

RIGHTS OF NATURE IN HAWAI‘I: PRESERVING THE  
RELATIONSHIP BETWEEN NATURAL RESOURCES  
AND CULTURAL SIGNIFICANCE

BY  
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*Haunani-Kay Trask encapsulated the essence of this Comment when she wrote:*

*Despite American territorial and economic control of Hawai‘i since 1900, Hawaiians are not Americans. Nor are we Europeans or Asians. We are not from the Pacific Rim, nor are we immigrants to the Pacific. We are the children of Papa – earth mother – and Wākea – sky father – who created the sacred lands of Hawai‘i Nei. From these lands came the taro, and from the taro, came the Hawaiian people. As in all of Polynesia, so in Hawai‘i. Younger siblings must care for and honor an elder sibling who, in return, will protect and provide for the younger sibling. Thus, Hawaiians must nourish the land from whence we come. The relationship is more than reciprocal, however, it is familial. The land is our mother, and we are her children. This is the lesson of our genealogy.<sup>1</sup>*

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<sup>1</sup> Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 STAN. L. REV. 1197, 1197 (1991) (internal citations omitted).

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## I. INTRODUCTION

Many Indigenous groups have deep cultural and spiritual connections to their traditionally inhabited lands, as well as the associated natural resources that have sustained their lives and those of their ancestors. *Kānaka Maoli*<sup>2</sup> are no different. As the beloved Haunani-Kay Trask explained, “[i]n Polynesian cultures, genealogy is paramount.”<sup>3</sup> An individual’s connection to their lands and to their families determines their identity.<sup>4</sup> According to their creation chant, *Kumulipō*, Native Hawaiians have lived in the Hawaiian Islands since the time *Papa* (earth mother) and *Wākea* (sky father) gave birth to the lands and taro<sup>5</sup> in the age following *Pō* (darkness).<sup>6</sup> Additionally, Native

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<sup>2</sup> “Kānaka Maoli” is the popular term for referring to Native Hawaiians by those advocating for Hawaiian independence. See OFF. OF HAWAIIAN AFF., MO‘OLELO EA O NĀ HAWAI‘I: HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAI‘I 3 (2015), <https://perma.cc/2VMX-SJB8>. Native Hawaiians is defined as:

any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawai[‘i].

HAW. REV. STAT. § 10-2 (2022). This Comment will use Kānaka Maoli throughout where appropriate.

<sup>3</sup> Trask, *supra* note 1, at 1197.

<sup>4</sup> *Id.*

<sup>5</sup> “Taro” (*Colocasia esculenta*), also known as *kalo*, is one of the oldest crops globally and is considered a staple in Native Hawaiian diets. Aurora Kagawa-Viviani, Penny Levin, Edward Johnston, Jeri Ooka, Jonathan Baker, Michael Kantar, & Noa Kekuewa Lincoln, *I Ke Ēwe Āina o Ke Kupuna: Hawaiian Ancestral Crops in Perspective*, 10 SUSTAINABILITY, Dec. 2018, at 5.

<sup>6</sup> Trask, *supra* note 1, at 1198; see also MARTHA WARREN BECKWITH, THE KUMULIPO: A HAWAIIAN CREATION CHANT 42 (1951) (ebook) (“The first six lines [of the Kumulipō] give[s] [the translator] the picture of a burnt-out world just taking shape again out of the mists of night under the first faint light of the moon. The next four stress the idea of remoteness, at the very roots where darkness begins, far from the sun, far from the ‘night.’”). Additionally:

Hawaiians believe that all living things have spirit and consciousness, just like them;<sup>7</sup>

Since the land was an ancestor, no living thing could be foreign. The cosmos, like the natural world, was a universe of familial relations with human beings but one constituent link in the larger family. Nature was not objectified, but personified, resulting in an extraordinary respect (when compared to Western ideas of nature) for the life of the sea, the forest, and the earth.<sup>8</sup>

For this reason, Indigenous peoples like Kānaka Maoli, have a great interest in the preservation and conservation of land and natural resources. Unfortunately, western-centric laws do not appropriately cater to their perspective of the natural world, leaving little protection of the land and natural resources that hold this unique cultural significance.

