles.[251] The majority, however, conflated an issue arising from Article XII, Section 4, (Public Trust Land)[252] with an issue also arising under Article XI, Section 1 (Conservation and Development of Resources).[253] Specifically, the majority held that TMT is consistent "with Article XI, Section 1 public trust principles and that [] BLNR met its duties as trustee under the Article XI, Section 1 public land trust[.]"[254] The

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and other *lands*." *Id.* However, a "law passed in 2014 now requires only a simple majority approval of the legislature for an exchange of public trust lands for private lands." *Id.*

[249] *Mauna Kea II*, 143 Hawai'i at 401, 431 P.3d at 774.

[250] *Id.* at 433, 431 P.3d at 806 (Wilson, J., dissenting); *see* HAW. CONST. art. XI, § 1.

[251] *See Mauna Kea II*, 143 Hawai'i 379, 402, 431 P.3d 752, 775 (2018) ("[T]here was no actual evidence of use of the TMT Observatory site and Access Way area by Native Hawaiian practitioners.").

[252] Article XII, Section 4 provides:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for [N]ative Hawaiians and the general public.

HAW. CONST. art. XII, § 4.

[253] *Compare* HAW. CONST. art. XI, § 1 ("[T]he State . . . shall conserve and protect Hawai[ʻ]i's natural beauty and all natural resources, including land[.]"), *with* HAW. CONST. art. XII, § 4 ("The lands granted to the State of Hawai[ʻ]i by Section 5(b) of the Admission Act . . . shall be held by the State as a public trust for [N]ative Hawaiians and the general public.").

[254] *Mauna Kea II*, 143 Hawai'i at 402, 431 P.3d at 775.

State, however, has additional and distinct trust duties under the public land trust and the public trust doctrine.[255]

Fourth, the majority opined that "in general, astronomy and Native Hawaiian uses on Mauna Kea have co-existed for many years and [] TMT [] will not curtail or restrict Native Hawaiian uses."[256] TMT, however, is the largest astronomical project to date, on the summit of Mauna Kea,[257] and previous compatibility of smaller telescopes does not justify building a much larger telescope.

Fifth, the majority stated that "TMT is an advanced world-class telescope designed to investigate and answer some of the most fundamental questions regarding our universe, including the formation of stars and galaxies after the Big Bang and how the universe evolved to its present form."[258] This measure may justify the development and utilization aspect of the constitutional mandate, but it does not mitigate the damage to the land that the State is obligated to conserve and protect under Article XI, Section 1.[259]

Sixth, the *Mauna Kea II* court also considered the following mitigation factors such that Native Hawaiians will receive monetary benefits from the project, TMT will open up a "workforce pipeline" with high paying jobs, and TMT will pay rent to the University.[260] The public trust doctrine, however, is not a pay-to-play system.[261] If it were, the

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[255] ***See supra* note 256.**

[256] ***Id.***

[257] ***See id.* at 423, 431 P.3d at 796 (Wilson, J., dissenting) (opining that TMT is "the most extensive construction project yet proposed for the Astronomy Precinct").**

[258] ***Id.* at 402, 431 P.3d at 775 (majority opinion).**

[259] ***See* HAW. CONST. art. XI, § 1.**

[260] ***Mauna Kea II*, 143 Hawai'i at 402, 431 P.3d at 775.**

[261] ***Waiāhole I* held that,**

> **while the [S]tate water resources trust acknowledges that private use for 'economic development' may produce important public benefits and that such benefits must figure into any balancing of competing interests in water, it stops short of embracing private commercial use as a protected 'trust purpose' . . . . [I]f the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time.**

94 Haw. 97, 138, 9 P.3d 409, 450 (2000) (citing *Robinson*, 65 Haw. at 676, 658 P.2d at 312); *but see Mauna Kea II*, 143 Hawai'i at 402, 431 P.3d at 775 ("Use of the land by TMT will result in a substantial community benefits package, which has already

general public would have lost shoreline access and water rights to big business.[262] The Hawai'i Supreme Court has expressly stated, "To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as [Native] Hawaiians."[263]

TMT is slated to be the largest telescope on Mauna Kea and similar to the Giant Magellan Telescope in Chile, it "would be roughly three times larger and 10 times more powerful than anything now on Earth."[264] The *Mauna Kea II* court, however, concluded that TMT will have "no substantial adverse impact due to extensive degradation from prior development of telescopes in the summit area."[265] The majority—without adopting the *Kaua'i Springs* analysis, but citing the constitutional provision of the public trust doctrine—went into incredible detail to justify the permitting of TMT through mitigation measures.[266] Undoubtedly, the majority's holding is a valiant attempt at addressing a sensitive and significant constitutional issue. A building as colossal and intrusive as TMT, however, cannot pass constitutional muster under the public trust doctrine as it applies to the sacred summit of Mauna Kea.

