

Mai Kēia Manawa ā Mau Loa Aku: Kānaka Maoli Governance Through Nearshore Fisheries Management in Mo‘omomi¹

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¹ In the Hawaiian language, “mai kēia manawa ā mau loa aku” translates to “from now to eternity” and “from now on and forever.” MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 241 (rev. and enlarged ed. 1986) [hereinafter HAWAIIAN DICTIONARY].

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I. INTRODUCTION

‘Āina² serves as a central organizing concept for Kānaka Maoli³ narratives.⁴ This term in itself “evoke[s] powerful sensory and emotional connections [for Kānaka Maoli] as they associate[] certain ‘āina with particular activities . . . , family members or relationships . . . , events,” or genealogical histories.⁵ Maoli scholar and Hawaiian Language Professor Katrina-Ann R. Kapā‘anaokalāokeola Nākoa Oliveira writes:

The fact that Kānaka had a very close connection to the ‘āina in ancestral times is evident in our ‘ōlelo makuahine.⁶ Terms such as ‘āina, aloha ‘āina (love for the land), and kua‘āina (the people who carry the burden of land on their backs) all reflect an undeniable bond between ‘āina and kānaka.

² In the Hawaiian language, ‘āina means “land” or “earth.” *Id.* at 11.

³ “Native Hawaiian,” “Kānaka Maoli,” or “Maoli” as used in this article, refers to individuals that can trace their ancestry back to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. HAW. CONST. art. XII, § 7. “Kānaka” is the singular, while “Kānaka” is the plural. HAWAIIAN DICTIONARY, *supra* note 1, at 127. Both “Native Hawaiian” and “Indigenous” are capitalized in this article to represent the unique legal and political status of these groups.

⁴ See Erin Kahunawaika‘ala Wright & Brandi Jean Nālani Balutski, *Ka ‘Ikena a ka Hawai‘i: Toward a Kanaka ‘Ōiwi Critical Race Theory*, in KANAKA ‘ŌIWI METHODOLOGIES: MO‘OLELO AND METAPHOR 86, 100 (Katrina-Ann R. Kapā‘anaokalāokeola Nākoa Oliveria & Erin Kahunawaika‘ala Wright eds., 2015) [hereinafter METHODOLOGIES].

⁵ *Id.*

⁶ In the Hawaiian language, ‘ōlelo makuahine means “mother tongue” and is often used to refer to the Hawaiian language. HAWAIIAN DICTIONARY, *supra* note 1, at 284.

Kānaka knew their places so intimately that they were able to describe their kulāiwi⁷ apart from other places.⁸

The root of the word ‘āina is the word “ai” which means “to eat.”⁹ ‘Ai as the core term emphasizes that Kānaka not only live off the land but also eat its resources, and this is a concept that still holds true today.¹⁰ Kānaka Maoli do not distinguish themselves from the land in the way that westerners do.¹¹

⁷ In the Hawaiian language, kulāiwi means “native land” or “homeland.” *Id.* at 179.

⁸ KATRINA-ANN R. KAPĀ‘ANAOKALĀOKEOLA NĀKOĀ OLIVERIA, ANCESTRAL PLACES: UNDERSTANDING KANAKA GEOGRAPHIES 92 (2014). ‘Āina is used by kānaka to provide “literal mapping of place and time,” “describe[] the places they were born and raised,” and “retrace the journeys of their ‘ohana throughout the generations as they traversed Hawai‘i.” *METHODOLOGIES*, *supra* note 4. Kānaka Maoli have an intimate relationship with the elements. *See* COLLETTE LEIMOMI AKANA WITH KIELE GONZALEZ, HĀNAU KA UA: HAWAIIAN RAIN NAMES xv (2015). In the Maoli epistemology, to connect to one’s home is to know its stories, legends, landmarks, winds, rains, and famous ali‘i. *See id.* at xvii. Kānaka Maoli were keen observers and had a nuanced understanding of the rains and winds of their home:

They knew that one place could have several different rains, and that each rain was distinguishable from another. They knew when a particular rain would fall, its color, duration, intensity, the path it would take, the sound it made on the trees, the scent it carried, and the effect it had on people.

Id. at xv.

⁹ HAWAIIAN DICTIONARY, *supra* note 1, at 9. In the Hawaiian language, ‘ai means “food or food plant, especially vegetable food as distinguished from i‘a, meat or fleshy food; often ‘ai refers specifically to poi,” “to eat,” “destroy or consume as by fire,” “to taste, bite, take a hook, grasp, hold on to,” “edible,” “to rule,” “score,” “dancing style,” “stroke or hold in lua,” or “stone used in the kimo game.” *Id.*

¹⁰ *See* *METHODOLOGIES*, *supra* note 4, at 101.

¹¹ There is an intergenerational quality to indigenous identity that is closely linked to traditional lands and resources . . . [O]nly those who have experienced this environment over centuries can really know what the relationship entails. Indigenous peoples and the lands that sustain them are closely linked through ancient epistemologies that organize the universe quite differently than Western epistemology does.

Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1677 (2007). The origin stories of indigenous peoples, including Kānaka Maoli, illustrate the complex spiritual and cultural relationship between the native communities and natural resources:

The Kumulipo explains that Maoli descend from akua (ancestors or gods) and are physically related to all living things in the Hawaiian archipelago. As younger siblings, Native Hawaiians are bound to their extended family and have a kuleana (responsibility and privilege) to care for Hawai‘i’s natural and cultural resources. Given the familial relationship between Maoli and the native environment, elder siblings support younger ones by providing the resources necessary to sustain human and other life. In return, Kānaka Maoli care for their elder siblings by managing those resources as a public trust for present and future generations.

D. Kapua‘ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV’T. L.J. 157, 167–68 (2016).

Instead, Kānaka Maoli emphasize the often quoted mantra of “I am this land, and this land is me.”¹²

For Kānaka Maoli, the concepts of “mālama ‘āina” and “aloha ‘āina” encompass the deep emotional understanding of the word ‘āina.¹³ “Mālama ‘āina” is seen as caring for the land while “aloha ‘āina” is a feeling of aloha or love for the land. These terms emphasize the intergenerational relationship of ‘āina to kānaka that extend back to time immemorial.¹⁴ To mālama ‘āina does not mean only to care for the land; it also means to care for the freshwater, estuaries, air, oceans, and more.

Lawai‘a, fisher people, are the protectors and key embodiment of mālama ‘āina in the ocean.¹⁵ Traditionally, to Kānaka Maoli, lawai‘a are people of extensive knowledge and are highly honored.¹⁶ Lawai‘a knowledge is passed down typically from elders within their respective community.¹⁷ Those who inherit this knowledge have a significant responsibility to continue its intergenerational transfer.¹⁸ This responsibility includes understanding and teaching methods of capture, seasonal spawning, fish habitats, and schooling seasonalities.¹⁹ Lawai‘a are especially revered for having particular knowledge associated with “kilo” or observation.²⁰ Through kilo, lawai‘a quantify their inherited experiences, knowledge, and observations into effective fisheries management.²¹

¹² Pualani Kanahale, *I Am This Land, and This Land is Me*, 2 HULILI: MULTIDISCIPLINARY RESEARCH ON HAWAIIAN WELL-BEING 21, 23 (2005).

¹³ See METHODOLOGIES, *supra* note 4.

¹⁴ See METHODOLOGIES, *supra* note 4, at 101; see, e.g., Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. REST. & ENV'T 37, 37 (2007) (“The land, like a cherished relative, cared for the Native Hawaiian people and, in return, the people cared for the land. The principle of *mālama ‘āina* (to take care of the land) is therefore directly linked to conserving and protecting not only the land and its resources but also humankind and the spiritual world as well.”).

¹⁵ See MARGARET TITCOMB WITH MARY KAWENA PUKUI, NATIVE USE OF FISH IN HAWAII 5 (2nd ed. 1972) [hereinafter NATIVE USE OF FISH]. In the Hawaiian language, lawai‘a means “fishermen,” “fishing technique,” “to fish or catch.” HAWAIIAN DICTIONARY, *supra* note 1, at 197.

¹⁶ See NATIVE USE OF FISH, *supra* note 15.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *id.* In the Hawaiian language, kilo means “stargazer,” “reader of omens,” “seer,” “astrologer,” “necromancer,” “examine,” “observe,” or “forecast.” HAWAIIAN DICTIONARY, *supra* note 1, at 151.

²¹ See NATIVE USE OF FISH, *supra* note 15, at 5–6 (discussing the required skills of the po‘o lawai‘a).

Fisheries management in Hawai‘i has strayed from reliance on lawai‘a.²² Up until recently, the State of Hawai‘i did not utilize knowledge held by lawai‘a to effectuate proper fisheries management.²³ Today, the State of

²² See ‘Ōiwi TV, *Nā Loea: The Masters, Mac Poepoe: Mālama Mo‘omomi* (Apr. 1, 2014), <http://oiwi.tv/oiwitv/na-loea-malama-moomomi/> (describing the “hold” of commercialism on attitudes toward fishing on Moloka‘i, shifting ideals surrounding providing for one’s family, resource depletion, and other economic drivers of fishing on the island).

²³ See Brooke Kumabe, *Protecting Hawai‘i’s Fisheries: Creating an Effective Regulatory Scheme to Sustain Hawai‘i’s Fish Stocks*, 29 U. Haw. L. Rev. 243, 257 (2006); but see MaryAnn Wagner, *From Observations to Action: How Kelson “Mac” Poepoe Feeds the Community, Environment and Spirit* (Apr. 18, 2022), <https://indigenouaquaculture.org/1769/>.

Uncle Mac helped lead the effort to bring small fishing communities throughout Hawai‘i together to share traditional practices. In the early 2000s, he helped envision and bring to life Kua‘āina Ulu ‘Auamo (KUA), the organization that supports a network of community based natural resources managers to restore Hawai‘i communities’ traditional role as caretakers of their ‘āina (land or earth – literally, “that which feeds”). In his Mo‘omomi community, he worked to unite local fishermen and subsistence practitioners. Together, this group – the Hui Mālama O Mo‘omomi – organized, proposed, and passed legislation for a mile-long stretch of community based subsistence fishing area designated for subsistence communities on the northwestern shore of Moloka‘i, part of a larger community-based fishing area program across Hawai‘i.

Id.; Ka‘ūpūlehu Marine Life Advisory Committee, *Try Wait: Proposal to Rest Ka‘ūpūlehu’s Reef and Restore Abundance* (2020), <https://www.kalaemano.com/uploads/1/1/8/3/118343418/kaupulehu-try-wait-faqs-2016.pdf>.

The [Ka‘ūpūlehu Marine Life Advisory Committee] has been working for 17 years to take care of Ka‘ūpūlehu’s ocean and coastline. Initially, [Ka‘ūpūlehu Marine Life Advisory Committee] created educational materials to try and establish a voluntary code of conduct based on seasons and bag limits, which was unfortunately unsuccessful. [Ka‘ūpūlehu Marine Life Advisory Committee] considered dozens of ideas ranging from permanent reef protection, to bag limits, to no action at all.

Id.; Kama Hopkins and Shane Palacat-Nelson, *Residents of the Last Hawaiian Fishing Village Look to Preserve Their Icebox* (Sept. 1, 2021), <https://kawaiola.news/aina/residents-of-the-last-hawaiian-fishing-village-look-to-preserve-their-icebox/>.

[Ka‘imi] Kaupiko acknowledges that traditions have changed and evolved, referencing the shift from paddling canoes to the gas propelled ones now used for catching ‘ōpelu (mackerel scad). The resources have been impacted too – the negative consequences of over-harvesting and the unsustainable fishing practices of folks who don’t respect local values is that fish populations have been depleted. Witnessing these changes to their “icebox,” Miloli‘i kūpuna and residents in the 80s and 90s worked hard on efforts to mālama ‘āina. In 2005, they established a Community Based Subsistence Fishing Area (CBSFA) designation for Miloli‘i. Today, Kalanihale has taken on the kuleana of listening to the voices of the community to understand how they want to mālama their marine resources.

Id.

Hawai‘i Department of Land and Natural Resources (DLNR) is responsible for finding solutions to manage Hawai‘i’s fish stocks.²⁴ Despite its best intentions and efforts, the State has yet to implement an effective strategy to do so.²⁵ Various studies have shown a massive decline in Hawai‘i’s fish populations.²⁶ Observations by local fishers and ocean users confirm the same downward trend.²⁷ A 2003 study that involved hundreds of interviews with Kānaka Maoli elders found that after the 1990s, they observed changes in “the quality of the fisheries, and the declining abundance of fish—noting that [there] were significant declines in almost all areas of the fisheries, from streams to nearshore and the deep sea.”²⁸ Unfortunately, even with modern rules and regulations, Hawai‘i has not successfully monitored or implemented an effective management plan that ensures the perpetuity of fisheries into the future.²⁹ By focusing on the current state laws and Maoli resource management, this article demonstrates the legal arguments that communities and advocates can make to protect their subsistence fisheries.

Part II of this article examines the significance of Hawai‘i’s nearshore fisheries. It discusses the current status of Hawai‘i’s fisheries and the laws that regulate them. This section also explores communal management practices prior to westerners stumbling onto the shores of Hawai‘i in 1778.³⁰ It then articulates the cultural significance of lawai‘a and fisheries to ancient Kānaka Maoli. Finally, this section highlights the impact of westernization upon Hawai‘i’s fisheries and Kānaka Maoli culture and laws.

Part III puts the regulation of fisheries in the modern context by illustrating the importance of a Community-Based Subsistence Fishing Area (“CBSFA”) in community governance. It assesses the Mo‘omomi CBSFA on Moloka‘i as a model and highlights the issues that the Mo‘omomi CBSFA has

²⁴ Kumabe, *supra* note 23, at 243.

²⁵ *Id.* at 243–44.

²⁶ KEPA MALY & ONAONA MALY, KA HANA LAWAI‘A A ME NĀ KO‘A O NA KAI ‘EWALU: A HISTORY OF FISHING PRACTICES AND MARINE FISHERIES OF THE HAWAIIAN ISLANDS x (2003) [hereinafter MALY & MALY]. See Alan M. Friedlander et al., *Characteristics of effective marine protected areas in Hawai‘i*, 29 AQUATIC CONSERV: MAR. FRESHW. ECOSYST. 103–17 (2019) (“Reef fish populations and their associated fisheries have declined dramatically around Hawai‘i over the past 100 years due to a growing human population, destruction of habitat, introduction of new and unsustainable fishing techniques, and loss of traditional conservation practices.”).

²⁷ Zoom Interview with Kevin K.J. Chang, Co-Dir., Kua‘āina Ulu ‘Auamo (Feb. 19, 2021).

²⁸ MALY & MALY, *supra* note 26, at x.

²⁹ See Kumabe, *supra* note 23, at 243–44.

³⁰ For an analysis of the arrival of Westerners in Hawai‘i and the resulting impacts, see LILIKALĀ KAME‘ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? HOW SHALL WE LIVE IN HARMONY? 67 (1992).

historically faced. The CBSFA elegantly puts forth a management strategy that utilizes scientific data, Maoli fisheries management techniques, place-based knowledge, and State fishing regulations. Despite this, the Mo‘omomi CBSFA still has not been approved by DLNR and its governing body. This article argues that DLNR’s delay and refusal to designate the CBSFA is a breach of its constitutional obligation to affirmatively protect traditional and customary Native Hawaiian rights and the fisheries for future generations.

II. BACKGROUND

A. *Ka ‘Oihana Lawai‘a: The Historical and Cultural Significance of Lawai‘a*³¹

Ua akamai kekahi poe kanaka Hawaii i ka lawaia, no ia mea,
ua kapa ia lakou, he poe lawaia. O ka makau kekahi mea e
lawaia ai. O ka upena kekahi, a o ka hinai kekahi.³²

Prior to Europeans stumbling on the shores of Hawai‘i, lawai‘a (fishing) was an integral part of the daily survival of traditional maoli society.³³ Every kanaka possessed the skill to obtain fish through various traditional techniques.³⁴ This skillset emphasized the i‘a or fish as a primary protein source.³⁵ The health of community fisheries was essential in sustaining the prosperity of kĀnaka. Prior to western contact, the estimated population of

³¹ See DANIEL KAHĀ‘ULELIO, KA ‘OIHANA LAWAI‘A: HAWAIIAN FISHING TRADITIONS (Mary Kawena Pukui trans., M Puakea Nogelmeier ed., 2006) (repository of narratives on fishing customs, sources of fish and methods of procurement). Daniel Kahā‘ulelio is a native fisherman of the Lāhainā region. He provides readers with a vast knowledge of locations, practices, methods and beliefs of native fisher-people of the Maui region waters. “Ka ‘oihana lawai‘a” translates to fishing practices and customs.