Native Hawaiian interests in the preservation of land and natural resources go beyond physical and economic aspects of ownership and control. Rather, their desire for the respect of lands and natural resources originates with their spiritual beliefs regarding the sacredness of the natural world. Other indigenous groups around the world share similar cultural and spiritual connections to nature. For example, the Māori tribe (the Indigenous people of New Zealand) believes that Mount Taranaki and the Whanganui River are sacred.<sup>9</sup> Similarly, the Anishinaabe people of White Earth (the largest Ojibwe tribe in Minnesota) believe that a wild

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The Kumulipō is detailed and complex, with sixteen *wa* (intervals) and over 2,000 lines. [BECKWITH, *supra* note 6, at 37]. Although Maoli undoubtedly have ties to extended family throughout Polynesia, the Kumulipō explains that in the beginning there was Pō, or darkness, and from this darkness came life. *Id.* at 42–49. Pō gave birth to two children: a son named Kumulipō and a daughter named Pō‘ele. *Id.* at 58. Through their union, Kumulipō and Pō‘ele created the natural world. *Id.* at 55–56. The first child born to them was the coral polyp, which created the foundation for all life in the sea. *Id.* at 55. Born in continuing sequential order were all of the plants and animals in Hawai‘i nei, which became ‘aumakua or guardians that continue to watch over Kānaka Maoli. *Id.* at 50–93. Pō had many children that comprised all aspects of Hawai‘i’s natural world. *Id.* at 37. After all the Hawaiian Islands were born, Wākea (sky father) had a child with Ho‘ohōkūkalanani, which was stillborn. *Id.* at 118–19. They buried it outside of their home and a kalo plant grew from its grave. *Id.* [at 118]. Wākea and Ho‘ohōkūkalanani had a second child, named Hāloa in honor of its elder sibling, which was the first Kānaka Maoli—the first human child born in Hawai‘i. *Id.* [at 118–19].

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 n.36 (2016).

<sup>7</sup> Trask, *supra* note 1, at 1199.

<sup>8</sup> *Id.*

<sup>9</sup> See DAVID R. BOYD, *THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD* 136 (Susan Renouf ed., 2017) (explaining that the river is “central to, and indeed inseparable from, [the Māori’s] identity, culture, health, and well-being.”); Eleanor Ainge Roy, *New Zealand Gives Mount Taranaki Same Legal Rights as a Person*, THE GUARDIAN (Dec. 22, 2017), <https://perma.cc/24JW-9FL9>.

rice, referred to as Manoomin, is not only a vitally important crop but also a relative.<sup>10</sup> Due to the spiritual and cultural significance that these natural entities possess, New Zealand recognized the Whanganui River and Mount Taranaki as “legal persons” with accompanying rights and obligations,<sup>11</sup> and the “Rights of Manoomin” was recently passed and became part of tribal regulatory authority under their 1855 Treaty.<sup>12</sup>

The concept of the rights of nature, which grants legal personhood rights to natural resources, has slowly gained traction around the world.<sup>13</sup> Although granting these rights involves complicated legal issues, legal recognition of natural resources presents a possible resolution to environmental conflicts in Hawai‘i. Most importantly, the rights of nature framework could ease the ongoing struggle to preserve the special relationship between the cultural and spiritual significance of Hawai‘i’s natural resources. Granting natural entities such as taro, rivers, and Mauna Kea legal personhood rights in Hawai‘i would protect and preserve not only the natural resources themselves, but also the cultural and spiritual significance attributed to these natural entities by native Hawaiian beliefs, traditions, and culture. With a rights of nature framework, the legal system in Hawai‘i could support the unique perspective that Native Hawaiians have of the natural world, erasing the mismatch between intimate relationships to nature and the inadequate legal framework currently in existence.