D. *The Degradation Principle is Bad Policy*

It is worth noting that Justice Wilson joined Justice Pollack in his concurrence but disagreed with the result.[267] Most evidently, Justice Wilson dissented because TMT would violate HAR Section 13-5-30(c)(4)

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provided over $2.5 million for grants and scholarships for STEM education benefitting Hawai'i students. The package also includes an additional commitment to provide $1 million annually for this program.").

[262] In *McBryde Sugar Company v. Robinson*, the Hawai'i Supreme Court held that the sugar company could not "divert and transport" water from the Hanapepe Valley "to be used on other parcels of land owned by them elsewhere" or "prejudic[e] the riparian rights of others" downstream. 54 Haw. 174, 190–98, 504 P.2d 1330, 1340–44 (1973). In *County of Hawaii v. Sotomura*, the Hawai'i Supreme Court also held that "[p]ublic policy, as interpreted by this court, favors extending to public use and ownership as much of [Hawai'i's] shoreline as is reasonably possible." 55 Haw. 176, 182, 517 P.2d at 61–62; *see* discussion *infra* Section VI.

[263] *OHA v. HCDCH II*, 121 Hawai'i 324, 333, 219 P.3d 1111, 1120 (2009) (citation omitted).

[264] Dennis Overbye, *American Astronomy's Future Goes on Trial in Washington*, N.Y. TIMES (Mar. 13, 2020), https://www.nytimes.com/2020/03/13/science/telescopes-decadal-survey-hawaii.html.

[265] *Mauna Kea II*, 143 Hawai'i at 423, 431 P.3d at 796 (Wilson, J., dissenting).

[266] *See generally id.* at 384–410, 324 P.3d at 757–83 (majority opinion).

[267] *See id.* at 409, 324 P.3d at 782 (Pollack, J., concurring, in which Wilson, J., joined as to Parts I–III).

—a regulation governing the use of conservation lands.[268] Justice Wilson opined that the majority's use of the degradation principle to reach the conclusion that the "addition of another telescope—TMT—could not be the cause of substantial adverse impact on the existing resource" ran afoul of the law.[269]Justice Wilson explained that "HAR § 13-5-30(c)(4) is a direct refutation of such regressive treatment of conservation land."[270] Justice Wilson further stated that by applying the degradation principle, the court "substitute[d] a contrary standard that relieve[d] the permittee of the burden to prove no substantial adverse impact—if the resource is already substantially adversely impacted."[271] Most analogously, Article XI, Section 1—the public trust doctrine—is a direct refutation of the degradation principle and substitutes a contrary standard.[272] As described below, Hawai'i's history is also a refutation of the degradation principle.

When Hawai'i became a territory in 1900, the island of Kaho'olawe was ceded to the United States.[273] In 1941, the United States began using Kaho'olawe as a military target range.[274] In the 1970s, the Protect Kaho'olawe 'Ohana was founded to protest the bombing of Kaho'olawe and reclaim the island for Native Hawaiians.[275] During this

[268] HAW. ADMIN. R. § 13-5-30(c)(4).

[269] *Mauna Kea II*, 143 Hawai'i at 422, 431 P.3d at 795 (Wilson, J., dissenting).

[270] *Id.* at 433, 431 P.3d at 806.

[271] *Id.* at 433-34, 431 P.3d at 806–07.

[272] *See* HAW. CONST. art. XI, § 1; *Mauna Kea II*, 143 Hawai'i at 433–34, 431 P.3d at 806–07 (Wilson, J., dissenting).

[273] In 1900, "Congress passed an Organic Act establishing Hawai'i's territorial government. The Organic Act confirmed the cession of public lands to the United States and provided specific laws to administer those lands." *See* MACKENZIE, *supra* note 35, at 27.

[274] *OHA v. HCDCH I*, 117 Hawai'i 174, 194 n.16, 177 P.3d 884, 904 (2008) (internal quotation marks omitted) (citing 1993 Haw. Sess. L. Act 340, § 1 at 803).