³² W.E. Kealakai, He moololo no ka lawaia ana, KA HAE HAWAII, May 15, 1861, at 28; MALY & MALY, *supra* note 26, at ii (“Some of the people of Hawaii were very knowledgeable about fishing, and they were called fisher-people. The hook was one thing used in fishing. The net was another, and the basket trap, another.”). This excerpt does not utilize diacritical markings because it is quoted as originally written in Ka Hae Hawaii.

³³ See NATIVE USE OF FISH, *supra* note 15, at 3; D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 139 (2011). See LILIKALĀ KAME‘ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? HOW SHALL WE LIVE IN HARMONY? 67 (1992), for an analysis illustrating the arrival of Westerners in Hawai‘i and resulting impacts.

³⁴ See NATIVE USE OF FISH, *supra* note 15, at 3, 5–6.

³⁵ MOKE MANU ET AL., HAWAIIAN FISHING TRADITIONS ix (Esther Mookini trans., 2006) (“While pig, dog, chicken, and wild birds were eaten, and might also be called i‘a (meat), fish was the main source of protein. ‘Ai was the bland staple, i‘a the tasty accompaniment that made eating a delight. Seafood was eaten live, raw, baked, broiled, dried, and fermented.”).

Kānaka Maoli ranged from several hundred thousand to a million or more.³⁶ The health of community fisheries was essential for sustaining the health of a population of that scale.³⁷ The expansive knowledge of lawai‘a was thus necessary for the effective and sustainable management of nearshore fisheries.³⁸

Traditional management of Maoli fisheries stems from a land tenure system that emphasized mutual benefit and resource conservation³⁹ from the mountaintops out into the ocean.⁴⁰ In Maoli society, the ali‘i nui held all ‘āina and adjacent fishing areas personally and as sovereign of the people.⁴¹ Bound by trust, the ali‘i nui was required to oversee the welfare of both the people and the ‘āina.⁴² Ali‘i nui appointed other ali‘i to exercise political control over ahupua‘a and ‘ili to manage resources and people effectively.⁴³ The ali‘i nui as the executive ensured that other ali‘i, acting as trustees, responsibly managed the land divisions.⁴⁴ Maka‘āinana,⁴⁵ the common people, held ali‘i accountable for any abuse of position and power to ensure the health of the land and its people.⁴⁶ This relationship between ali‘i and maka‘āinana

³⁶ DENNIS KAWAHARADA ed., HAWAIIAN FISHING LEGENDS WITH NOTES ON ANCIENT FISHING IMPLEMENTS AND PRACTICE xi (1992).

³⁷ *See id.*

³⁸ *See id.*

³⁹ Alan T. Murakami & Wayne Chung Tanaka, *Konohiki Fishing Rights in NATIVE HAWAIIAN LAW: A TREATISE* 612, 616 (Melody Kapilialoha Mackenzie et al. eds., 2015) [hereinafter TREATISE].

⁴⁰ *See id.*

⁴¹ *Id.* In the Hawaiian language, ali‘i means “chief,” “chiefess,” “officer,” “ruler,” “monarch,” “king,” “queen,” or “royal.” Ali‘i nui means “high chief.” HAWAIIAN DICTIONARY, *supra* note 1, at 20.

⁴² TREATISE, *supra* note 39.

⁴³ *See id.* In the Hawaiian language, ‘ili means “land section, next in importance to ahupua‘a and usually a subdivision of an ahupua‘a.” HAWAIIAN DICTIONARY, *supra* note 1 at 97.

⁴⁴ TREATISE, *supra* note 39.

⁴⁵ In the Hawaiian language, maka‘āinana means “commoner,” “populace,” “people in general,” “citizen,” or “subject.” HAWAIIAN DICTIONARY, *supra* note 1, at 224.

⁴⁶ *See* DAVID MALO, HAWAIIAN ANTIQUITIES 267 (N.B. Emerson trans., 1st ed. 1903). There are many accounts of maka‘āinana holding their ali‘i accountable for abuse of power. One particular account hails from the land of Ka‘ū, where maka‘āinana were upset with the ali‘i’s abuse of power and killed him because of it:

[Koihala] also robbed the fishermen of their fish. The story is that he compelled his canoe men to paddle him about here and there where the fleets of fishing canoes were. The wind was bleak and his men suffered from the wet and cold, he being snugly housed in the *pola*. One day he had his men take his canoe out towards the south cape where there was a fleet of fishing canoes. His own canoe, being filled with the spoils of his robbery, began to sink; and he called out for help. The

sometimes referred to as *hoa'āina*,⁴⁷ the tenants who worked the land, thus embodied the principle of mutual benefit in traditional Maoli society.⁴⁸ “Ali'i, with the help of their *konohiki*, regulated the taking of marine resources in each *ahupua'a*” through communal harvesting on an as-needed basis.⁴⁹ Ali'i nui also implemented “temporary and permanent *kapu*⁵⁰ on specific species, areas, and times.”⁵¹ “[A]ny violation thereof in ancient time was said to be punishable by death.”⁵² However, “spiritual and practical principles,” in addition to *kapu*, encouraged the conservation of resources.⁵³

For example, the religious practices of the ocean imposed significant self-regulation on particular fishing practices. Prior to fishing trips, *lawai'a* would observe strict religious rituals to ensure their successful catch and safety.⁵⁴ *Lawai'a* would place fish on the *ko'a*, or shrine, as an offering to the ocean's many gods and deities.⁵⁵ In Maoli religion, *Kanaloa* is the *akua* or god representing the ocean and watersheds.⁵⁶ *Kanaloa* and his brother, *Kāne*, are “described in legend as cultivators, *awa* drinkers, and water finders, who

fishermen declined all assistance; his own men left him and swam to the canoes of the fishers, leaving him entirely in the lurch. He was drowned.

Id.

⁴⁷ In the Hawaiian language, *hoa'āina* means “tenant” or “caretaker, as on a *kuleana*.” HAWAIIAN DICTIONARY, *supra* note 1, at 73.

⁴⁸ See Wayne Tanaka, *Ho'ohana Aku, Ho'ōla Aku: First Steps to Averting the Tragedy of the Commons in Hawai'i Nearshore Fisheries*, 10 ASIAN-PAC. L. & POL'Y J. 235, 243 (2008) [hereinafter *Tragedy*]; TREATISE, *supra* note 39, at 617.

⁴⁹ *Tragedy*, *supra* note 48; TREATISE, *supra* note 39, at 617. In the Hawaiian language, *konohiki* means the “headman of an *ahupua'a* land division under the chief; land or fishing rights under control of the *konohiki*; such rights are sometimes called *konohiki* rights.” HAWAIIAN DICTIONARY, *supra* note 1, at 166.

⁵⁰ In the Hawaiian language, *kapu* means “taboo,” “prohibition,” or “forbidden.” HAWAIIAN DICTIONARY, *supra* note 1, at 132.

⁵¹ TREATISE, *supra* note 39, at 617. The *kapu* ensured the replenishment of the nearshore fishery through communal regulation of all *kānaka*. See MALO, *supra* note 46, at 275.

In the month of *Hina'ialeele* (corresponding to July) they took the *opelu* by means of the *kaili* net and used it for food. The *aku* was then made *tabu*, and no man, be he commoner or *alii*, might eat of the *aku*; and if any chief or commoner was detected in so doing he was put to death. The *opelu* was free and might be used as food until the month of *Kaelo*, or January.

Id.

⁵² MALY & MALY, *supra* note 26, at 95.

⁵³ TREATISE, *supra* note 39, at 617; see MALY & MALY, *supra* note 26, at 13.

⁵⁴ See NATIVE USE OF FISH, *supra* note 15, at 5.

⁵⁵ *Id.* at 8.

⁵⁶ See MALO, *supra* note 46, at 149–50.

migrated from Kahiki and traveled about the islands.”⁵⁷ Kanaloa, along with other minor gods and ‘aumākua,⁵⁸ are believed to take on the form of sea creatures and protect lawai‘a and their families.⁵⁹ Given these divine origins, kānaka became caretakers of the land and related resources, and established the community principles of conservation necessary to ensure generous harvests.

B. *Hulihia: The Overthrow of Maoli Fisheries Management*⁶⁰

Western contact brought quick and harsh change to the traditional culture and lifestyle of kānaka.⁶¹ Resource commodification led to an abandonment of resources, resulting in alienated land and resources essential for the Kānaka Maoli subsistence lifestyle.⁶² The shift “from communal stewardship and religious reverence to the public right and incentive to maximize exploitation” led “to the proliferation of destructive practices and overexploitation of many of Hawai‘i’s fisheries.”⁶³

⁵⁷ MARTHA BECKWICK, HAWAIIAN MYTHOLOGY 62 (Univ. of Haw. Press 1970) (1940).

⁵⁸ In the Hawaiian language, ‘aumakua means “family or personal gods,” “deified ancestors who might assume the shape of sharks . . . [.] owls . . . [.] hawks . . . [.] ‘elepaio, ‘iwi, mudhens, octopuses, eels, mice, rats, dogs, caterpillars, rocks, cowries, clouds, or plants. A symbiotic relationship existed; mortals did not harm or eat ‘aumākua [plural of ‘aumakua], and ‘aumākua warned and reprimanded mortals in dreams, visions, and calls.” HAWAIIAN DICTIONARY, *supra* note 1, at 32.

⁵⁹ See Pualani Kanaka‘ole Kanahale et al., *Nā Oli no ka ‘Āina o Kanaka‘ole: A Compilation of Oli and Cultural Practices*, EDITH KANAKA‘OLE FOUNDATION ii, 25–26 (2017). E Kanaloanuiākea is a chant that honors the many forms of Kanaloa. This chant is used during the Kū‘ula dedication ceremony and can be used anytime to honor Kanaloa:

E Kanaloanuiākea (Kanaloa of the vast expanse)
 E Kanaloa Haunawela (Kanaloa of the depths of intensity)
 Kanaloa ke ala ma‘awe ‘ula a ka lā (Kanaloa of the west sky, the setting sun)
 Kāne ke ala ‘ula o ka lā (Kāne of the east sky, the rising sun)
 Kanaloa noho i ka moana nui (Kanaloa residing in the great sea)
 Moana iki (Small sea)
 Moana o‘o (Mottled sea)
 I ka i‘a nui (In the big fish)
 I ka i‘a iki (In the small fish)
 I ka manō (In the shark)
 I ka niuhi (In the tiger shark)
 . . .
 Ola i ke au a Kanaloa (Life to the realm of Kanaloa)

Id.

⁶⁰ In the Hawaiian language, hulihia means “overturned,” “a complete change,” “overthrow,” or “turned upside down.” HAWAIIAN DICTIONARY, *supra* note 1, at 89.

⁶¹ See *Tragedy*, *supra* note 48, at 253.

⁶² *Id.*

⁶³ *Id.* at 262.

1. *Codification of Fishing Rights for Maka‘āinana*

“On June 7, 1839, King Kamehameha III formally acknowledged ancient Hawaiian fishing practices and uses of the ocean” by adopting a law⁶⁴—the first of its kind—to formally recognize maka‘āinana fishing rights.⁶⁵ It distributed fishing grounds “between different classes of people, granting specific rights to the ‘landlords’ . . . and their tenants with respect to the nearshore fishing grounds.”⁶⁶ This declaration was further codified in 1840 and reaffirmed the ali‘i nui’s acknowledgment of such rights.⁶⁷ The law

⁶⁴ See TREATISE, *supra* note 39, at 617.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ The 1839 declaration of King Kamehameha III relating to fishing rights was subsequently reaffirmed, translated, and codified by statute enacted on November 9, 1840. An Act to Regulate the Taxes, Laws of the Hawaiian Islands ch. III, § 8(1) (June 7, 1839) (amended Nov. 9, 1840), *reprinted in* MALY & MALY, *supra* note 26, at 243–44. The statute translated into English read:

**No na Kai noa, a me na Kai kapu
(Of free and prohibited fishing grounds) (1839-1841)**

I. -Of free fishing grounds. (No ka noa ana o ke kai)

His majesty the King hereby takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself. These are the fishing which His Majesty the King takes and gives to the people; the fishing grounds without the coral reef, viz., the Kilohee grounds, the Luhee ground, the Malolo ground, together with the ocean beyond.

But the fishing grounds from the coral reefs to the sea beach are for the landlords, and for the tenants of their several lands, but not for others . . .

If any of the people take the fish which the landlord taboos for himself, this is the penalty, for two years he shall not fish at all on any fishing ground. And the several landlords shall give immediate notice respecting said fishermen, that the landlords may protect their fishing grounds, lest he go and take fish on other grounds.

If there be a variety of fish on the ground where the landlord taboos his particular fish, then the tenants of his own land may take them, but not the tenants of other lands, lest they take also the fish tabooed by the landlord. The people shall give to the landlord one third of the fish thus taken. Furthermore, there shall no duty whatever be laid on the fish taken by the people on grounds given to them, nor shall any canoe be taxed or taboo’d.

If a landlord having fishing grounds lay any duty on the fish taken by the people on their own fishing grounds, the penalty shall be as follows: for one full year his own fish shall be taboo’d for the tenants of his particular land, and notice shall be given of the same, so that a landlord who lays a duty on the fish of the people may be known . . .

Id. (emphasis added).

recognized the people’s rights in fisheries beyond fringing coral reefs and sanctioned the right of konohiki to place kapu on certain species of fish or fishing seasons applicable to nearshore fishing grounds.⁶⁸ The law also penalized abuse of power by konohiki, such as unduly seizing and taxing k anaka.⁶⁹ This law, and subsequent laws enacted in 1842, attempted to preserve the traditional management system for stewarding nearshore areas.⁷⁰ These rights were revisited in 1845 when the Kingdom of Hawai‘i passed the Organic Acts.⁷¹ The Organic Acts of 1845 and 1846 clarified the respective fishing rights and responsibilities of the ali‘i nui, konohiki, and maka‘ ainana.⁷² The Acts also opened ocean fisheries seaward of the nearshore konohiki fisheries to all.⁷³ These statutes were amended and clarified up until 1897. Still, along the way, the decline of the traditional land tenure system and adoption of private property rights led to many court decisions that collectively commodified and commercialized fisheries.⁷⁴

A series of cases established the precedent that fisheries are the private property of the konohiki and subject only to the limitations set out in the Organic Acts statutes.⁷⁵ This precedent emphasized that ownership rights in fisheries were also conferred to hoa‘ aina. In 1858, the Supreme Court of the Kingdom of Hawai‘i in *Haalelea v. Montgomery* affirmed the shared fishing rights of tenants, holding that such rights could be restricted by konohiki only as proclaimed explicitly by Kamehameha III and codified in 1846.⁷⁶ Ha‘alelea claimed that Montgomery unlawfully prohibited the ahupua‘a tenants from fishing in the waters off Pu‘uloa.⁷⁷ Ha‘alelea owned the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 243.

⁷¹ An Act to Organize the Executive Departments of the Hawaiian Islands, Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands pt. 1, ch. VI, art. V (Apr. 27, 1846), reprinted in MALY & MALY, *supra* note 26, at 246–48.

⁷² *Id.* Article V of the Act to Organize the Executive Departments of the Hawaiian Islands defined the responsibilities and rights that the konohiki and people had to the wide range of fishing grounds and resources. The law addressed the practice of designating kapu on the taking of fish, tribute of fish paid to King Kamehameha, and identified specific types of fisheries from the freshwater and pond fisheries to those on the high seas under the jurisdiction of the Kingdom.

⁷³ See An Act to Organize the Executive Departments (Apr. 27, 1846), ch. VI, art. V, 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 90.