First, this Comment explains why Native Hawaiians present a unique case given their cultural ties with natural resources and the problems that they face due to their lack of status as a federally recognized tribe and their ancient land tenure system. Next, this Comment discusses why existing legal frameworks fail to adequately protect Native Hawaiian cultural and natural resources, and why this failure is an environmental justice issue despite not falling squarely

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<sup>10</sup> Sierra Clark, *Creator’s Grain: Past, Present, & Future of Manoomin*, TRAVERSE CITY REC. EAGLE (Oct. 2, 2022), <https://perma.cc/J3HE-L4KD>.

<sup>11</sup> Andrew Geddis & Jacinta Ruru, *Places as Persons: Creating a New Framework for Māori-Crown Relations*, in *THE FRONTIERS OF PUBLIC LAW* 255, 225–56 (Jason Varuhas & Shona Wilson Starks eds., 2019) (“In March of 2017, another enactment acknowledged the country’s 300-kilometre-long Whanganui River as ‘a legal person [with] all the rights, powers, duties, and liabilities of a legal person.’ In late 2017, the Crown and Taranaki [Māori] signed a record of understanding that Parliament will in the future legislate to grant the 2,518-metre-tall Mount Taranaki/Mount Egmont legal personhood. By virtue of these legislative acts, the various geographic entities gain an independent existence in the eyes of the law. Rather than being mere Crown or public property, they own themselves. They are deemed to be holder of their own rights, which may be asserted in legal proceedings and other fora. In short, they are no longer ‘things’ over which human beings exercise dominion; they are ‘persons’ with which humans have a relationship.”) (internal citations omitted).

<sup>12</sup> *Rights of Manoomin (Wild Rice): White Earth Law and Enforcement Case*, CTR. FOR DEMOCRATIC & ENV’T RTS., <https://perma.cc/464C-N752> (last visited Apr. 16, 2023); Winona Laduke, *The Rights of Wild Rice*, IN THESE TIMES (Feb. 21, 2019), <https://perma.cc/8WQV-286N>.

<sup>13</sup> Craig M. Kauffman & Pamela L. Martin, *Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand*, 18 GLOB. ENV’T POL., Aug. 2018, at 43, 43.

within the ordinary definition of “environmental justice.” The third section of this Comment focuses on the United States’ federal law system, specifically the National Environmental Policy Act (NEPA)<sup>14</sup> and how it falls short of protecting natural resources, as well as the cultural and spiritual significance tied to these natural resources. This Comment then discusses Hawai‘i’s state laws. In particular this Comment discusses the Hawai‘i’s Environmental Policy Act (HEPA)<sup>15</sup> and how the development of this statute, in relation with Hawai‘i’s State Constitution, supports a future rights of nature legal framework. Finally, this Comment concludes with how the rights of nature legal framework could help mend the gaps and shortcomings of NEPA and HEPA in the context of Native Hawaiians’ cultural and spiritual relationship with the environment.

## II. ENVIRONMENTAL (IN)JUSTICE TO KĀNAKA MAOLI COMMUNITIES

On the ancient burial ground of our ancestors, glass and steel shopping malls with layered parking lots stretch over what were once the most ingeniously irrigated taro lands, lands that fed millions of people over thousands of years. Large bays, delicately ringed long ago with well-stocked fishponds, are now heavily silted and cluttered with jet skis, windsurfers, and sailboards. Multistory hotels disgorge over six million tourists a year onto stunningly beautiful (and easily polluted) beaches, closing off access to locals. On the major islands of Hawai‘i, Maui, O‘ahu, and Kaua‘i, meanwhile, military airfields, training camps, weapons storage facilities, and exclusive housing and beach areas remind the Native Hawaiians who owns Hawai‘i: the foreign, colonizing country called the United States of America.<sup>16</sup>

### A. *Why Hawai‘i?*

Recently, there has been numerous projects that have caused Kānaka Maolis to question the efficacy of Hawai‘i’s environmental review process,<sup>17</sup> especially projects that would have a drastic native effect on

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<sup>14</sup> 42 U.S.C. §§ 4321–4370m-12 (2018).

<sup>15</sup> HAW. REV. STAT. §§ 343-1–343-8 (2022).