[275] MACKENZIE, *supra* note 35, at 39. The Protect Kaho'olawe 'Ohana ('Ohana) organization was, an "integral part of a growing political and cultural resurgence among Native Hawaiians[.]" *Id.* In January 1976,

> 'Ohana members landed on the island in an act of peaceful civil disobedience. Although the coast guard quickly escorted the protesters off the island and cited several for trespass, the 'Ohana continued its landings on the island. This persistence, combined with two leaders of the 'Ohana, George Helm and James Kimo Mitchell, galvanized the Hawaiian community and called statewide and national attention to the destruction of the island.

Id.

advocacy process, Native Hawaiian kūpuna (elders) taught that Kahoʻolawe was of great cultural significance because it was a "place where traditional navigation was taught and [was] a vital link in the navigational path between Hawaiʻi and Tahiti."[276] The island was also sacred because "Hawaiians have long recognized Kahoʻolawe as a wahi pana (legendary place) and puʻuhonua (place of refuge)."[277] In response to this movement, the bombing of the island was finally put to an end in 1990.[278] Subsequently, in 1993, the Hawaiʻi legislature declared that the natural resources—namely lands and waters—of Kahoʻolawe "shall be held in trust" for a future Native Hawaiian sovereign entity and "found that the island of [Kahoʻolawe] is of significant cultural and historic importance" to Native Hawaiians.[279] Kahoʻolawe is not part of the conservation lands district, but it is protected under the public land trust and the public trust doctrine.[280]Had the degradation principle been applied to Kahoʻolawe, however, the outcome would have been different.

As described above, the lands of Kahoʻolawe were severely damaged by fifty years of bombing—destroyed even more than the summit of Mauna Kea.[281] A fact finder, therefore, could have easily found that like Mauna Kea, Kahoʻolawe had been substantially and adversely impacted.[282] Accordingly, the degradation principle—had it been applied to Kahoʻolawe—would have paved the way to allow further damage to the land and natural resources of Kahoʻolawe, under the premise that it had surpassed the "tipping point" of substantial adverse impact.[283]

The application of the degradation principle to Kahoʻolawe would have allowed the military to continue to destroy ʻāina under the guise that it had been previously subject to substantial and adverse impact. The

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[276] ***Id.*** **at 40.**

[277] ***Id.*** **(citations and footnotes omitted).**

[278] ***OHA v. HCDCH I*****, 117 Hawaiʻi at 194 n.16, 177 P.3d at 904 n.16.**

[279] ***Id.*** **at 194, 177 P.3d at 904 (internal quotation marks omitted) (citation omitted).**

[280] ***See*** **HAW. CONST. art. XI, § 1; HAW. CONST. art. XII, § 4,** ***supra*** **note 1 and accompanying text.**

[281] **Kahoʻolawe has been used as a military target practice range.** ***OHA v. HCDCH I*****, 117 Haw. at 194 n.16, 177 P.3d at 904 n.16. In comparison, TMT will be dug 21 feet into the summit of Mauna Kea.** ***Mauna Kea II*****, 143 Hawaiʻi at 433, 431 P.3d at 806 (Wilson, J., dissenting).**

[282] ***See*** **discussion** ***supra*** **Section V.A.**

[283] ***See Mauna Kea II*****, 143 Hawaiʻi 379, 421, 426, 431 P.3d 775, 794, 799 (2018) (Wilson, J., dissenting) (arguing that the utilization of the degradation principle by the majority was improper).**

example of Kahoʻolawe demonstrates that the implications of the degradation principle are very broad, and the application of such a principle runs contrary to longstanding Hawaiʻi precedent. If adopted, the degradation principle could negatively affect *all* public trust lands, as well as Native Hawaiians.[284]

VI. CONCLUSION

The *Mauna Kea II* decision falls short of the precedent—the "settled law"—set by former Chief Justice William S. Richardson.[285] He sat as chief justice for seventeen years and was "known for decisions in property law that expanded the beaches and preserved [S]tate waters and newly-added volcanic lands for the people of Hawaiʻi . . . . [which] bec[ame] the foundation of natural resources law in the State of Hawaiʻi."[286] CJ Richardson "reincorporate[d] Native Hawaiian tradition and custom into [S]tate law and expanded public rights . . . . balanc[ing] competing factors: the past and the future; Western law and Hawaiian law and tradition; the rights of the individual and the rights of the collective; and public and private interests."[287] In C.J.'s own words:

> Hawaiʻi has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawaiʻi's territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawaiʻi's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawaiʻi. The result can be found in the decisions of our Supreme Court beginning

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[284] **Recently, in 2019, the Hawaiʻi Supreme Court concluded that the "State breached its constitutional trust duties by failing to reasonably monitor the PTA [(Pohākuloa Military Training Area)], including by failing to inspect the land to ensure the United States' compliance with the lease terms intended to protect and preserve trust property." Ching v. Case, 145 Hawaiʻi 148, 183, 449 P.3d 1146, 1181 (2019); *see also id.* at 162 n.26, 449 P.3d at 1160 n.26 ("Throughout its findings of fact and conclusions of law, the circuit court referred to th[e] [State's] obligation as the duty to 'm[ā]lama '[ā]ina,' which the court translated as 'to care for the land.'").**

[285] **Williamson B.C. Chang, *The Life of the Law is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson*, 33 U. HAW. L. REV. 99, 101 (2010).**

[286] ***Id.* at 100 (footnotes and citations omitted).**

[287] ***Ka Lama Kū O Ka Noʻeau*, *supra* note 3, at 6.**

> after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases-and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[288]

As stated by Justice Pollack, the majority in *Mauna Kea II* did not "fully apply" the public trust doctrine principles and the majority "only partially adopt[ed] . . . precedents that set out public trust principles," effectively giving different measures of protection to Hawai'i's natural resources.[289] Article XI, Section 1 of the Hawai'i Constitution, which establishes the public trust doctrine, was not intended to and does not prescribe lesser amounts of protections for different natural resources.[290] Furthermore, Article XI, Section 1 is not a constitutional protection just for water.[291] It includes land, water, air, minerals, and energy sources.[292] Consequently, the application of the degradation principle chips away at the public trust doctrine not only for land, but for all of Hawai'i's natural beauty and natural resources.[293]

As stated by Justice Wilson, the "degradation principle substitutes a contrary standard . . . ."[294] Moreover, Hawai'i law, correctly applied, "requires that the impacts of TMT be assessed with full recognition that the existing resource has already received cumulative impacts that amount to a substantial adverse impact."[295] Justice Wilson concluded that the "substantial adverse impacts to cultural resources presently existing in the Astronomy Precinct of Mauna Kea combined with the impacts from TMT —a proposed land use that eclipses all other telescopes in magnitude— would constitute an impact on existing cultural resources that is substantial and adverse."[296] The real-world implications and consequences of the degradation principle go far beyond this case.

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[288] ***Id.* at 6–7.**

[289] ***Mauna Kea II*, 143 Hawai'i at 410, 431 P.3d at 783.**

[290] ***See* HAW. CONST. art. XI, § 1.**

[291] ***See id.***

[292] ***Id.***

[293] ***See id.***

[294] ***Mauna Kea II*, 143 Hawai'i at 433–34, 431 P.3d at 806–07.**

[295] ***Id.* at 434, 431 P.3d at 807.**

[296] ***Id.***

The degradation principle not only conflicts with the constitutional mandate to conserve and protect but also establishes bad policy that could disincentivize developers and big business to mālama ʻāina. Even more concerning, the degradation principle could actually encourage the destruction of land and other natural resources so that the contrary principle may be applied on protected lands. Moreover, damage to the ʻāina is permanent, while benefits from TMT are only temporary.[297] This regression of policy and precedent by the majority is alarming. The Hawaiʻi Supreme Court has consistently upheld Native Hawaiian values that have been incorporated into the Hawaiʻi Constitution.[298] In this light, the court's exodus in *Mauna Kea II* is a departure from precedent and the law.

Chief Justice Richardson was celebrated as the standing torch of wisdom—Ka Lama Kū O Ka Noʻeau.[299] The Hawaiʻi Supreme Court in *Mauna Kea II* has clearly begun to depart from the precedent set by C.J. Richardson's court. To get it right, the court must do what CJ did and face the future by looking to the past.[300]

[297] ***See id.*** **at 428, 431 P.3d at 801 ("Future generations do not receive the benefit of protection of the cultural resource in the future because past substantial adverse impacts render it unnecessary to determine future impacts from TMT.").**

[298] ***See supra*** **note 1 and accompanying text.**

[299] ***Supra*** **note 290, at 15.**

[300] ***See*** **Chang, *supra* note 288, at 138.**