⁷⁴ See, e.g., *Haalelea v. Montgomery*, 2 Haw. 62 (Haw. Kingdom 1858); *Hatton v. Piopio*, 6 Haw. 334 (Haw. Kingdom 1882).

⁷⁵ See, e.g., *Haalelea*, 2 Haw. 62; *Hatton*, 6 Haw. 334.

⁷⁶ *Haalelea*, 2 Haw. at 65, 70–71.

⁷⁷ *Id.* at 63. Pu‘uloa is located on the Island of O‘ahu, “[c]ommencing at mauka north corner or point of this land at place called Lae Kekaa, at [the] bend of Pearl River, and running

Honouliuli ahupua‘a, which he had inherited from his wife, M. Kekau‘ōnohi.⁷⁸ Montgomery, on the other hand, claimed to have previously received in fee a portion of Honouliuli known as Pu‘uloa.⁷⁹ The court held that even an attempt to divide a konohiki’s rights would infringe on the rights of the hoā‘āina by potentially subjecting them to multiple kapu or taxes within an ahupua‘a’s fisheries.⁸⁰ Montgomery had not received any konohiki rights because they could be conveyed only by express grant, which he did not have.⁸¹ The court concluded that it was Ha‘alelea who solely held konohiki rights to the nearshore waters of the entire ahupua‘a, including the waters of Pu‘uloa.⁸²

In 1882, just as it had in *Haalelea*, the Hawai‘i Supreme Court confirmed the statutory fishing rights of hoā‘āina.⁸³ The *Hatton v. Piopio* court narrowly construed the codified rights of a konohiki, holding that a konohiki could not prohibit the commercial sale of a tenant’s catch.⁸⁴ By holding that Piopio had the right to sell his catch, the courts illustrated the diminished role of communal stewardship and the change in the economy in the islands.⁸⁵ In doing so, it also emphasized the individual right of an ahupua‘a tenant to sell fish for profit, subject only to the superior right of the konohiki to kapu or tax the catch.⁸⁶ Starting with *Hatton*, the Hawai‘i Supreme Court slowly changed the narrative and focused on the economic incentive to harvest fish for profit instead of focusing on communal subsistence.

2. *The Downfall of Konohiki Fishing Rights*

The downfall of konohiki fishing rights in the twentieth century is no coincidence. Leading up to the enactment of the Hawaiian Organic Act of

along [the] edge of Pearl River, makai side, taking in three fish ponds called Pamoku, Okiokilipi and Paakule to open sea[.]” *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 70–71

⁸¹ *Id.* at 69–70.

⁸² *Id.* at 70–71.

⁸³ See TREATISE, *supra* note 39, at 619–21.

⁸⁴ *Hatton v. Piopio*, 6 Haw. 334, 337 (Haw. Kingdom 1882) (“The fishing in the open sea off our coasts does not tend materially to lessen the supply unless extraordinary means are used . . . If the ordinary means are employed in taking fish, the Konohiki’s opportunities to take all the fish he is able to capture are not diminished by whatever fishing the tenants may do.”).

⁸⁵ *Id.* at 336–37.

⁸⁶ *Id.* at 336.

1900, which incorporated Hawai'i as a Territory of the United States,⁸⁷ the Hawaiian Kingdom was experiencing political and cultural turbulence. On January 17, 1893, the Hawaiian Kingdom was overthrown by European and American businessmen who were supported by the military power of the United States of America.⁸⁸ The overthrow directly violated the treaties existing between the United States and the Hawaiian Kingdom.⁸⁹ In 1896, only three years later, the newly formed Republic of Hawai'i enacted drastic changes to education that required the English language to be the medium and basis of instruction in all public and private schools.⁹⁰ Furthermore, in 1898 the perpetrators of the overthrow successfully pushed for the annexation of Hawai'i to the United States.⁹¹ Coincidentally, Hawai'i was also experiencing an economic shift to harvesting fish for profit and straying away from subsistence fishing. Therefore, by the time Congress considered the Hawaiian Organic Act of 1900, the cultural and political foundation of Hawai'i was already in a state of disarray.

The Hawaiian Organic Act of 1900 repealed "all laws of the Republic of Hawai'i which confer exclusive fishing rights upon any person or persons."⁹² Furthermore, it proclaimed that "all fisheries in the sea waters of the Territory of Hawai'i . . . shall be free to all citizens of the United States, subject, however, to vested rights[.]"⁹³ It intended to "do away with all fisheries in the sea waters of the Territory belonging to private individuals[.]"⁹⁴ The *konohiki* at this time could still register and retain their "vested" fishery rights, but only if they petitioned for recognition within two years of the Act's

⁸⁷ An Act to Provide a Government for the Territory of Hawaii, ch. 339, § 2, 31 Stat. 141, 141 (1900).

⁸⁸ See RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY 183 (rev. ed. 1961).

⁸⁹ See Joint Resolution of Nov. 23, 1893, Pub. L. No. 103-150, 107 Stat. 1510, 1510.

⁹⁰ Laws of the Republic of Hawaii Act 57, § 30, at 189 (1896).

The English language *shall* be the medium and basis of instructions in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the school, or by direct order in any particular instance. Any schools that shall conform to the provisions of this Section shall not be recognized by the Department.

Id. (emphasis added).

⁹¹ See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55, 55th Cong., 30 Stat. 750 (1898).

⁹² *Id.* § 95, 31 Stat. at 160.

⁹³ *Id.* § 95, 31 Stat. at 160.

⁹⁴ *Kapiolani Est. v. Territory*, 18 Haw. 460, 462 (Haw. Terr. 1907) (holding that "vested fishing rights" under § 95 and § 96 of the Hawaiian Organic Act excluded fishery claims in the Hanapepe River).

passage.⁹⁵ This right, however, was not guaranteed because the Attorney General could exercise eminent domain powers to condemn fishery rights.⁹⁶ In enacting sections 95 and 96 of the Hawaiian Organic Act of 1900, the United States Congress deliberately sought to “destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the people.”⁹⁷ By 1953, whether through eminent domain taking by the Attorney General or failure of the konohiki to register, less than a hundred konohiki fisheries remained registered.⁹⁸ The Hawaiian Organic Act of 1900 facilitated the replacement of traditional Hawaiian fishery management with western fisheries management policies.⁹⁹ Thereafter, Hawai‘i’s fisheries suffered massive decline in part due to the newly integrated capitalistic economic scheme along with the aftershocks of the events following the 1893 overthrow.¹⁰⁰

C. *Kūpa‘a Mahope o Ka ‘Āina: Insurgence of Kānaka Maoli in the Political Machine*¹⁰¹

The truth is, there is man and there is the environment. One does not supersede the other. The breath in man is the breath

⁹⁵ *Id.* at 461.

⁹⁶ See *Damon v. Territory of Hawai‘i*, 194 U.S. 154, 159 (1904).

⁹⁷ *In re Fukunaga*, 16 Haw. 306, 308 (Haw. Terr. 1904).

⁹⁸ See TREATISE, *supra* note 39, at 621–22 (“[O]f 1,200-1,500 [total] fisheries, 360 to as many as 720 were classified as privately owned fisheries in 1900. As of 1939, only 101 fisheries had been established and registered by some thirty-five owners . . . [B]etween 1900 and 1953, the federal and territorial governments condemned or acquired [around] 37 fisheries, while an estimated 248 fisheries were not registered and were declared ‘abandoned.’”).

⁹⁹ See *id.*

¹⁰⁰ See *Tragedy*, *supra* note 48, at 262–65.

¹⁰¹ Eleanor C. Nordyke & Martha H. Noyes, “*Kaulana Nā Pua*”: *A Voice for Sovereignty*, 27 HAWAIIAN J. HIST. 27, 27–29 (1993). “*Kaulana Nā Pua*,” written by Ellen Keho‘ohiwaokalani Wright Prendergast, speaks to the immense opposition Kānaka Maoli had to the annexation of Hawai‘i to the United States. It was also known as “*Mele ‘Ai Pōhaku*” or the “*Stone-eating Song*,” and “*Mele Aloha ‘Āina*” or the “*Patriot’s Song*.”

Kaulana nā pua a‘o Hawai‘i (Famous are the children of Hawai‘i)
Kūpa‘a ma hope o ka ‘āina (Ever loyal to the land)
Hiki mai ka ‘elele o ka loko ‘ino (When the evil-hearted messenger comes)
Palapala ‘ānunu me ka pākaha (With his greedy document of extortion)
. . . .
‘A‘ole mākou a‘e minamina (We do not value)
I ka pu‘u kālā o ke aupuni (The government’s sums of money)
Ua lawa mākou i ka pōhaku (We are satisfied with the stones)
I ka ‘ai kamaha‘o o ka āina (Astonishing food of the land)

of Papa [the earth]. Man is merely the caretaker of the land that maintains his life and nourishes his soul. Therefore[,] ‘āina is sacred. The church of life is not in a building, it is the open sky, the surrounding ocean, the beautiful soil. My duty is to protect Mother Earth, who gives me life. And to give thanks with humility as well as forgiveness for the arrogance and insensitivity of man.¹⁰²

In the 1970s, Hawai‘i witnessed a cultural and social shift in what it means to be Kānaka Maoli.¹⁰³ The “Hawaiian Renaissance,” as it is called today, is the dynamic movement to revive all things Kānaka Maoli.¹⁰⁴ This includes the resurgence of nearly forgotten traditional arts, sciences, and cultural practices, and the insurgence of kānaka into legislative and judicial processes.¹⁰⁵ The roots of the “Hawaiian Renaissance” emerged with the 1966 appointment of Kānaka Maoli, William Shaw Richardson, as the Chief Justice of the Hawai‘i State Supreme Court.¹⁰⁶ The Richardson court applied Maoli concepts to modern jurisprudence in protecting Maoli rights, public ownership of resources, and even broadening citizens’ rights to challenge important environmental and land development decisions.¹⁰⁷

Outside of the Richardson court’s decisions, Kānaka Maoli led grassroots initiatives to protect their traditional and cultural rights.¹⁰⁸ Throughout the

Ma hope mākou o Lili‘ulani (We back Lili‘ulani)
 A loa‘a ē ka pono o ka ‘āina (Who has won the rights of the land)
 Ha‘ina ‘ia mai ana ka puana (Tell the story)
 Ka po‘e i aloha i ka ‘āina (Of the people who love their land)
Id.

¹⁰² NOELANI GOODYEAR-KA‘ŌPUA, IKAIKA HUSSEY, & ERIN KAHUNAWAIKA‘ALA WRIGHT, A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 241 (Duke University Press 2014) (quoting George Helm, “Reasons for the Fourth Occupation of Kaho‘olawe,” January 30, 1977). George Jarrett Helm is renowned as a Kānaka Maoli hero and was instrumental in the struggle to protect the life of Kaho‘olawe. *See* Kamako‘i, *Hawaiian Patriots Project*, <https://www.kamakakoi.com/hawaiianpatriots/george.html> (last visited Apr. 1, 2021).

¹⁰³ Ronald Williams Jr., *The Other Hawaiian Renaissance*, HANA HOU, Dec. 1, 2014, at 147, https://www.academia.edu/9658002/The_Other_Hawaiian_Renaissance.

¹⁰⁴ *See id.* at 150–51. A century before the cultural revival of the 1970s, there was a similar resurgence, a first Hawaiian Renaissance. *Id.* The effort to preserve things Kānaka Maoli began with Mō‘ī Lot Kapuwa (Kamehameha V). *Id.* He sought to remedy the devastation wrought on the native population from introduced diseases by pushing to preserve and celebrate maoli history. *Id.* When David La‘amea Kalakaua was elected to the throne in 1874, he sought to honor the native past while securing the future. *Id.*

¹⁰⁵ *See* Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6 (2010).

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* at 6–7.

¹⁰⁸ *See* Williams, *supra* note 103, at 149.

1970s, many movements inspired the convening of delegates to amend the Hawai‘i Constitution.¹⁰⁹ The 1978 Constitutional Convention led to another outgrowth of Kānaka Maoli land and sovereignty movements.¹¹⁰ Kānaka Maoli delegates from across the islands convened to advocate for various Maoli issues including: “(1) the protection and perpetuation of ancient Hawaiian rights, traditions, heritage, and archaeological sites; (2) the implementation of native Hawaiian culture and language; (3) the preservation of native Hawaiian vegetation and crops; (4) the recognition of problem areas common to native Hawaiians; and (5) the Hawaiian Homes Commission Act.”¹¹¹ Key Kānaka Maoli delegates included John D. Waihe‘e III and Adelaide Keanuenuokalaninuiamamao “Frenchy” DeSoto.¹¹² Waihe‘e, sometimes referred to as the unofficial majority leader of the Convention, and other representatives strategized how to maximize their influence on the Convention.¹¹³ Frenchy DeSoto, the powerhouse behind the grassroots initiative in the convention process, chaired the Hawaiian Affairs

¹⁰⁹ See *id.* One political action in particular led by the Protect Kaho‘olawe ‘Ohana (PKO) catalyzed Kānaka Maoli and the general public to protest the bombing of Kaho‘olawe by the U.S. Navy. *Mo‘olelo ‘Āina, Protect Kaho‘olawe ‘Ohana*, <http://www.protectkahoalaweohana.org/mo699olelo-699256ina.html> (last visited Dec. 9, 2020). PKO began a “series of occupations on the island, which brought national attention to the movement” and led to arrests, imprisonment, and the prohibition of access for protesters. *Id.* In 1976, PKO “filed a federal civil suit that sought compliance with environmental, historic site, and religious freedom protection laws.” *Id.* Even after the disappearance of George Helm and Kimo Mitchell in 1977, who were lost at sea after journeying to the island to protest the bombings, the fight for aloha aloha ‘āina continued. Colleen Uechi, *40 Years After Men’s Disappearance at Sea, Their Visions for Kahoolawe Has Become a Reality*, Maui News (Mar. 5, 2017), <https://www.mauinews.com/news/local-news/2017/03/40-years-after-mens-disappearance-at-sea-their-vision-for-kahoolawe-has-become-a-reality>. In the Hawaiian language, aloha ‘āina means “love of the land or of one’s country” and “patriotism[.]” Hawaiian Dictionary, *supra* note 1, at 21. Furthermore, on October 22, 1990, President George H. W. Bush directed the Secretary of Defense to discontinue the island’s use for bombing and target practice, and the United States eventually returned Kaho‘olawe to the State of Hawai‘i. Department of Defense Appropriations Act of 1994, Pub. L. No. 103–139 § 10001(b), 107 Stat. 1480–81.

¹¹⁰ See Williams, *supra* note 103, at 149.

¹¹¹ See Troy J.H. Andrade, *Hawai‘i ‘78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 UPJLSC 85, 122 (2021) (citing Constitutional Convention of Hawaii of 1978, *Committee on Hawaiian Affairs: Scope*, (1978)).

¹¹² See Zoom Interview with John Waihe‘e, Former Governor of Haw. (Nov. 19, 2020); Chad Blair, *What A Constitutional Convention Might Mean For Hawaiians*, HONOLULU CIV. BEAT (Feb. 6, 2018), <https://www.civilbeat.org/2018/02/chad-blair-what-a-constituitional-convention-might-mean-for-hawaiians/>.

¹¹³ Zoom Interview with John Waihe‘e, *supra* note 112.

Committee.¹¹⁴ Delegates codified the overwhelming majority of the Committee’s work in article XII of the Hawai‘i Constitution.¹¹⁵ By the end of the Constitutional Convention, the Hawaiian Affairs Committee successfully codified crucial amendments in the Constitution.¹¹⁶ For example, these provisions established the Office of Hawaiian Affairs (OHA), ensured that “ceded” lands would be held in trust by the State of Hawai‘i for native Hawaiians¹¹⁷ and the general public, and protected “traditional and customary rights” of Kānaka Maoli.¹¹⁸ An additional amendment provided that the State of Hawai‘i holds all public natural resources “in trust for the benefit of the people.”¹¹⁹ This consequential amendment would be famously known as the Hawai‘i public trust doctrine.