<sup>16</sup> HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I 2–3 (1999).

<sup>17</sup> Most recently there has been a long going effort to ensure that sacred Mauna Kea is protected from further desecration. Trisha Kehaulani Watson-Sproat, *Why Native Hawaiians are Fighting to Protect Maunakea from a Telescope*, VOX (July 24, 2019), <https://perma.cc/G3RV-JEAN>. Located on Hawai‘i, Mauna Kea is the state’s highest mountain, and “is one of the most sacred locations in Native Hawaiian culture.” Joshua Rosenberg, *Kū Kia‘i Mauna: Protecting Indigenous Religious Rights*, 96 WASH. L. REV. 277, 277 (2021) (internal citation omitted); J.O. Juvik & S.P. Juvik, *Mauna Kea and the Myth of the Multiple Use: Endangered Species and Mountain Management in Hawai‘i*, 4 MOUNTAIN RSCH. & DEV. 191, 192 (1984). The summit is known as “Kūkahau‘ula and is [believed to be] the place where the gods reside.” Rosenberg, *supra* note 17, at 284. “Native Hawaiians believe the summit touches the sky, giving them a spiritual connection to their ancestors and ensuring the ‘rights to regenerative powers of all that is Hawai‘i.’” *Id.* (internal citation

the protection of “Hawai‘i’s natural and cultural resources.”<sup>18</sup> “It is this history of continued cultural harms, despite broad environmental protections, that explains why these projects continue to symbolize an ‘injustice’ to the Kānaka Maoli people, and to their cultural and natural resources.”<sup>19</sup> Colonization and the degradation of natural resources are not problems unique to Native Hawaiians; they affect many Indigenous people around the world. While Kānaka Maoli continue to go through issues similar to other indigenous groups, Native Hawaiians present a unique case because of their land tenure system and the fact that they are not a federally recognized tribe by the United States, despite being an Indigenous people group.

The U.S. government has crafted a political relationship with many Native American Tribes and Alaska Native peoples, making them “federally recognized Indian tribes” (federally recognized tribes).<sup>20</sup> Within the contiguous 48 states and Alaska, the government currently recognizes 574 Tribal entities eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.<sup>21</sup> Listed Tribes and communities “are recognized to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their Government-to-Government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Indian Tribes.”<sup>22</sup> Native Hawaiians, however, are not on this list—even

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omitted). Additionally, “Lake Waiau is among the most religiously significant sites on [Mauna Kea]. To this day, Native Hawaiians utilize Lake Waiau’s waters, which are associated with the god Kāne, in religious practices.” *Id.* (internal citation omitted). “Moreover, [Mauna Kea] serves as the eternal resting place for those buried across its topography,” with families still traveling to the mountain for ceremonial purposes, such as blessing the mountain for all their ancestors buried there. *Id.* at 284–85. Mauna Kea is also home to the biodiverse environment on the Hawaiian archipelago. Juvik & Juvik, *supra* note 17, at 192. However, notwithstanding Mauna Kea’s cultural and environmental significance, there are currently thirteen telescopes on Mauna Kea’s summit. Rosenberg, *supra* note 17, at 285. The telescopes, constructed by University of Hawai‘i in 1968, now pollute Mauna Kea’s “cultural and natural resources after fifty years of mismanagement.” *Id.* at 279 (internal citation omitted). A 2018 decision by the Hawai‘i Supreme Court allowed a proposed Thirty-Meter Telescope (TMT) to go forward and be built on the Mauna, raising strong objections from Kānaka and their supporters. *Id.* at 278; see *In re Conservation Dist. Use Application HA-3568*, 431 P.3d 752, 757 (Haw. 2018), *as amended* (Nov. 5, 2018), *as amended* (Nov. 30, 2018) (affirming the Hawai‘i Board of Land and Natural Resource’s decision to issue a Conservation District Use Permit for the TMT). Even with public outcry, “the Court ruled that construction of the TMT on [Mauna Kea] would neither interrupt any Native Hawaiian religious practices nor affect the mountain’s natural resources.” Rosenberg, *supra* note 17, at 278 (internal citation omitted).