1. *The Duty to Mālama ‘Āina: The Hawai‘i Public Trust Doctrine*

The Hawai‘i public trust doctrine is a direct product of communal management rooted in Maoli custom and tradition that has developed over time, starting from Kingdom Law.¹²⁰ In 1840, the first Constitution of the Kingdom of Hawai‘i declared that the land, along with its resources, “was not [the King’s] private property. It belonged to the Chiefs, and the people in common, of whom [the King] was the head and had the management of landed property.”¹²¹ In 1892, an additional fundamental kingdom law was enacted, setting the foundation for the public trust by expressly preserving the usage of land.¹²² In essence, through the adoption of English common law as the law of Hawai‘i, the public trust doctrine also incorporates kingdom laws and Hawaiian customs.¹²³ In 1899, a year after Hawai‘i’s annexation, the territorial Supreme Court adopted the public trust doctrine in *King v. Oahu Railway*, holding that “the people of Hawai‘i hold the absolute rights

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ *See id.*

¹¹⁷ The term “native Hawaiian” with a lowercase *n* was invented when Congress passed the Hawaiian Homes Commission Act (HHCA). The term referred to “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” Kekuni Blaisdell, *I Hea Nā Kānaka Maoli? Whither the Hawaiians?*, 11 HŪLILI 253, 256 (2019) (quoting Hawaiian Homes Comissions Act, ch. 42, 42 Stat. 108 (1920)).

¹¹⁸ *See Blair, supra* note 112.

¹¹⁹ HAW. CONST. art. XI, §1.

¹²⁰ *See D. Kapua‘ala Sproat & Isaac Moriwake, Ke Kalo Pa‘a o Waiāhole: Use of the Public Trust as a Tool for Environemtnal Advocacy*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247, 249 (Cliff Rechtschaffen & Denise Antolini eds., 2007) [hereinafter *Kalo Pa‘a*].

¹²¹ *Id.*

¹²² *See id.* at 254; HAW. REV. STAT. § 1-1 (2009).

¹²³ *See* HAW. REV. STAT. § 1-1.

to all its navigable waters and the soils under them for their own common use.”¹²⁴

The 1978 Constitutional Convention led to the adoption of the public trust doctrine into state constitutional law and demonstrated the State’s efforts to reconcile with Kānaka Maoli and their interests as a matter of conserving and protecting Hawai‘i’s natural resources.¹²⁵ Article XI, section 1 of the Hawai‘i Constitution proclaims:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and 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.¹²⁶

In *In re Water Use Permit Applications*, (“*Waiāhole*”), the Hawai‘i Supreme Court held that under the public trust doctrine, the State has both the authority and duty to preserve the rights of present and future generations in the waters of the State.¹²⁷ The court rejected the argument that private use for economic development qualified as public trust use, maintaining that “if 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.”¹²⁸ More importantly, the *Waiāhole* court declined to designate “absolute priorities” between categories of uses under the public trust.¹²⁹ This emphasized the idea that “[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances.”¹³⁰ The ever-changing needs of the public trust hold true in *In re Conservation District Use Application HA-3568* (“*Mauna Kea II*”).¹³¹ Justice Richard W. Pollack of the

¹²⁴ King v. Oahu Ry. & Land Co., 11 Haw. 717, 723–25 (Haw. Terr. 1899) (citing Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452–55 (1892)); *Kalo Pa‘a*, *supra* note 120, at 254.

¹²⁵ See TREATISE, *supra* note 39, at 538, 553.

¹²⁶ HAW. CONST. art. XI, §1.

¹²⁷ *Waiāhole*, 94 Hawai‘i 97, 139, 9 P.3d 409, 451 (2000); see *Kalo Pa‘a*, *supra* note 120, at 248, 260.

¹²⁸ *Waiāhole*, 94 Hawai‘i at 138, 9 P.3d at 450 (citing *Robinson v. Ariyoshi*, 65 Haw. 641, 677, 658 P.2d 287, 312 (1982)).

¹²⁹ *Id.* at 142, 9 P.3d at 454; see *Kalo Pa‘a*, *supra* note 120, at 261.

¹³⁰ *Waiāhole*, 94 Hawai‘i at 135, 9 P.3d at 477.

¹³¹ *Mauna Kea II*, 143 Hawai‘i 379, 431 P.3d 752 (2018).

Hawai'i Supreme Court took the opportunity to apply the public trust doctrine to conservation land, ruling 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."¹³²

Based on this understanding, the public trust framework should apply to all-natural and cultural resources, including nearshore fisheries. Thus, the State's duty as a trustee is to "protect and maintain the trust property and regulate its use."¹³³ The State "must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process."¹³⁴ Therefore, the "State must consider the cumulative impact of existing and proposed [water] diversions on trust purposes and to implement reasonable measures to mitigate the impact, including the use of alternative resources."¹³⁵ In its decision-making processes, the State must also utilize a "global, long-term perspective."¹³⁶ *Waiāhole* recognized the conventional notion of the public trust but also Kānaka Maoli traditional and customary uses for public trust purposes.¹³⁷

2. *Other Constitutional Provisions Protecting Hawai'i's Natural Resources*

In addition to the public trust, other constitutional provisions direct the management and perpetuation of our ocean resources. Article XI, section 6 of the Hawai'i Constitution provides:

The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State, including the archipelagic waters of the State, and reserves to itself all such rights outside state boundaries not specifically limited by federal or international law.

All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the Legislature, which shall protect the public's

¹³² *Id.* at 414, 431 P.3d at 787 (Pollack, J., concurring).

¹³³ *Kobayashi ex rel State v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977).

¹³⁴ *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See id.* at 137–43, 9 P.3d at 449–55; *Kalo Pa'a*, *supra* note 120, at 261–67.

use and enjoyment of the reefs. The State may condemn such vested rights for public use.¹³⁸

Article XI, section 6 thus imposes an affirmative duty to “protect the public’s use and enjoyment of the reefs.”¹³⁹ DLNR is the authority tasked with managing “all water and coastal areas of the State,” including the taking of aquatic life, “boating, ocean recreation, and coastal areas programs.”¹⁴⁰ In fulfilling this duty, the State must manage and protect the public’s use and enjoyment of marine, seabed, and archipelagic waters within the State’s boundaries.¹⁴¹

Likewise, article XII, section 7 of the Hawai‘i Constitution provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.¹⁴²

This provision is a critical tool to preserve Maoli culture and conserve the marine resources that are necessary for Maoli practices.¹⁴³ All citizens of Hawai‘i, including Kānaka Maoli, may utilize these constitutional provisions to ensure that state agencies fulfill their obligation to uphold the constitutional mandates to protect the environment for future generations.¹⁴⁴

3. *Rulemaking by the Department of Land and Natural Resources*

DLNR has the power and duty to “manage and administer the aquatic life and aquatic resources of the State,” and “[f]ormulate and from time to time recommend . . . additional legislation necessary or desirable to implement” the State’s conservation and resource management objectives.¹⁴⁵ The Division of Aquatic Resources (DAR), a division of DLNR, retains the authority to manage all aquatic resources, including marine resources.¹⁴⁶ As

¹³⁸ HAW. CONST. art. XI, § 6.

¹³⁹ *Id.*

¹⁴⁰ HAW. REV. STAT. § 26-15(b) (2009).

¹⁴¹ HAW. CONST. art. XI, § 6.

¹⁴² HAW. CONST. art. XII, § 7.

¹⁴³ *Id.*

¹⁴⁴ *See* HAW. CONST. art. XI, § 1.

¹⁴⁵ HAW. REV. STAT. § 187A-2 (2011).

¹⁴⁶ *See* HAW. REV. STAT. § 26-15(b) (stating the DLNR “shall manage and administer the public lands of the State . . . and all water and coastal areas of the State . . . including . . . aquatic life . . . and all activities thereon and therein including, but not limited to, boating,

a State agency, DAR must aid in fulfilling the State’s public trust responsibilities to “conserve and protect Hawai‘i’s natural beauty and all natural resources” for the “benefit of present and future generations.”¹⁴⁷ DAR has adopted numerous fishing regulations through its rulemaking power, including “creating geographical or area prohibitions, seasonal prohibitions, size limits, and banning the commercial sale of individual species.”¹⁴⁸

DAR also utilizes various legal approaches focused on species-specific regulations or blanket restrictions within specific areas or throughout all state waters.¹⁴⁹ DAR has six main legal approaches to regulating nearshore marine resources: (1) size limits; (2) bag limits; (3) open and closed fishing seasons; (4) permits for use and possession of lay nets; (5) gear restrictions; and (6) restrictions on types of bait used and the conditions for entry into areas for taking aquatic life.¹⁵⁰ These regulations are applied within each marine management area to address the area’s specific needs.

DAR administers six types of marine management areas: (1) marine life conservation districts (MLCD);¹⁵¹ (2) fishery management areas (FMA);¹⁵² (3) fisheries replenishment areas (FRA);¹⁵³ (4) natural area reserves (NARS);¹⁵⁴ (5) bottom fish restricted fishing areas (BRFA);¹⁵⁵ and (6) Community Based Subsistence Fisheries Area (CBSFA).¹⁵⁶ DAR manages more than forty-three marine protected areas within State waters.¹⁵⁷ Additionally, more than twenty-two fish species have individualized restrictions focused on the season, size, weight, and take of these species.¹⁵⁸ Lawai‘a are also limited in the types of fishing gear they can use.¹⁵⁹

DLNR is given police power to “enforce all laws relating to the protecting, taking, killing, propagating, or increasing of aquatic life within the State and

ocean recreation, and coastal areas programs.”); HAW. REV. STAT. § 187A-4 (describing that the Board of Land and Natural Resources shall appoint an administrator who has “charge, direction, and control of all matters relating to aquatic resources management”).

¹⁴⁷ HAW. CONST. art. XI, § 1.

¹⁴⁸ Kumabe, *supra* note 23, at 243.

¹⁴⁹ HAW. ADMIN. R. § 13-28-1 to -100 (LEXIS through 2022).

¹⁵⁰ *See* HAW. REV. STAT. § 187A-5 (2011).

¹⁵¹ HAW. REV. STAT. § 190-1 (2011).

¹⁵² HAW. REV. STAT. § 188F (2011).

¹⁵³ HAW. REV. STAT. § 188F-4 (2011).

¹⁵⁴ HAW. REV. STAT. § 195 (2011).

¹⁵⁵ HAW. ADMIN. R. § 13-94-8 (LEXIS through 2022).

¹⁵⁶ HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2011).

¹⁵⁷ *See* HAW. ADMIN. R. § 13-28-1 to -100 (LEXIS through 2022).

¹⁵⁸ *See* *Hawai‘i Fishing Regulations*, DLNR (July, 2022), https://dlnr.hawaii.gov/dar/files/2022/06/fishing_regs_Jul_2022.pdf; HAW. ADMIN. R. § 13-75 (LEXIS through 2022) (regulating the possession and use of certain fishing gear).

¹⁵⁹ *See id.*

the waters subject to its jurisdiction[.]”¹⁶⁰ The Division of Conservation and Resources Enforcement (DOCARE) is the DLNR-designated agency responsible for enforcing all regulations.¹⁶¹ Given the “myriad of fishing regulations applicable in State water, [DAR] continues to struggle with managing its fisheries.”¹⁶²

Recently, various communities and lawai‘a have voiced concerns about an observational shift in spawning seasons that do not align with seasonal closures. DAR primarily implements its seasonal closure management strategy through effort control.¹⁶³ Fishing effort improves spawning potential or protects juveniles from depletion during recruitment when the smaller younger fish transition to older and larger fish.¹⁶⁴ Typically, seasonal closures are the first management strategy deployed by fisheries managers.¹⁶⁵ Seasonal closures, however, historically had both successes and failures – they usually fail when it is the predominant or the only method of

¹⁶⁰ HAW. REV. STAT. § 187A-2(7) (2011); *see* HAW. REV. STAT. § 199-4 (2011).

¹⁶¹ *See generally* HAW. REV. STAT. § 199 (2011); *Department of Land and Natural Resources: Division of Conservation and Resources Enforcement*, STATE OF HAW., <http://hawaii.gov/dlnr/docare/index.html> (last visited Mar. 5, 2021). DOCARE officers also have the authority to investigate complaints and violations, gather evidence, issue citations, and conduct searches and seizures. HAW. REV. STAT. § 199. DOCARE officers enforce regulations related to aquatic life, protection of caves, historic preservation, and the Kaho‘olawe Island Reserve, as well as several city and county ordinances. *See* HAW. REV. STAT. §§ 6D, 6E, 6K (2009); HAW. REV. STAT. § 199-4 (2011).

¹⁶² Kumabe, *supra* note 23, at 244.

¹⁶³ JIM BEETS & MARK MANUEL, *TEMPORAL AND SEASONAL CLOSURES USED IN FISHERIES MANAGEMENT: A REVIEW WITH APPLICATION TO HAWAI‘I* 1 (2007).

[F]ishing effort is a useful measure of the ability of a fleet to catch a given proportion of the fish stock each year. When fishing effort increases, all else being equal, we would expect the proportion of fish caught to increase . . . [R]estricting the amount of fishing by either effort or catch management is one way of protecting fish stocks from becoming overexploited or of encouraging the recovery of stocks that are already depleted.

A FISHERY MANAGER’S GUIDEBOOK 222–24 (Kevern L. Cochrane & Serge M. Garcia eds., 2nd ed. 2009).

¹⁶⁴ *See* EDWARD V. CAMP ET AL., *FISH POPULATION RECRUITMENT: WHAT RECRUITMENT MEANS AND WHY IT MATTERS* 1–5 (2020) (“Recruitment refers to the process of small, young fish transitioning to an older, larger life stage . . . Recruitment processes are responsible for any fishery that is sustainable and are critically important to consider when making fisheries management decisions.”).

¹⁶⁵ BEETS & MANUEL, *supra* note 163.

management.¹⁶⁶ When fishery managers utilized multiple strategies instead of a single management strategy, the survival or return increases exponentially.¹⁶⁷

The Pacific Halibut Fishery is infamous for its failed management strategy. In this particular fishery, “seasonal closures were enacted and considered economically beneficial by resource agencies[.]” in order to save the fishery as a whole.¹⁶⁸ Ultimately, the Pacific Halibut Fishery closures “failed to reduce fishing effort and w[ere] considered to be of limited conservation value.”¹⁶⁹ Similarly, the Hawaiian longline swordfish fishery seasonal closures were similarly ineffective, and the State instead implemented alternative strategies to manage that fishery better.¹⁷⁰ The State found that utilizing alternative measures ensured the proliferation of various threatened and endangered species impacted by the longline fishery.¹⁷¹ Indigenous peoples around the globe, including Kānaka Maoli, utilize this simple yet effective mixed-management strategy.¹⁷² While Indigenous communities have traditionally utilized these strategies, western fisheries managers are only recently realizing the value of this form of management.¹⁷³ What strengthens the use of mixed-management strategy for Kānaka Maoli is their knowledge of the religious and practical reasons for properly managing fisheries.¹⁷⁴ This intergenerational and sacred knowledge prevents the outright collapse of communal fisheries.

What current fisheries management lacks is what has allowed Maoli fisheries to thrive. Kānaka Maoli fisheries management is superior because of the intimate connection that Kānaka have to the ocean, food, and each other. Today, local communities, predominantly Kānaka Maoli, are attempting to once again move toward subsistence fishing and utilize this collective knowledge and perspective.¹⁷⁵

¹⁶⁶ CAMP ET AL., *supra* note 164, at 2.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *Id.* at 2–3.

¹⁷⁰ *Id.* at 3.

¹⁷¹ *Id.*

¹⁷² *See id.* at 3. The taking of particular fish was prohibited during the spawning seasons. For example, “the most important and well-known tabu of this sort was that governing the *aku* and the ‘*opelu* (ocean bonito and mackerel)[.]” NATIVE USE OF FISH, *supra* note 15, at 13. “Closed seasons for the ‘*opelu* and *aku* usually alternated every six months. There were different times of kapu (fishing prohibited), but the common time was in February and usually lasted for approximately ten days.” BEETS & MANUEL, *supra* note 163, at 7.

¹⁷³ BEETS & MANUEL, *supra* note 163, at 6–8.

¹⁷⁴ NATIVE USE OF FISH, *supra* note 15, at 13.

¹⁷⁵ *See* Charles Ka‘ai‘ai & Sylvia Spalding, *Ho‘ohanohano I Nā Kūpuna Puwala*, 24 J. MARINE EDUC. 1, 2 (2008).

III. ANALYSIS

A. *Hawaiian Self Governance: Emergence of the CBSFA*

Ke ha‘awi nei au iā ‘oe. Mālama ‘oe i kēia mau mea. ‘A‘ohe
Mālama, pau ka pono o ka Hawai‘i¹⁷⁶

For Kānaka Maoli, fishing traditions, ethics, and skills are passed down within family units. While a book is helpful in establishing familiarity to ‘oihana lawai‘a, without additional support from an experienced lawai‘a, a book is not nearly enough. The role of experienced lawai‘a is integral to learning and conserving Maoli fishing traditions. With this in mind, communities perpetuating these practices and knowledge bases are mobilizing to save the remnants of their nearshore fisheries.¹⁷⁷ Hā‘ena is one example of a community that has successfully petitioned for a new form of management that brings together biocultural knowledge and western management frameworks.¹⁷⁸

In 1994, Governor John Waihe‘e convened the Moloka‘i Subsistence Task Force to determine the importance of subsistence living on Moloka‘i, identify problems affecting subsistence practices, and recommend policies and programs to improve arising socio-economic issues.¹⁷⁹ Traditionally, Moloka‘i was seen as a strategic location between O‘ahu and Maui for natural resources and war. Throughout the years, however, Moloka‘i became economically secluded, which resulted in its exclusion from rapid economic change.¹⁸⁰ For years, Moloka‘i communities faced economic instability resulting in a reliance on subsistence activities to support them through times

¹⁷⁶ DAVIANNA PŌMAIKA‘I MCGREGOR, NĀ KUA‘ĀINA: LIVING HAWAIIAN CULTURE 5 (2007) (“I pass on to you. Take care of these things. If you don’t take care, the well-being of the Hawaiian people will end”) NĀ KUA‘ĀINA is a repository of narratives pertaining to kua‘āina from rural communities who have endured despite more than a century of American subjugation and control. McGregor provides readers with a discussion of the landscape and history of places and its people. Additionally, she provides an overview of the effects of westernization to kua‘āina. Kua‘āina translates to the “country,” “person from the country,” or “back land.” HAWAIIAN DICTIONARY, *supra* note 1, at 168.

¹⁷⁷ Ka‘ai‘ai & Spalding, *supra* note 175.

¹⁷⁸ MOLOKA‘I SUBSISTENCE TASK FORCE, GOVERNOR’S MOLOKA‘I SUBSISTENCE TASK FORCE FINAL REPORT 4 (1994) [hereinafter MOLOKA‘I TASK FORCE]; DIV. OF AQUATIC RES., HAW. DEP’T OF LAND & NAT. RES., MANAGEMENT PLAN FOR THE HĀ‘ENA COMMUNITY-BASED SUBSISTENCE FISHING AREA, KAUA‘I 1 (Aug. 2016) [hereinafter HĀ‘ENA], https://dlnr.hawaii.gov/dar/files/2016/08/Haena_CBSFA_Mgmt_Plan_8.2016.pdf.

¹⁷⁹ MOLOKA‘I TASK FORCE, *supra* note 178.

¹⁸⁰ *See* MOLOKA‘I TASK FORCE, *supra* note 178.

of economic hardship.¹⁸¹ The Moloka‘i Subsistence Task Force Report found that approximately half of the interviewed residents fished as a source of subsistence.¹⁸² The task force “recogniz[ed] that Hawaiians were great fishermen and established the kapu system to preserve the ocean’s resources.”¹⁸³ In addition, the report concluded that “[w]ithout subsistence as a major means for providing food, Moloka‘i families would be in a dire situation.”¹⁸⁴ The findings of the Governor’s Moloka‘i Subsistence Task Force Final Report were foundational to the legislative establishment of CBSFAs throughout Hawai‘i and, in particular, from Kalaeoka‘ilio to Nihoa flats on Moloka‘i.¹⁸⁵

In 1994, following the publication of the Final Task Report, DLNR submitted “an Administrative Proposal to designate a CBSFA for the North West coast of Moloka‘i from Kalaeoka‘ilio to Nihoa flats.”¹⁸⁶ During that same year, the Legislature passed Act 271, codified as Hawai‘i Revised Statutes (HRS) section 188-22.6, authorizing DLNR to designate and manage CBSFAs to “reaffirm[] and protect[] fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion.”¹⁸⁷

Act 271 sought “to provide native Hawaiians with an opportunity to educate and perhaps guide Hawai‘i and the world in fishery conservation,” and “to ensure that subsistence fishing areas continue to be available for use of native Hawaiians.”¹⁸⁸ Act 271 was intended to provide DLNR with a means to effectuate its duty under article XII, section 7 of the Hawai‘i Constitution, namely to “protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the right of the State to regulate such rights.”¹⁸⁹ Act 271 also mandated that DLNR establish a subsistence

¹⁸¹ *Id.* at 20.

¹⁸² *Id.* at 47. For Hawaiian families, thirty-eight percent of their food is gathered through subsistence activities. *Id.* at 5.

¹⁸³ HAW. S. JOURNAL, 17th Cong., S. C. Rep. 2965, at 1180 (1994).

¹⁸⁴ HUI MĀLAMA O MO‘OMOMI, MO‘OMOMI NORTH COAST OF MOLOKA‘I COMMUNITY-BASED SUBSISTENCE FISHING AREA PROPOSAL AND MANAGEMENT PLAN 28 (2017) [hereinafter MO‘OMOMI CBSFA].

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.*

¹⁸⁷ HAW. REV. STAT. § 188-22.6(a) (2011).

¹⁸⁸ HAW. S. JOURNAL, 17th Cong., S. C. Rep. 2965, at 1180 (1994); HAW. H. JOURNAL, 17th Cong., S. C. Rep. 441-94, at 1031 (1994).

¹⁸⁹ HAW. CONST. art. XII, § 7.

pilot demonstration project on Moloka‘i focusing primarily on Kānaka Maoli families in Ho‘olehua Hawaiian Homestead.¹⁹⁰

1. CBSFA Designation

The CBSFA designation process enables community members to assist DLNR in creating management strategies based on Kānaka Maoli values.¹⁹¹ Communities can obtain CBSFA designation either through DLNR or the Legislature. To obtain designation through DLNR, applicants must compile and submit a proposal.¹⁹² HRS section 188-22.6 identifies foundational information required in the proposal, including “justification for the proposed designation” and a “management plan containing a description of the specific activities to be conducted in the fishing area.”¹⁹³ The proposals should also meet community-based subsistence needs and judicious fishery conservation and management practices.¹⁹⁴

The second avenue to attain designation is through the Legislature. In 2005, Miloli‘i on Hawai‘i Island became the first CBSFA to receive permanent legislative designation through a statute.¹⁹⁵ The proposed administrative rules for the Miloli‘i CBSFA were finally approved on June 9, 2022 and signed into law on August 2, 2022.¹⁹⁶ In 2006, the Hā‘ena CBSFA was established by statute on the island of Kaua‘i.¹⁹⁷ In 2015, the administrative regulations governing the Hā‘ena CBSFA were approved by

¹⁹⁰ HAW. S. JOURNAL, 17th Cong., S. C. Rep. 2965, at 1180 (1994).

¹⁹¹ See HAW. REV. STAT. § 188-22.6 (2011).

¹⁹² *Id.* § 188-22.6(b).

¹⁹³ *Id.* (“The proposal shall include: (1) The name of the organization or group submitting the proposal; (2) The charter of the organization or group; (3) A list of the members of the organization or group; (4) A description of the location and boundaries of the marine waters and submerged lands proposed for designation; (5) Justification for the proposed designation including the extent to which the proposed activities in the fishing area may interfere with the use of the marine waters for navigation, fishing, and public recreation; and (6) A management plan containing a description of the specific activities to be conducted in the fishing area, evaluation and monitoring processes, methods of funding and enforcement, and other information necessary to advance the proposal.”).

¹⁹⁴ *Id.*

¹⁹⁵ HAW. REV. STAT. § 188-22.7 (2011) (designating the Miloli‘i CBSFA on Hawai‘i Island).

¹⁹⁶ *State of Hawai‘i Division of Aquatic Resources: Newly-Established Miloli‘i Community-Based Subsistence Fishing Area Now In Effect*, <https://dlnr.hawaii.gov/dar/announcements/newly-established-miloli-community-based-subsistence-fishing-area-rules-now-in-effect/>; David M. Forman, *Applying Indigenous Ecological Knowledge for the Protection of Environmental Commons: Case Studies from Hawai‘i for the Benefit of “Island Earth,”* 41 U. HAW. L. REV. 300, 318 (2019).

¹⁹⁷ HAW. REV. STAT. § 188-22.9 (2011) (designating the Hā‘ena CBSFA on Kaua‘i Island).

the governor and enacted into law.¹⁹⁸ The “[l]egislative designation may allow communities to achieve designation, free from any [procedural] constraints imposed by DLNR.”¹⁹⁹ The Hā‘ena CBSFA covers three-and-a-half miles of shoreline, unlike the proposed five miles that Moloka‘i sought to designate.²⁰⁰ The significant difference between DLNR designation and legislative designation is that a legislative designation is attained *before* the community attempts to draft a management plan; thus, communities avoid wasting their effort on proposals that DLNR will not approve.²⁰¹ The challenge to obtaining this type of designation, however, is to survive the legislative process.²⁰²

The CBSFA concept should be viewed through the lens of the Kānaka Maoli value of “aloha ‘āina, which emphasizes the connection between the environment and communities, whereby if you care for the environment, the environment will care for you.”²⁰³ CBSFAs represent a State-recognized way for community groups to maintain “traditional communal management informed by traditional and customary fishing and management practices that were integral to sustaining the health and abundance of marine resources[.]”²⁰⁴ CBSFA designation represents a hybrid-konohiki fisheries management system with State-community collaborative fisheries management that is “place-based, community-driven, and culturally rooted.”²⁰⁵

¹⁹⁸ Jade M.S. Delevaux et al., *Linking Land and Sea Through Collaborative Research to Inform Contemporary Applications of Traditional Resource Management in Hawai‘i*, 10 SUSTAINABILITY (SPECIAL ISSUE) 159, 162 (2018), <https://www.mdpi.com/books/pdfdownload/book/5177> (“[A]fter nearly ten years of planning and negotiation, over seventy meetings, fifteen rule drafts, three public hearings and multitude studies undertaken to document visitor impacts, user groups, fishery health, and the importance of locally caught fish within and beyond the Hā‘ena community, these rules became law.”).

¹⁹⁹ Jodi Higuchi, *Propagating Cultural Kīpuka: The Obstacles and Opportunities of Establishing a Community-Based Subsistence Fishing Area*, 31 U. HAW. L. REV. 193, 210 (2008).

²⁰⁰ HĀ‘ENA, *supra* note 178, at 14.

²⁰¹ Higuchi, *supra* note 199.

²⁰² See generally H. Majority Staff Off., State H.R., *A Citizen’s Guide to Participation in the Legislative Process*, HAW. STATE LEGISLATURE (June 2013), <https://www.capitol.hawaii.gov/docs/cg/CitizensGuide.pdf> (discussing the hurdles and deadlines of the legislative process).

²⁰³ HĀ‘ENA, *supra* note 178, at 6.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

2. CBSFA Rulemaking

The designation of a CBSFA is a burdensome process that communities bear.²⁰⁶ The investment into the CBSFA process requires an immense amount of community resources, including funds, time, and emotional drive.²⁰⁷ Once the community completes a management proposal, there is a series of community and DAR stakeholder meetings.²⁰⁸ The purpose of these meetings is to gather the communities’ opinions and perspectives of the designation.²⁰⁹ Following these meetings, the Board of Land and Natural Resources (BLNR)²¹⁰ holds a meeting to approve initiation of the CBSFA process and holds a public hearing for the rules.²¹¹ The Department of the Attorney General and the small business regulatory review board assess the proposed rules.²¹²

Once a community passes the preliminary designation phase of the CBSFA, it then moves on to the rulemaking phase.²¹³ HRS section 188-22.6 requires DLNR to “designate community-based subsistence fishing areas and carry out fishery management strategies for such areas[] through administrative rules adopted pursuant to [c]hapter 91, for the purpose of reaffirming and protecting fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion.”²¹⁴ Chapter 91, known as the Hawai‘i Administrative Procedure Act (HAPA), governs the “administrative procedure[s] for all state and county

²⁰⁶ See generally Mehana B. Vaughan & Margaret R. Caldwell, *Hana Pa ‘a: Challenges and Lessons for Early Phases of Co-Management*, 62 MARINE POL’Y 51 (2015) (discussing reasons the CBSFA planning process experienced by community members in Hā‘ena, one of the few areas designated a CBSFA by the DLNR, was so lengthy and difficult).

²⁰⁷ See *id.*

²⁰⁸ Erin Zanre, *Community-Based Subsistence Fishing Area Designation Procedures Guide*, HAW. DEP’T OF LAND & NAT. RES., DIV. OF AQUATIC RES. 6 (2014), https://dlnr.hawaii.gov/coralreefs/files/2015/02/CBSFA-Designation-Procedures-Guide_v.1.pdf.

²⁰⁹ See *id.* at 4.

²¹⁰ The BLNR is the seven-member board that heads the DLNR. HAW. REV. STAT. §§ 171-3, -4 (2011). The chair of the BLNR is also the executive head of DLNR. *Board of Land and Natural Resources*, HAW. DEP’T OF LAND & NAT. RES., <https://dlnr.hawaii.gov/boards-commissions/blnr-board/> (last visited Sep. 20, 2022).

²¹¹ Zanre, *supra* note 208, at 9–10.

²¹² *Id.* at 10.

²¹³ *Id.*

²¹⁴ HAW. REV. STAT. § 188-22.6 (2011).

boards, commissions, departments or offices which would encompass procedure of rule making and adjudication of contested cases.”²¹⁵

Section 91-3 of HAPA outlines the rulemaking procedures that agencies must follow to adopt, amend, or repeal a rule.²¹⁶ First, the agency must “[g]ive at least thirty days’ notice for a public hearing” that describes the topic of the hearing, the language of the proposed rule, and the date, time, and place of the hearing.²¹⁷ Second, all agencies must:

Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency, if requested to do so by an interested person, shall issue a concise statement of the principal reasons for and against its determination.²¹⁸

Third, the notice must be mailed to all persons who made a timely written request for advance notice and the notice must be posted on the internet.²¹⁹ After the public hearing, public comments are collected, and BLNR is mandated to “fully consider all written and oral submissions respecting the proposed rule.”²²⁰ Once the notice and comment section is complete, BLNR holds a hearing for official approval of the administrative rules.²²¹ Finally, the rules are reviewed by the governor.²²² If approved, all rules adopted, amended, or repealed must be made available for public inspection.²²³ The Chapter 91 rulemaking process is a labyrinth that has proven to be burdensome to communities, taking years to finalize, including multiple hearings and drafts of rules.²²⁴

²¹⁵ *Bush v. Hawaiian Homes Comm’n*, 76 Haw. 128, 133, 870 P.2d 1272, 1277 (1994) (quoting H. Stand. Comm. Rep. No. 8, in 1961 House J., at 653).

²¹⁶ HAW. REV. STAT. § 91-3 (2012).

²¹⁷ *Id.*; *Hall v. State*, 10 Haw. App. 210, 217, 863 P.2d 344, 347 (Ct. App. 1993) (concluding that “the Notice met all the present requirements of HRS § 91-3” to provide enough information for interested persons to meaningfully participate in the rule amendment process because it “clearly summarized the Amendments and their purpose, advised where copies of the Amendments could be obtained, and stated where the public could be heard on the matter”).

²¹⁸ HAW. REV. STAT. § 91-3(a)(2) (2012).

²¹⁹ *Id.* § 91-3(a)(1).

²²⁰ *Id.* § 91-3(a)(2).

²²¹ *Id.*

²²² *Id.* § 91-3(d).

²²³ *Id.* § 91-3(e).

²²⁴ Zoom Interview with Malia Akutagawa, Assoc. Professor of Law and Hawaiian Stud., Univ. of Haw. at Mānoa (Feb. 19, 2021).