<sup>18</sup> Elena Bryant, *Innovation or Degradation?: An Analysis of Hawai‘i’s Cultural Impact Assessment Process as a Vehicle of Environmental Justice for Kānaka Maoli*, 13 ASIAN-PACIFIC L. & POL’Y J., Jan. 2011, at 230, 284 (internal citation omitted).

<sup>19</sup> *Id.* at 284–86.

<sup>20</sup> *Dep’t of Just. Pol’y on Indian Sovereignty & Government-to-Government Relations with Indian Tribes*, U.S. DEPT OF JUST. (Jun. 1, 1995), <https://perma.cc/AL48-48P7>.

<sup>21</sup> Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4,636, 4,636–37 (Jan. 28, 2022).

<sup>22</sup> *Id.* at 4,637.

though they are recognized as Indigenous peoples by federal and state governments—making them ineligible for certain political and legal rights that are extended to federally recognized tribal rights.<sup>23</sup>

Despite the clear difference between federally recognized tribes and nonfederal recognized tribes, many tend to assume that all Indigenous peoples hold the same political rights and recognitions, regardless of status.<sup>24</sup> This becomes particularly important in an era of environmental crises because only federally recognized tribes have jurisdiction to govern their lands and resources.<sup>25</sup>

Non-recognized tribes and Native Hawaiians are indigenous peoples, but they do not have the ability to regulate their lands and resources as distinctive governments, nor do they have the ability to receive statutory delegations of federal authority, which would allow them to exercise meaningful control over air, water, or land resources. In that sense, members of these groups, [such as Native Hawaiians,] must rely upon their status as individual citizens of the United States in order to participate in the existing structures of governance. Because of these distinctions, federally recognized tribal governments are the only indigenous peoples within the United States who have the ability to generate environmental laws of their own choosing and apply them to their lands and resources.<sup>26</sup>

This leaves Indigenous groups like Native Hawaiians in a unique and challenging situation.

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<sup>23</sup> Many Native Hawaiians oppose recognition as a federal tribe as they see it to be a barrier to true independence. For more information, see Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857 (2001).

<sup>24</sup> 87 Fed. Reg. at 4,636–37.

<sup>25</sup> *Id.* Note, however, that:

the rights of tribal governments to exercise territorial jurisdiction are linked to the concept of “Indian Country.” This impairs [for example,] the rights of Alaska Native governments because the United States Supreme Court has issued a restrictive reading of ‘Indian Country’ in Alaska due to the effect of the Alaska Native Claims Settlement Act, which revoked the most existing reservations within the state.

Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TULANE ENV'T L.J. 239, 241 (2013). In *Alaska v. Native Village of Venetie Tribal Government*, 552 U.S. 520 (1998), the court held that the village governments were not “dependent Indian communities,” and that “Indian Country” in Alaska was limited to just the sole existing reservation—Metlakatla—and all other “allotments still held in Native title.” Tsosie, *supra* note 25, at 24 (citing *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 530–31 & n.5). Thus, tribal governments are only able to regulate members, not nonmembers. *Id.* This becomes even more difficult for tribal governments who do not have a reservation because they “may be perceived as ‘less sovereign’ [since] they cannot exercise taxing and regulatory jurisdiction on the same basis as tribal governments who still possess a trust land base.” *Id.*

<sup>26</sup> *Id.* at 242.

*B. The Kingdom of Hawai‘i—Land Tenure*<sup>27</sup>

Ancient Hawai‘i’s land tenure system was in harmony with the environment and the natural world. Unlike “the Western notion of privately held property,” Native Hawaiians viewed land as communal and shared among all members of the community.<sup>28</sup> The relationship between Kānaka Maoli and the ‘āina (land) is best expressed through the ‘ōlelo no‘eau (proverb or wise saying) that reads “*He ali‘i ka ‘āina: he kauwā ke Kānaka*: [meaning] The land is chief; man is its servant.”<sup>29</sup> Kānaka Maoli and their relationship to the ‘āina “is embodied in the modern concept of *malama ‘āina*” (to serve and take care of the land), and “highlights the importance of maintaining a healthy environment to sustain a healthy society.”<sup>30</sup> Thus, the land does not need the Kānaka Maoli to survive, but *kānaka* [human beings] need the land and work it to sustain their families.”<sup>31</sup>