B. *Mo‘omomi CBSFA*

CBSFAs are unique to Hawai‘i because of the State’s mandate to protect Kānaka Maoli rights and conserve Hawai‘i’s precious marine resources.²²⁵ While CBSFAs provide a rose-colored glimpse into the future of fisheries management, they are still inherently difficult to implement. Currently, only Hā‘ena and Miloli‘i have obtained a permanent CBSFA designation.²²⁶ The pilot project in Mo‘omomi failed to secure permanent designation after the pilot period concluded in 1997.²²⁷

1. *Hawai‘i Revised Statutes Section 188-22.6*

The Mo‘omomi CBSFA is in compliance with section 188-22.6 which clearly outlines the standards that communities must follow to be designated as a CBSFA. The Mo‘omomi CBSFA includes all the requirements within a proposal while meeting “community-based subsistence needs and judicious fishery conservation and management practices.”²²⁸ In addition to the required proposal, the Mo‘omomi CBSFA serves as a repository of scientific data and traditional and customary knowledge of Kānaka Maoli lawai‘a within the community.²²⁹

a. *Hui Mālama o Mo‘omomi Proposal*

Since 1993, Hui Mālama o Mo‘omomi (“HMM”) “has provided stewardship of the natural and public trust resources at Mo‘omomi throughout eight DLNR administrations.”²³⁰ HMM is comprised of “Ho‘olehua Homesteaders and Pālā‘au moku²³¹ residents whose subsistence lifestyle depends on efforts to mālama both natural and cultural resources for present and future generations.”²³² HMM’s formation coincided with the Governor’s Moloka‘i Subsistence Task Force “to document the importance of subsistence fishing and gathering of marine resources for Moloka‘i

²²⁵ See generally HAW. CONST. art. XI, §§ 1, 6; HAW. CONST. art. XII, § 7.

²²⁶ See HAW. REV. STAT. § 188-22.9 (2011).

²²⁷ See MO‘OMOMI CBSFA, *supra* note 184, at 10, 30.

²²⁸ See HAW. REV. STAT. § 188-22.6 (2011).

²²⁹ See generally MO‘OMOMI CBSFA, *supra* note 184.

²³⁰ *Id.* at 10.

²³¹ In the Hawaiian language, moku in this context refers to a “district,” “island,” “islet,” or a “section.” However, moku also means “to be cut,” “severed,” “amputated,” “broken in two, as a rope,” “broken loose, as a stream after heavy rains, or as a bound person,” “to punctuate,” “forest,” “grove,” “clump,” “severed portion,” “fragment,” “cut,” “laceration,” “scene in a play,” “ship,” “schooner,” “vessel,” “boat,” or “a stage of pounded poi.” HAWAIIAN DICTIONARY, *supra* note 1, at 252.

²³² See generally MO‘OMOMI CBSFA, *supra* note 184, at 10.

families.”²³³ Through rulemaking, the pilot project area was reduced to Kawa‘aloa and Mo‘omomi Bays.²³⁴ After the discontinuation of the pilot project, HMM continued to work with stakeholders to informally but consistently monitor and manage Kawa‘aloa and Mo‘omomi Bays.²³⁵ Despite DLNR’s failure to promulgate administrative rules to formally designate this area as a CBSFA, HMM and coastal landowners continued to manage the fishery, expanding west to Kalaeoka‘ilio and east to Nihoa flats.²³⁶ In the years following, HMM continued to work with community stakeholders, community organizations, and government agencies to effectively steward the land and sea of the North West coast of Moloka‘i.²³⁷ Through their efforts to effectively mālama the North West coast of Moloka‘i, HMM created a repository of Kānaka Maoli fisheries knowledge,²³⁸ observational data,²³⁹ and educational curriculum²⁴⁰ to further the goal to “perpetuate local resources essential for subsistence of present and future generations of Ho‘olehua Homesteaders.”²⁴¹

b. Mo‘omomi CBSFA Location and Boundaries

The proposed location and boundary of the Mo‘omomi CBSFA focus on the Mo‘omomi North Coast fisheries.²⁴² The proposed regulatory area is a product of lawai‘a meetings, community round-table discussions, and DAR-led public community workshops on Moloka‘i.²⁴³ HMM seeks to create a CBSFA from Kalaeoka‘ilio to Kaholaiki, from the shoreline and extending

²³³ *Id.*

²³⁴ *Id.* at 2.

²³⁵ *Id.* at 10.

²³⁶ *Id.*

²³⁷ *See id.* at 10. Stewardship projects, activities, and experiences include the ongoing management of resources and facilities at Mo‘omomi and Kawa‘aloa Bay (1997–present). *Id.* at 11. It also includes the return of Kalaina Wāwae to the stewardship of HMM (2003). *Id.* at 14.

²³⁸ *See id.* HMM stewardship projects tailored toward the natural and cultural experience at Mo‘omomi include the observation of Hawaiian moon phases and fish spawning cycles and the publication of pono fishing calendar. *Id.* at 11.

²³⁹ *Id.* at 12–13. Natural stewardship projects include erosion projects (late 1990s–early 2000s); turtle nesting observations (1993–current); and Native Hawaiian plant restoration (2001–2004). *Id.*

²⁴⁰ *Id.* at 14–15.

²⁴¹ *Id.* at 5 (“The mission of HMM is to perpetuate local resources essential for the subsistence of present and future generations of Ho‘olehua Homesteaders; to maintain subsistence as a viable option in Moloka‘i’s fluctuating economy; and to encourage young Hawaiians to perpetuate traditional Hawaiian fishing practices.”).

²⁴² *See id.* at 64.

²⁴³ State of Haw. Div. of Aquatic Res., *Mo‘omomi Online Public Hearing Presentation*, YOUTUBE, at 14:07 (Aug. 7 2020), <https://dlnr.hawaii.gov/dar/announcements/moomomi-online-public-hearing-presentation-faqs/>.

one nautical mile offshore.²⁴⁴ Pursuant to section 187A-23(a), the proposed boundary is fundamental to traditional and customary management by Kānaka Maoli of the nearshore fisheries.²⁴⁵ Under Kingdom Law, the fishing grounds for the konohiki and the hoā‘āina tenants extended “from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward, to the beach at low water mark.”²⁴⁶ In addition, the one-mile boundary ensures the protection of ko‘a²⁴⁷ that were traditionally managed by hoā‘āina.²⁴⁸ The one-mile boundary will focus on subsistence use while protecting the area from commercial extraction of its reef, bottom, and pelagic fish.²⁴⁹

The proposed CBSFA boundaries also include the Kawa‘aloa Bay Nursery Area.²⁵⁰ HMM hopes to establish Kawa‘aloa Bay as a protected nursery area, consistent with traditional ecological knowledge and twenty-seven years’ worth of data collection.²⁵¹ Even though this portion will be protected, it will still allow for extensive subsistence fishing and gathering activities in Mo‘omomi Bay and areas outside of Kawa‘aloa Bay.²⁵² Through these proposed CBSFA boundaries, HMM hopes to manage in accordance with modern science and traditional knowledge while ensuring that community members are still able to survive.²⁵³

c. Justification for Mo‘omomi CBSFA Designation

The north coast of Moloka‘i is an essential and extensively used traditional fishing and gathering area. The marine resources of the north coast of Moloka‘i have sustained the Kānaka Maoli population of this area since at

²⁴⁴ *Id.* at 14:37.

²⁴⁵ See HAW. REV. STAT. § 187A-23(a) (2011) (establishing that “[t]he fishing grounds from the reefs, and where there happens to be no reefs, from the distance of one geographical mile seaward of the beach at low watermark, in law, shall be considered the private fishery of the [K]onohiki, whose lands by ancient regulations, belong to the same”).

²⁴⁶ CIV. CODE §§ 387–88 (1859).

²⁴⁷ In the Hawaiian language, ko‘a means “coral,” “coral head,” “fishing grounds, usually identified by lining up with marks on shore,” or “shrine, often consisting of circular piles of coral or stone, built along the shore or by ponds or streams, used in ceremonies as to make fish multiply; also built on bird islands, and used in ceremonies to make birds multiply.” HAWAIIAN DICTIONARY, *supra* note 1, at 155.

²⁴⁸ See HAW. REV. STAT. § 187A-23(a) (2011).

²⁴⁹ MO‘OMOMI CBSFA, *supra* note 184, at 38.

²⁵⁰ *Id.* at 65.

²⁵¹ See *id.* at 62–63.

²⁵² *Id.* at 63.

²⁵³ *Id.* at 59.

least 900 A.D.²⁵⁴ Whether by land or by sea, oral history accounts indicate that the coast from Nihoa to Kalaeoka‘īlio was abundant with ko‘a (traditional fishing areas) marked by kū‘ula (fishing shrines).²⁵⁵ Here, this integral knowledge of the lawai‘a has been passed from one generation to the next, illustrating its importance.²⁵⁶ Through these lawai‘a, “[t]he fishing protocols, scientific observation methods and harvesting practices of that time have been passed down from generation-to-generation to promote the sustainable use of marine resources within the utilized nearshore areas.”²⁵⁷ Residents between Nihoa and Kalaeoka‘īlio have utilized this coastline as a fishing and gathering area, a classroom, and a place of generational knowledge.²⁵⁸ The Ho‘olehua Homestead collective identity of subsistence lawai‘a illustrates the shared cultural heritage that is analogous to the perspectives of traditional communities in Hawai‘i.²⁵⁹ In addition to providing sustenance through subsistence, Kānaka Maoli reinforce a deep kinship to ‘āina that is the foundation of Māoli spirituality and religion. Through subsistence fishing, the lawai‘a emphasizes communal identity, relationships, and perpetuating traditional and cultural practices.

This CBSFA seeks to prioritize addressing various threats to the livelihood of the ho‘āina.²⁶⁰ These threats include (1) the critical transition of stewardship, (2) the severe decline of species and the protection of special resources, and (3) the threats to traditional fishing practices.²⁶¹ With the kūpuna of the north coast of Moloka‘i aging, the next generation needs to take on the responsibility of exercising stewardship of these vital community resources. The community seeks the State’s assistance by adopting the CBSFA and the proposed regulations to formalize management practices that HMM has sought to implement for the past twenty-seven years.²⁶² Simply adopting the proposed regulations will reinforce the rights and responsibilities in Kānaka Maoli subsistence, cultural, and religious practices of managing the ocean for the next generation of stewards.

²⁵⁴ *Id.* at 16 (quoting Marshall Weisler, *Mo‘omomi: A Place of the Ancient Hawaiians*, MOLOKA‘I NEWS, Aug. 1, 1987).

²⁵⁵ *Id.* at 17. In the Hawaiian language, kū‘ula means “any stone god used to attract fish, whether tiny or enormous, carved or natural, named for the god of fishermen,” “heiau near the sea for worship of fish gods,” and a “hut where fish gear was kept with kū‘ula images so that gear might be impregnated with kū‘ula mana, usually inland and very taboo.” HAWAIIAN DICTIONARY, *supra* note 1, at 187.

²⁵⁶ MO‘OMOMI CBSFA, *supra* note 184, at 17.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 30–31.

²⁶¹ *Id.*

²⁶² *Id.* at 30.

2. Mo‘omomi CBSFA Management Plan

Pursuant to HRS section 188-22.6(b)(6), each community must submit “[a] management plan containing a description of the specific activities to be conducted in the fishing area, evaluation and monitoring processes, methods of funding and enforcement, and other information necessary to advance the proposal.”²⁶³ The Mo‘omomi CBSFA management plan is “based upon observations and knowledge that have been accumulated and passed down from one generation to the next of kūpuna and po‘o lawai‘a (head fishers).”²⁶⁴ HMM seeks to directly manage five different species due to the threat of overfishing.²⁶⁵ Each species is significant in the diet of hoa‘āina who rely on the fisheries of the north coast of Moloka‘i. By implementing place-based pono²⁶⁶ fishing practices, HMM created species bag limits, species size limits, and species-specific gear and harvesting restrictions.²⁶⁷ Species bag limits target Ula, Uhu, Kūmū, and Kole.²⁶⁸ Species size limits target Moi and Kūmū.²⁶⁹ Families that rely on subsistence fishing will be able to continue to

²⁶³ HAW. REV. STAT. § 188-22.6(b)(6) (2011).

²⁶⁴ MO‘OMOMI CBSFA, *supra* note 184, at 45.

²⁶⁵ *Id.* at 81.

²⁶⁶ In the Hawaiian language, pono has many definitions including “[g]oodness,” “uprightness,” “morality,” “moral qualities,” “correct or proper procedure,” “excellence,” “well-being,” “prosperity,” “welfare,” “benefit,” “behalf,” “equity,” “sake,” “true condition or nature,” “duty,” “moral,” “fitting,” “proper,” “righteous,” “right,” “upright,” “just,” “virtuous,” “fair,” “beneficial,” “successful,” “in perfect order,” “accurate,” “correct,” “eased,” “relieved,” “should,” “ought,” “must,” and “necessary.” HAWAIIAN DICTIONARY, *supra* note 1, at 340.

²⁶⁷ MO‘OMOMI CBSFA, *supra* note 184, at 67.

²⁶⁸ *Id.* The species bag limits for Ula (spiny lobster) are two per day. The species bag limit for Uhu pālupaluka or ahu‘ula is two per day. For Kūmū it is two per day and for Kole it is twenty per day. *Id.* Ula sometimes referred to as spiny lobster is “any crustacean of the genus Panulirus. These animals are also known as lobster, Hawaiian spiny lobster, red lobster, green lobster, or ula.” Uhu means “any fish known as *Scarus dubius*, *Scarus psittacus*, *Scarus rubroviolaceus*, *Chlorurus sordidus*, *Chlorurus perspicillatus*, or any recognized synonym.” Kūmū means “any fish known as *Parupeneus porphyreus* or any recognized synonym.” HAW. ADMIN. R. § 13-95-1 (LEXIS through 2022); DIV. OF AQUATIC RES., HAW. DEP’T OF LAND & NAT. RES., FISHING IN HAWAII: A STUDENT MANUAL 66 (Mar. 2016) https://dlnr.hawaii.gov/dar/files/2016/03/Fishing_in_Hawaii.pdf (identifying Kole as *Ctenochaetus strigosus* or goldring surgeonfish).

²⁶⁹ MO‘OMOMI CBSFA, *supra* note 184, at 67. The species size limit for Moi is a maximum size of eighteen inches fork length in comparison to the § 13-95-23 requirement of eleven inches in length. The species size limit for Kūmū is a maximum size limit of sixteen inches fork length. *Id.* To harvest Kole, the fish must be a minimum of five inches fork length. *Id.* at 68. Moi means “any fish known as *Polydactylus sexfilis* or any recognized synonym.” HAW. ADMIN. R. § 13-95-1.

fish with a reasonable limitation. In addition to these regulations, HMM intends to limit commercial fishing to only Akule²⁷⁰ and Ta‘ape.²⁷¹ HMM also places a time limit to gather certain species and utilize specific gear.²⁷² Finally, scuba spearfishing will not be allowed in the CBSFA boundaries.²⁷³ In addition to these CBSFA regulations, all existing state regulations would continue to apply.²⁷⁴ HMM, in partnership with DLNR, has held a plethora of community-organized outreach meetings starting in 2014.²⁷⁵ From 2014-2018, several public scoping meetings occurred to organize and solicit public opinion on the CBSFA.²⁷⁶

3. Chapter 91 Process

On April 13, 2018, BLNR approved formal Chapter 91 rulemaking for the Mo‘omomi CBSFA.²⁷⁷ In January 2020, Governor Ige approved the draft Mo‘omomi CBSFA Rules for Public Hearing, initiating the Chapter 91 process.²⁷⁸ According to Chapter 91, DLNR must “[g]ive at least thirty days’ notice for a public hearing” that describes the topic of the hearing, the language of the proposed rule, and the date, time, and place of the hearing.²⁷⁹ DLNR published a legal public notice in the July 19, 2020 edition of the Honolulu Star Advertiser and on its website.²⁸⁰ Per section 91-3, DAR

²⁷⁰ Akule means “any fish identified as *Selar crumenophthalmus* or other recognized synonym. This fish is also known as pa‘a‘a, halal[ū], hahalal[ū], and big-eyed scad.” HAW. ADMIN. R. § 13-95-1.

²⁷¹ MO‘OMOMI CBSFA, *supra* note 184, at 68.

²⁷² *Id.*

²⁷³ *Id.* at 67.

²⁷⁴ *Id.* at 68.

²⁷⁵ *Id.* at 101–03.

²⁷⁶ *Id.* The community organized meetings include January 2014; November 8, 2014; March 25, 2015; April 25, 2015; August 26, 2015; September 2015; October 15, 2015; November 2015; March 16, 2017; March 21, 2017; April 5, 2017; June 6, 2017; June 14, 2017; August 10, 2017; September 26, 2017; November 17–18, 2017; and March 30–April 1, 2018. HUI MĀLAMA O MO‘OMOMI, MO‘OMOMI NORTHWEST COAST OF MOLOKA‘I: ADMINISTRATIVE RECORD 13–22 (2020) [hereinafter ADMINISTRATIVE RECORD], https://www.mauinui.net/uploads/9/4/3/7/94377987/moomomi_administrative_record_2008_14_abbreviated_compressed.pdf.

²⁷⁷ Division of Aquatic Resources, *Moomomi CBSFA Meeting*, YOUTUBE (Aug. 19, 2020), <https://www.youtube.com/watch?v=XbIaQk9xfWU>.

²⁷⁸ *Id.*

²⁷⁹ *Hall v. State*, 10 Haw. App. 210, 217, 863 P.2d 344, 347 (Ct. App. 1993) (concluding that “the Notice met all the present requirements of HRS § 91-3. The Notice clearly summarized the Amendments and their purpose, advised where copies of the Amendments could be obtained, and stated where the public could be heard on the matter. The Notice provided enough information or access to information to enable interested persons to participate meaningfully in the rule amendment process.”).

²⁸⁰ *Public Hearing Notice for Proposed Adoption of Hawaii Administrative Rules Chapter 13-60.9, Moomomi Community-Based Subsistence Fishing Area, Molokai*, STAR

published a statement informing the public of the proposed rule adoption to establish the Mo‘omomi CBSFA and the date, time, and place to attend the hearing.²⁸¹ All interested persons could testify either online via internet or telephone, in-person, or by written testimony.²⁸²

On August 19, 2020, from 5:30 to 9:30 pm, the online and in-person public hearing for the proposed adoption of a new chapter under the Hawai‘i Administrative Rules to establish the Mo‘omomi CBSFA was held.²⁸³ Moloka‘i residents, as well as non-Moloka‘i residents, testified in support of the proposed adoption of the CBSFA.²⁸⁴ Testimony was given by people of all ages from keiki to kūpuna advocating for the designation of the CBSFA.²⁸⁵ Residents elaborated on their responsibility to care for Mo‘omomi and its fisheries as follows:

I am nine years old and attend Kualapu‘u elementary school. Lobster is one of my favorite things to eat. I hope that we will still have lobster when I grow up. I also hope that one day my children will get to eat lobster. That is why the Mo‘omomi CBSFA is a good thing. I support the CBSFA. – Ka‘ikena Rawlins-Fernandez, 2020

I love to fish. It is technically my life. I caught seven pāpio a couple of weeks ago with my pole, and I let all of them go except for one. The one that I used to feed my family, and while I only take what I need and I support CBSFA. – Kauluwai, 2020

We are not saying that there are no fish. There are fish. What we are saying is that there has been an observed decline and to wait until the fish are gone to take action to protect them is too late. We were raised and taught to ensure that our future mo‘opuna, seven generations from now, will have the resources they need to subsist. In addition to safeguarding food for future generations, this issue is about the survival and perpetuation for traditional and customary practices passed down by kūpuna. CBSFA designation would grant

ADVERTISER (July 19, 2020), <https://statelegals.staradvertiser.com/2020/07/19/0001288119-01/>.

²⁸¹ *Id.*

²⁸² *Id.* All interested persons who desired to testify were asked to sign up to testify via zoom. All requests needed to be emailed to CBSFA@hawaii.gov at least 48 hours in advance. *Id.*

²⁸³ *Id.*; State of Haw. Div. of Aquatic Res., *Moomomi CBSFA Meeting*, YOUTUBE (Aug. 19, 2020), <https://www.youtube.com/watch?v=XbIaQk9xfWU>.

²⁸⁴ State of Haw. Div. of Aquatic Res., *Moomomi CBSFA Meeting*, YOUTUBE (Aug. 19, 2020), <https://www.youtube.com/watch?v=XbIaQk9xfWU>.

²⁸⁵ *Id.*

the Moloka‘i community more authority by co-managing with DLNR, and DOCARE officers who are Moloka‘i boys. Misconception has made these rules challenging to pass. – Keani Rawlins-Fernandez, 2020

To not have regulation or kapu is not very akamai. We leave ourselves open for exploitation and disaster. Our change to be a part of this process should not be overlooked. If we expect to keep our kūleana intact for the next generation, the approval of these rules is necessary. – Kelson Mac Poepoe, 2020

This is for the keiki. This is for those yet unborn. – Malia Akutagawa, 2020.²⁸⁶

Based on testimony given at the public hearing, there was overwhelming support to adopt the Mo‘omomi CBSFA under the Hawai‘i Administrative Rules.²⁸⁷

However, the testimony also showed some opposition to the designation as well. While some opposed the CBSFA, none of the opposition was against the actual regulations themselves.²⁸⁸ The general concerns of the opposition can be summarized into four main points: (1) the proposal was not representative of the community; (2) the proposal will take away Kānaka Maoli gathering rights; (3) the resources of Mo‘omomi are not depleted; and (4) DLNR needs to focus on invasive species removal.²⁸⁹ Community members identified similar issues that the CBSFA process addressed, including regulating fishing from residents not from Moloka‘i, focusing on replenishing native fisheries, and preserving a constant connection to Mo‘omomi.²⁹⁰ Most of the opposition targeted the overall scoping, hearing, and rulemaking process.²⁹¹ The majority of the opposition also focused on community politics and general distrust of DLNR.²⁹² In recent years, a group calling themselves the Native Hawaiian Gathering Rights Association (NHGRA) asserted claims that Kānaka Maoli are “basically giving up [their] native gathering rights and turning it over to the state and allowing them to manage.”²⁹³ Article XII, section 7 of the Hawai‘i Constitution, while

²⁸⁶ *Id.* Ka‘ikena Rawlins-Fernandez. *Id.* at 2:16:48. Kauluwai. *Id.* at 3:19:05. Keani Rawlins-Fernandez. *Id.* at 3:32:55. Kelson Mac Poepoe. *Id.* at 1:17:42. Malia Akutagawa. *Id.* at 4:23:04.

²⁸⁷ *See id.*

²⁸⁸ *See id.*

²⁸⁹ *See id.*

²⁹⁰ *See id.*

²⁹¹ *See id.*

²⁹² *See id.*

²⁹³ Catherine Cluett Pactol, *Mo‘omomi CBSFA Gets Support in Public Hearing*, THE MOLOKA‘I DISPATCH (Aug. 26, 2020), <https://themolokaidispatch.com/moomomi-cbsfa-gets-support-in-public-hearing/>; see Ku‘uwehi Hiraishi, *Community Fisheries Management Put to*

allowing state regulation of traditional and customary rights, has been interpreted by the courts to ensure that the government does not regulate and manage Maoli gathering rights out of existence.²⁹⁴ The proposed regulations allow for the continued harvest of the five target species with additional regulations including seasonal limits, bag limits, size limits, and gear restrictions.²⁹⁵

Disagreement between the supporters and non-supporters of the CBSFA has led to an alleged divide in the Ho‘olehua Homestead community.²⁹⁶ This disagreement led to DLNR’s supposed hesitation in adopting the CBSFA designation.²⁹⁷ The CBSFA designation and Chapter 91 process, however, is not a popularity contest.²⁹⁸ DLNR’s hesitation in adopting the CBSFA is rooted in the concept that the “whole community” needs to want the CBSFA to adopt this rule.²⁹⁹ While DLNR holds this position for Mo‘omomi, DLNR did not have the same position when it came to approving the Hā‘ena CBSFA.³⁰⁰ Similar to Mo‘omomi CBSFA, the Hā‘ena CBSFA also had similar opposition from commercial fishers, many of which have businesses based on O‘ahu.³⁰¹ Additionally, nothing in the language of Chapter 91 indicates that an entire community needs to support a rule for it to be adopted.³⁰² The agency action must be in accordance with the binding law of HRS section 188-22.6, which states that “the proposals shall meet community-based subsistence needs and judicious fishery conservation and management practices.”³⁰³

Test on Moloka‘i, HAW. PUB. RADIO (Aug. 27, 2020, 3:52 PM), <https://www.hawaiipublicradio.org/local-news/2020-08-27/community-fisheries-management-put-to-test-on-moloka-i>.

²⁹⁴ See *Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm’n (PASH)*, 79 Hawai‘i 425, 442, 903 P.2d 1246, 1263 (1995).

²⁹⁵ State of Haw. Div. of Aquatic Res., *Moomomi CBSFA Meeting*, YOUTUBE (August 19, 2020), <https://www.youtube.com/watch?v=XbIaQk9xfWU>.

²⁹⁶ Pactol, *supra* note 293.

²⁹⁷ Zoom Interview with Malia Akutagawa, *supra* note 224.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ See Nathan Eagle, *Ige Signs Rules to Create Community-Based Subsistence Fishing Area*, HONOLULU CIV. BEAT (Aug. 4, 2015), <https://www.civilbeat.org/2015/08/ige-signs-rules-to-create-hawaiiis-first-community-based-subsistence-fishing-area/>.

³⁰¹ See Will Caron, *Kaua‘i Overwhelmingly Supports Hā‘ena Subsistence Fishing Plan*, HAWAII INDEPENDENT (Oct. 19, 2014, 2:31 PM), <https://thehawaiiindependent.com/story/kauai-overwhelmingly-supports-haaena-subsistence-fishing-plan>.

³⁰² See HAW. REV. STAT. § 91-1 (2012).

³⁰³ See HAW. REV. STAT. § 188-22.6 (2011).

C. *Infringement of Hawai‘i Constitution Article XII, Section 7*

The Hawai‘i Constitution, statutes, and case law do not explicitly afford Kānaka Maoli absolute protection for subsistence fishing practices. However, this does not mean that subsistence fishing is not a traditional and customary Kanaka Maoli right. Article XI, section 6 of the Hawai‘i Constitution imposes an affirmative duty to “protect the public’s use and enjoyment of the reefs.”³⁰⁴ Likewise, article XII, section 7 of the Hawai‘i Constitution places an affirmative duty to “protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by . . . descendants of native Hawaiians.”³⁰⁵ These constitutional provisions, along with article XI, section 1 on the public trust, arm Kānaka Maoli communities with the ability to ensure that state agencies fulfill their constitutional obligation to protect the environment for future generations.³⁰⁶ The Hawai‘i Supreme Court has established four factors that indicate when traditional and customary Kānaka Maoli practices receive protection under article XII, section 7 of the Hawai‘i Constitution.³⁰⁷ Article XII, section 7 is considered “an important and indispensable tool in preserving the small remaining vestiges of a quickly disappearing culture and in perpetuating a heritage that is unique and an integral part of our State.”³⁰⁸ The following cases assisted the Hawai‘i Supreme Court define the scope of customary and traditional rights held by Kānaka Maoli under the Constitution.

1. *Foundation in Case Law*

In *Kalipi v. Hawaiian Trust Co.*, the late Billy Kalipi sought to gather certain items for subsistence and medicinal purposes within several ahupua‘a where he owned land but did not reside, and was denied access by the large ahupua‘a landowners.³⁰⁹ The Hawai‘i Supreme Court provided a test for claims under HRS section 7-1: (1) that a gatherer’s residence is within the ahupua‘a in which gathering rights were to be exercised; (2) that gathering is limited to, among other items, firewood, and house timber, as specified in HRS section 7-1; (3) that gathering takes place on undeveloped land; and (4) that gathering rights be utilized to practice native customs.³¹⁰ The court also

³⁰⁴ HAW. CONST. art. XI, § 6.

³⁰⁵ HAW. CONST. art. XII, § 7.

³⁰⁶ See HAW. CONST. art. XI, §§ 1, 6; HAW. CONST. art. XII, § 7.

³⁰⁷ See *Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm’n (PASH)*, 79 Hawai‘i 425, 438–47, 903 P.2d 1246, 1259–68 (1995); *State v. Hanapi*, 89 Hawai‘i 177, 186–87, 970 P.2d 485, 494–95 (1998).

³⁰⁸ COMM. OF THE WHOLE REP. NO. 12 (Haw. 1978), reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 1016 (1980).

³⁰⁹ 66 Haw. 1, 3–4, 656 P.2d 745, 747 (1982).

³¹⁰ *Id.* at 7–9, 656 P.2d at 749–51.

held that “any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of the purported native rights with our modern system of land tenure must fail.”³¹¹

In *Pele Defense Fund v. Paty*, Kānaka Maoli residents living in Puna on Hawai‘i Island asserted gathering rights claims in certain ahupua‘a outside of their ahupua‘a of physical residence.³¹² Finding for the petitioners, the court held that access and gathering rights “may extend beyond the ahupua‘a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.”³¹³ Thus, this case allowed for such rights to not be limited to one’s ahupua‘a of residence or common law concepts associated with tenancy or land ownership.

In *Public Access Shoreline Hawai‘i v. Hawai‘i City Planning Comm’n (PASH)*, petitioners challenged the issuance of a Special Management Area permit by the Hawai‘i County Planning Commission (HPC) to Nansay Hawai‘i, Inc. to pursue the development of a resort complex on the island of Hawai‘i.³¹⁴ The Hawai‘i Supreme Court held that the HPC erred in not granting Hawaiian practitioners standing.³¹⁵ The court reaffirmed *Pele Defense Fund* by holding that “common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state.”³¹⁶ Second, the court held that in determining customary rights, “the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner.”³¹⁷ The court also held that the State and all governing bodies and agencies at the state and county level are obligated to protect the reasonable exercise of traditional and customary rights of Kānaka Maoli to the extent feasible.³¹⁸

Finally, in *Ka Pa‘akai o Ka ‘Āina v. Land Use Comm’n, State of Hawai‘i*, a Hawaiian coalition challenged the State Land Use Commission’s grant for reclassification of 1,000 acres of land from conservation to urban, and the Commission’s failure to protect customary and traditional practices there.³¹⁹ The court held that the State, acting through its agencies, must employ an

³¹¹ *Id.* at 4, 656 P.2d at 748.

³¹² *See* 73 Haw. 578, 584-89, 837 P.2d 1247, 1253-55 (1992).

³¹³ *Id.* at 620, 837 P.2d at 1272.

³¹⁴ 79 Hawai‘i 425, 429, 903 P.2d 1246, 1250 (1995).

³¹⁵ *Id.* at 434, 903 P.2d at 1255.

³¹⁶ *Id.* at 448, 903 P.3d at 1269.

³¹⁷ *Id.* at 442, 903 P.3d at 1263.

³¹⁸ *See id.* at 450, 903 P.3d at 1271 n.43.

³¹⁹ 94 Hawai‘i 31, 34, 7 P.3d 1068, 1071 (2000).

analysis to “effectuate [its] obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]”³²⁰ The analysis includes determining the identity and scope of “valued cultural, historical, or natural resources.”³²¹ Next, the relevant state agency must evaluate the extent to which those resources will be affected or impaired by the proposed action.³²² Finally, the agency must determine the feasible action to be taken by the State to reasonably protect Kānaka Maoli rights if they exist.³²³ The court held that a State agency has an affirmative duty to protect cultural rights and practices; it may not abdicate this duty to the landowner or developer.³²⁴

Through these series of cases, the Hawai'i Supreme Court established factors that indicate whether traditional and customary Kānaka Maoli practices receive constitutional protection.³²⁵ The following criteria are considered: (1) establishment of a claimed customary practice by November 25, 1892;³²⁶ (2) exercise of the right within the ahupua'a of the practitioner's residence, with an exception occurring when the practice is not linked to residence within the ahupua'a;³²⁷ (3) exercise on less than fully developed land;³²⁸ and (4) that the customary practice is reasonably exercised.³²⁹ The court does consider the continuous exercise of traditional and customary practices.³³⁰ Continuous use is not required; even if the custom is interrupted, it is not “destroyed” but instead makes proving a traditional and customary right more difficult.³³¹

³²⁰ *Id.* at 46–47, 7 P.3d at 1083–84.