“In ancient times, Hawai‘i was completely self-sufficient and the traditional land tenure system regulated resource management.”<sup>32</sup> Prior to colonialism and the arrival of *haoles*,<sup>33</sup> Hawai‘i depended largely on the “balanced use of the products of the land and sea.”<sup>34</sup> Historically, each island “was divided into ‘*okana* (separate districts) running from the mountains to the sea[;]” each ‘*okana* was then further divided into landholding units called *ahupua‘a*, “which ran in wedge-shaped pieces from the mountains to the sea.”<sup>35</sup> Each *ahupua‘a* was subdivided into ‘*ili* broken up by ‘*ohanas* (extended families) “who cultivated the land.”<sup>36</sup> “‘*Ohana* was the core economic unit in Hawaiian society.”<sup>37</sup>

In the eighteenth and nineteenth centuries, the rise of colonialism drastically altered Native Hawaiians’ relationship to their lands.<sup>38</sup> In 1778, Captain James Cook introduced an entirely foreign belief system

<sup>27</sup> This is just a summary of Ancient Hawai‘i’s land tenure system. For a more in-depth and expansive history, see generally Jocelyn Linnekin, *The Hui Lands of Keanae: Hawaiian Land Tenure and the Great Mahele*, 92 J. OF POLYNESIAN SOC’Y 169, 168–88 (1983).

<sup>28</sup> Melody Kapilialoha MacKenzie, Susan K. Serrano, & Koalani Laura Kaulukukui, *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RES. & ENV’T, Winter 2007, at 37, 37.

<sup>29</sup> Bryant, *supra* note 18, at 231 (citing MARY KAWENA PŪKU‘I, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYING 62 (1983)).

<sup>30</sup> *Id.* at 231–32 (emphasis added).

<sup>31</sup> *Id.* at 232, n.5.

<sup>32</sup> *Id.* at 232 (internal citation omitted).

<sup>33</sup> *Haole* refers to all “white foreigner in Hawaiian.” Trask, *supra* note 1, at 1198 n.6. *Pre-haole* “refers to the period before contact with the white foreign world in 1778.” *Id.* (emphasis in original).

<sup>34</sup> *Id.* at 1198.

<sup>35</sup> *Id.*; see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 4.07(4)(B) (Nell Jessup Newton ed., 2019) (defining *Ahupua‘a* as “self-sufficient land areas . . . controlled by individual chiefs who received their authority from the high chief. Lesser chiefs and land agents (*konohiki*) controlled smaller subdivisions.”) (internal citation omitted).

<sup>36</sup> Trask, *supra* note 1, at 1198.

<sup>37</sup> *Id.*

<sup>38</sup> MacKenzie et al., *supra* note 28, at 37.



into the lives of Native Hawaiians.<sup>39</sup> “This [foreign] system was based on a view of the world that could not coexist with the system of Hawaiians,” and his arrival was nothing short of destructive.<sup>40</sup> Native Hawaiians were dispossessed of their religion, moral order, cultural practices, way of life, and most importantly—their lands and waters.<sup>41</sup> “Non-Natives turned the Islands’ traditional, self-sufficient economy into one geared to international trade.”<sup>42</sup>

By the middle of the nineteenth century, Hawaiian land tenure had transformed from a communal system to a fee simple, private property system, as the haole foreigners continued to buy up the land.<sup>43</sup> “The new land division system, known as the ‘Great Māhele,’ changed the entire structure of Hawaiian society as people became dispossessed of their land.”<sup>44</sup> The Great Māhele “instituted a non-Native system of fee ownership of land, destroying the interdependent, communal nature of land tenure and irrevocably ending the traditional Hawaiian land tenure system.”<sup>45</sup> By the end of the century, haoles owned the majority of land in Hawai‘i—“four acres of land for every one owned by a Native Hawaiian.”<sup>46</sup> “In addition to severely restricting Native Hawaiians’ ability to continue subsistence lifestyles, alienation from land and water resources had a devastating psychological effect, given Kānaka Maoli’s strong spiritual and familial connection to the environment.”<sup>47</sup>

The western view of land changed “the relationship between kānaka, their *ali‘i* [chief], and the land[]” forever.<sup>48</sup> The privatization of land and water rights allowed for haole businesses to quickly create a “monopoly on Hawai‘i’s natural and cultural resources.”<sup>49</sup> For example large plantations “diverted large amounts of water from Native Hawaiian communities,” which forced Kānaka Maoli “out of their homelands and obligated [them] to replace subsistence lifestyles with Western forms of survival.”<sup>50</sup> As business interests grew, haoles from the United States created the “Provisional Government of Hawai‘i” and quickly moved to annex Hawai‘i in order to secure the resources for their own use and profit.<sup>51</sup> What was once a familial and spiritual relationship between the people of Hawai‘i and their land shifted to one of unfamiliar exploitation.

<sup>39</sup> Trask, *supra* note 1, at 1199.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> COHEN’S HANDBOOK, *supra* note 35, § 4.07(4)(b).

<sup>43</sup> Trask, *supra* note 1, at 1200 (noting that “by 1888, three-quarters of all . . . land” in Hawai‘i was owned by haoles).

<sup>44</sup> Jon Matsuoka & Terry Kelly, *The Environmental, Economic, & Social Impacts of Resort Development and Tourism on Native Hawaiians*, 15 J. SOCIO. & SOC. WELFARE, Dec. 1988, at 29, 30.

<sup>45</sup> COHEN’S HANDBOOK, *supra* note 35, § 4.07(4)(b).

<sup>46</sup> Matsuoka & Kelly, *supra* note 44, at 30 (internal citation omitted).

<sup>47</sup> Sproat, *supra* note 6, at 170 (internal citation omitted).

<sup>48</sup> Bryant, *supra* note 18, at 241 (internal citations omitted).

<sup>49</sup> *Id.* (internal citation omitted).

<sup>50</sup> *Id.* (internal citation omitted).

<sup>51</sup> *Id.* at 241–42.

The loss of the Native Hawaiian land tenure system created the call for justice, both in the context of self-determination and environmental justice.

### III. ENVIRONMENTAL JUSTICE AS APPLIED TO KĀNAKA MAOLI COMMUNITIES

The following quote summarizes this next Part nicely:

“[Racial c]ommunities are not all created equal.” Yet, the established environmental justice framework tends to treat racial minorities as interchangeable and to assume for all communities of color that health and distribution of environmental burdens are main concerns. For some racialized communities, however, environmental justice is not only, or even primarily, about immediate health concerns or burden distribution. Rather, for them, and particularly for some indigenous peoples, environmental justice is mainly about cultural and economic self-determination and belief systems that connect their history, spirituality, and livelihood to the natural environment.<sup>52</sup>

According to the U.S. Environmental Protection Agency (EPA), “environmental justice” is “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>53</sup> There are four key characteristic of environmental justice:<sup>54</sup>

1. The first key concept centers on “improving [the] quality of life [for people of color] by making their communities safe from toxic chemicals, without sacrificing resources for future generations.”<sup>55</sup>
2. Second, the environmental justice framework focuses on the “disproportionate distribution of hazardous facilities and on the re-siting of those facilities.” This concept tends to focus on the physical location and relocation of polluting facilities, and not on the social and cultural effects on underrepresented communities.<sup>56</sup>
3. Third, the framework seeks to ensure that communities of color have equal access to and representation in the administration of environmental laws and policies. Environmental justice seeks to “level the playing field” with regard to environmental issues by opening communications between environmental and underrepresented groups

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<sup>52</sup> Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 311 (2001) (internal citations omitted).