³²¹ *Id.* at 47, 7 P.3d at 1084.

³²² *Id.*

³²³ *Id.*

³²⁴ *See id.* at 45, 7 P.3d at 1082.

³²⁵ *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 447–48, 903 P.2d 1246, 1268–69 (1995).

³²⁶ *Id.* at 47–48, 903 P.2d 1246, 1268.

³²⁷ *Id.* at 448, 903 P.2d at 1269.

³²⁸ *State v. Hanapi*, 89 Hawai'i 177, 186–88, 970 P.2d 485, 494–96 (1998) (affirming Hanapi's conviction of criminal trespass in the second degree for entering his neighbor's land to observe land restoration construction taking place) (“[I]f property is deemed ‘fully developed,’ i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always ‘inconsistent’ to permit the practice of traditional and customary native Hawaiian rights on such property.”).

³²⁹ *PASH*, 79 Hawai'i at 442, 903 P.2d at 1263 (citing *Pele Def. Fund v. Paty*, 73 Haw. 578, 618–21, 837 P.2d 1247, 1269–72 (1992)).

³³⁰ *Id.* at 441 n.26, 903 P.2d at 1262 n.26.

³³¹ *Id.*

2. *Residents of Mo‘omomi Have a Constitutional Right to Manage their Fisheries*

He kakaikahi loa paha ka poe e lawaia nei i keia mau la i lawa maoli ma keia oihana, a he mea minamina loa hoi ia na makou ka nalo aku o keia ike i huli ia me ka hoomanawanui e na kupuna o kakou.³³²

The State is obligated to affirmatively protect and ensure that traditional and customary Native Hawaiian rights are not regulated out of existence.³³³ DLNR breached its constitutional obligation to affirmatively protect traditional and customary Maoli fishing practices. Applying the *PASH* standard, the traditional and customary practices of lawai‘a at Mo‘omomi indicate use as early as 900 A.D.³³⁴ Archaeological studies show that Kānaka Maoli were present in the area because of the numerous habitation sites, ko‘a, and dense concentrations of fish remains.³³⁵ The traditional knowledge and use of Mo‘omomi indicate the continuous practices of the lawai‘a in this area.

Looking at the second factor considered by the Hawai‘i Supreme Court, the access and use of Mo‘omomi are predominantly used as a subsistence fishing ground by residents within the Pālā‘au moku.³³⁶ The Pālā‘au moku is not within the ahupua‘a boundaries of the CBSFA designation.³³⁷ The access and gathering rights, however, extend beyond the ahupua‘a of Mo‘omomi. There is proof that Kānaka Maoli outside of this ahupua‘a have utilized these waters customarily and traditionally for subsistence fishing and cultural activities.³³⁸ Kānaka Maoli from the Pālā‘au moku have been documented to

³³² KAHA‘ULELIO, *supra* note 31. (“Rare indeed today are those people that are fishing who are truly experts in this field, and it would [be] very regrettable to us if this knowledge, so patiently acquired by our ancestors, should be lost.”). This quote by D. Kanewanui does not utilize diacritical markings because it is quoted as originally written in KA ‘OIHANA LAWAI‘A: HAWAIIAN FISHING TRADITIONS.

³³³ *PASH*, 79 Hawai‘i at 442, 903 P.2d at 1263.

³³⁴ MO‘OMOMI CBSFA, *supra* note 184, at 16. *But see* Patrick V. Kirch, *When Did the Polynesians Settle Hawai‘i? A Review of 150 Years of Scholarly Inquiry and a Tentative Answer*, 12 HAWAIIAN ARCHAEOLOGY 3, 3 (2011) (rejecting original inferences of Polynesian settlement of Hawai‘i between ca. AD 300–750 and instead supporting Polynesian discovery and colonization of the Hawaiian Islands between approximately AD 1000 and 1200).

³³⁵ MO‘OMOMI CBSFA, *supra* note 184, at 16 (quoting Marshall Weisler, *Mo‘omomi: A Place of the Ancient Hawaiians*, MOLOKA‘I NEWS, Aug. 1, 1987).

³³⁶ *Id.* at 5.

³³⁷ *See id.* at 39; *Moku Maps*, DEP’T OF LAND & NAT. RES. (Apr. 6, 2022), <https://dlnr.hawaii.gov/ahamoku/2022/04/06/moku-maps/> (Pālā‘au Moku borders Moloka‘i’s southern coast and is thus outside the ahupua‘a boundaries of CBSFA designation, which runs along Moloka‘i’s northern coast).

³³⁸ *See* Pele Def. Fund v. Paty, 73 Haw. 578, 620–21, 837 P.2d 1247, 1271–72 (1992).

utilize the waters of Mo'omomi for "pole, hand-line fishing, throw net, spear fishing as well as gathering 'opihi (Patellidae spp.), 'a'ama crab (*Grapsus tenuicrustatus*, *Pachygrapsus plicatus*), limu (various marine algae) and lobster (*P. penicillatus*)."³³⁹

The third factor focuses on whether the customary practice is exercised on less than fully developed land. The Hawai'i Supreme Court utilizes the "less than fully developed" test to determine whether Kānaka Maoli customary practices are exercised on less than fully developed lands.³⁴⁰ Accordingly, "less than fully developed" lands apply to all State waters, except fishponds.³⁴¹ All subsistence fishing within Mo'omomi should be considered as occurring on less than fully developed land.

The fourth and final factor focuses on whether the customary practice is reasonably exercised. According to *PASH*, "the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7."³⁴² The Kānaka Maoli fishing practices at Mo'omomi must be for subsistence purposes³⁴³ and must place no actual harm upon the recognized interest of the State to enact regulations necessary for the conservation of aquatic life.³⁴⁴ Hawai'i courts have not yet defined "subsistence" in the context of traditional and customary rights. HRS section 188-22.6(c)(2), however, defines "subsistence" as "the customary and traditional Native Hawaiian uses of renewable ocean resources for direct personal or family consumption or sharing."³⁴⁵ The Governor's Moloka'i Subsistence Task Force Final Report indicated that in 1990, forty-nine percent of families were Kānaka Maoli on Moloka'i.³⁴⁶ Of those Maoli families, many "rely upon subsistence fishing, hunting, gathering, or cultivation for a significant portion of their food."³⁴⁷ The use of Mo'omomi as a subsistence fishery is crucial. The people of Moloka'i, through the passage of knowledge from lawai'a, and within families, have continuously utilized this area as a place to gather, fish,

³³⁹ See Mo'omomi CBSFA, *supra* note 184, at 18 ("When ocean conditions permit, residents of the Pāla'au Moku are able to launch small boats from a modest, unimproved boat ramp on the east side of Mo'omomi Bay, as well as across the sandy beach to fish for nearshore species using a variety of methods.").

³⁴⁰ Andrew R. Carl, *Note, Method is Irrelevant: Allowing Native Hawaiian Traditional and Customary Subsistence Fishing to Thrive*, 32 U. Haw. L. Rev. 203, 224–25 (2009).

³⁴¹ *Id.*

³⁴² *Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (PASH)*, 79 Hawai'i 425, 442, 903 P.2d 1246, 1263 (1995).

³⁴³ See HAW. CONST. art. XII, § 7.

³⁴⁴ Carl, *supra* note 340, at 225; see *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 11–12, 656 P.2d 745, 751–52 (1982); *PASH*, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43.

³⁴⁵ HAW. REV. STAT. § 188-22.6(c)(2) (2011).

³⁴⁶ MOLOKA'I TASK FORCE, *supra* note 178, at 19.

³⁴⁷ *Id.*

and survive. The testimonies and actions by families in the Ho‘olehua Homestead and Pālā‘au moku demonstrate that this area is continuously used for subsistence purposes. Considering the continuous usage and reliance by Kānaka Maoli families, subsistence fishing practices at Mo‘omomi should be reasonable under PASH, which is ultimately up to the factfinder to decide.

The right to gather and fish in Mo‘omomi is an assertion of traditional and customary rights by the Kānaka Maoli in the Pālā‘au moku. The HMM, on behalf of Kānaka Maoli within the Ho‘olehua Homestead and Pālā‘au moku, seeks permanent designation of a CBSFA in order to ensure that they can continue their traditional and customary right to fish.³⁴⁸ Without a CBSFA designation, the people of Moloka‘i will not be able to effectively manage their fisheries for subsistence, cultural, and religious purposes. There is also a threat that the traditional knowledge held dearly in Moloka‘i will eventually be lost or relegated to historical documents and stories, rather than put into actual use. Thus, by not approving the Mo‘omomi CBSFA, DLNR is impeding on the rights of the Kānaka Maoli of the Pālā‘au moku to continue their traditional and customary practices of subsistence fishing in Mo‘omomi.

D. Breach of DLNR’s Public Trust Responsibilities

The assertions of the breach of traditional and customary rights go hand in hand with assertions of a breach of the public trust. While on its face, the public trust doctrine seems to protect only “Hawai[‘i]’s natural beauty and natural resources” for “the benefit of present and future generations,” but it is clear that it does more than just that.³⁴⁹ The public trust doctrine also inherently protects the rights of Kānaka Maoli. The preservation and protection of Hawai‘i’s natural resources is a Maoli foundational concept. Historically, Hawai‘i has entrusted the care of its public natural resources to the ali‘i, konohiki, Mō‘ī, and then the state government for the benefit of all its people.³⁵⁰ The public trust precedents should be applied equally to all resources, ensuring that they are preserved to be passed to future generations as it was preserved for Hawai‘i residents.³⁵¹ This interpretation aligns with Kānaka Maoli principles, which seek to protect and conserve the natural resources and beauty for those who are not yet born. The Mo‘omomi CBSFA

³⁴⁸ See MO‘OMOMI CBSFA, *supra* note 184, at 5.

³⁴⁹ HAW. CONST. art. XI, § 1; see MO‘OMOMI CBSFA, *supra* note 184.

³⁵⁰ See *In re Conservation Dist. Use Application HA-3568 (Mauna Kea II)*, 143 Hawai‘i 379, 421, 431 P.3d 752, 794 (2018) (Pollack, J. concurring in part).

³⁵¹ *Id.*

seeks to protect the fisheries of Mo‘omomi for future generations.³⁵² There is a recorded decline of five particular species and today’s advocates seek to ensure that those five sources of food will be around for generations to come.³⁵³

When reviewing an agency’s decision under the public trust doctrine, the court requires additional rigor.³⁵⁴ The “[c]larity in the agency’s decision is all the more essential ‘in a case such as this where the agency performs as a public trustee and is duty-bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.’”³⁵⁵ “When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations” in that resource.³⁵⁶ DLNR “must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.”³⁵⁷ DLNR must then measure the use of Mo‘omomi “under a ‘reasonable and beneficial use’ standard, which requires examination of the proposed use in relation to other public and private uses.”³⁵⁸ All agencies “must apply a presumption in favor of public use, access, enjoyment, and resource protection.”³⁵⁹

DLNR does not provide any evidence that it has the legal authority to deny the public trust in fishery resource management. Clarity and completeness are essential in DLNR’s decision where DLNR performs as a public trustee and is “duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.”³⁶⁰ Since the community hearings in August 2020, DLNR has not released an official statement on the designation of the Mo‘omomi CBSFA. In December 2020, DAR released a testimony compilation and summary indicating individual testimonies who opposed and supported the CBSFA designation.³⁶¹ DAR received a total of 949 individual testimonies with approximately 650 individuals who “signed an online petition distributed through social media.”³⁶² Of the 949 individual

³⁵² See generally MO‘OMOMI CBSFA, *supra* note 184.

³⁵³ See *id.* at 30–31.

³⁵⁴ *Kauai Springs, Inc. v. Plan. Comm’n of Kaua‘i*, 133 Hawai‘i 141, 164, 324 P.3d 951, 974 (2014).

³⁵⁵ *Id.* (quoting *In re Water Use Permit Application (Waiāhole)*, 94 Hawaii 97, 158, 9 P.3d 409, 470 (2000)).

³⁵⁶ *Id.* at 173, 324 P.3d at 983.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 181, 324 P.3d at 991 (quoting *Waiāhole*, 94 Hawaii at 158, 9 P.3d at 470).

³⁶¹ See Division of Aquatic Resources, Mo‘omomi Community Based Subsistence Fishing Area: Testimony Compilation and Summary 1 (2020).

³⁶² *Id.*

testimonies, 561 individuals were in support of the designation while 388 individuals were opposed to the designation.³⁶³ The testimonies in opposition consistently highlighted that the conflicts over resources in Mo‘omomi seemed to be more of a “social issue” rather than the CBSFA designation itself.³⁶⁴

The Mo‘omomi CBSFA designation process has been ongoing since 1994 with several public scoping meetings occurring from 2014 to 2018.³⁶⁵ Furthermore, DLNR continued to have hearings in 2020 to receive individual testimonies to make a CBSFA determination.³⁶⁶ As of 2023, there has been no update on the Mo‘omomi CBSFA designation. DLNR has not released a statement indicating any reasoning as to why it would or would not designate the Mo‘omomi CBSFA. Thus, DLNR’s continuous delay of the designation of the Mo‘omomi CBSFA is a breach of the public trust, for it prevents the Kānaka Maoli community from protecting the natural resources of Mo‘omomi for future generations.

IV. CONCLUSION

Lawai‘a are the protectors and key embodiment of mālama ‘āina in the ocean. The knowledge of the lawai‘a is crucial for a community to achieve governance over its resources. The Mo‘omomi CBSFA reflects the repository of knowledge that the lawai‘a of Mo‘omomi have passed down over generations. The Mo‘omomi CBSFA illustrates the ideal hybrid management style that centralizes governance in the community and

³⁶³ *Id.* The Testimony Complication and Summary document further separated the total testimony in support of designation into overall Moloka‘i support and Ho‘olehua specific support. Out of 561 testimonies in support of designation, 190 testimonies were from Moloka‘i and 66 from Ho‘olehua. Similarly, the total testimony in opposition of designation is separated into overall Moloka‘i opposition and Ho‘olehua specific opposition. Out of 388 testimonies in opposition of designation, 280 were from Moloka‘i with 109 specifically from Ho‘olehua.

³⁶⁴ Transcript of Mo‘omomi CBSFA Public Hearing Kualapuu Charter School Cafeteria (Aug. 19, 2020) (on file with author). Some individual testimonies highlighted discontent with the CBSFA designation process and the history of DLNR in the management of Mo‘omomi. Other testimony indicated that the process had caused division within the community for families who felt that there was a lack of outreach. However, the majority of testimony recognized Mo‘omomi as a special place to the individual and their families.

³⁶⁵ Mo‘omomi CBSFA, *supra* note 184, at 68. The community organized meetings include January 2014; November 8, 2014; March 25, 2015; April 25, 2015; August 26, 2015; September 2015; October 15, 2015; November 2015; March 16, 2017; March 21, 2017; April 5, 2017; June 6, 2017; June 14, 2017; August 10, 2017; September 26, 2017; November 17-18, 2017; and March 30-April 1, 2018. Administrative Record, *supra* note 276, at 13–22.

³⁶⁶ State of Haw. Div. of Aquatic Res., Moomomi CBSFA Meeting, YouTube (Aug. 19, 2020), <https://www.youtube.com/watch?v=XbIaQk9xfWU>.

combines traditional knowledge with modern science and management techniques. The Mo'omomi CBSFA proposed rules should be adopted. The CBSFA process is not a popularity contest. Hawai'i Revised Statutes section 188-22.6 and the applicable Chapter 91 procedures allow communities to engage in the rulemaking process and protect resources.

DLNR's delay and refusal to designate the CBSFA breaches its constitutional obligation to affirmatively protect traditional and customary Hawaiian rights and the fisheries for future generations. Retroactive management is ineffective when a community relies so heavily on a particular fishery for subsistence. The purpose of management is to plan ahead to ensure that the resource is still around for generations to come. The opportunity to effectively co-manage the Mo'omomi fishery is there, and it is just a matter of DLNR taking the necessary steps to do its job and fulfill the State's constitutional mandates.