<sup>53</sup> *Environmental Justice*, U.S. ENV'T. PROT. AGENCY (Mar. 29, 2023), <https://perma.cc/X26E-5LGD>.

<sup>54</sup> Bryant, *supra* note 18, at 235.

<sup>55</sup> *Id.* at 235 (emphasis in original) (internal citation omitted).

<sup>56</sup> *Id.* at 236 (internal citation omitted).

in order to improve access to legislative, administrative, and judicial forums.<sup>57</sup>

4. Finally, the environmental justice framework emphasizes a “community-based movement to bring pressure on the person or agency with decision-making authority.”<sup>58</sup>

The environmental justice framework above is meant to address and remedy “environmental racism,”<sup>59</sup> however, it is not always applicable to Indigenous groups like Native Hawaiians, due to their “unique historical, social, and cultural landscapes,”<sup>60</sup> at least as applied in the ordinary sense. The general environmental justice framework “undercuts environmental justice struggles by racial and indigenous communities because it tends to foster misassumptions about race, culture, sovereignty, and the importance of distributive justice.”<sup>61</sup> One “misassumption is that for all racialized groups in all situations, a hazard-free physical environment is their main, if not only, concern.”<sup>62</sup> Racial and Indigenous communities, however, “have pressing needs and long-range goals beyond the re-siting of polluting facilities.”<sup>63</sup> Additionally, the framework wrongly assumes that all racial and Indigenous communities are the same, and thus have the same needs and goals.<sup>64</sup>

While effective, the [environmental justice] framework often fails to comprehend complex issues of indigenous peoples’ spiritual, social, and cultural connections to the land and natural environment. It also sometimes disregards the history of Western colonization and indigenous groups’ ongoing attempts to achieve cultural and economic self-determination. For example, “while some might describe the siting of a waste disposal plan near an indigenous American community as environmental racism, that community might say that the wrong is not racial discrimination or unequal treatment; it is the denial of group sovereignty – the control over land and resources for the cultural and spiritual well-being of a people.” For many indigenous peoples, environmental justice is thus largely about cultural and

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<sup>57</sup> *Id.* (internal citation omitted).

<sup>58</sup> *Id.* (citation omitted).

<sup>59</sup> “Environmental racism is described as the ‘nationwide phenomenon’ that occurs when ‘any policy, practice, or directive . . . differentially impacts or disadvantages [whether intended or unintended] individuals, groups, or communities based on race or color.’” Yamamoto & Lyman, *supra* note 52, at 315–16 (alteration in original) (internal citations omitted).

<sup>60</sup> Bryant, *supra* note 18, at 236.

<sup>61</sup> Yamamoto & Lyman, *supra* note 52, at 320.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 321.

<sup>64</sup> *Id.* at 323 (“In general, it assumes that in terms of cultural needs and political-legal remedies, one size fits all.”).

economic self-determination as well as about belief systems that connect their history, spirituality, and livelihood to the natural environment.<sup>65</sup>

Misassumptions like the ones above, erroneously gloss over the values most important to environmental justice communities.<sup>66</sup> For Kānaka Maoli, environmental justice is not just about removing hazard from their community, but about rebuilding their “connections to the environment, cultural resurrection, and political nationalism” and preventing future degradation and discrimination to these interests.<sup>67</sup> “Thus, rather than taking a ‘one size fits all’ approach” the environmental justice framework must be reworked so that it can be tailored to each community’s needs and goals.<sup>68</sup> The framework must be able to account for Indigenous beliefs and connections to resources, because “any such loss [of ancestral connections] will result in the loss of culture.”<sup>69</sup>

While Hawai‘i’s current process for assessing the cultural impacts of proposed activities on cultural resources at least acknowledges the unique circumstances of Hawai‘i’s history and spiritual relationship with the land, it is still rooted in Western concepts and systems. Thus, reworking established Western frameworks and being mindful of each community’s specific goals related to their cultural, historical, and political experiences, are required in order to best address environmental issues.<sup>70</sup> Given the shift from a communal land tenure system, as Native Hawaiians live with this “current continental value and behavior system,” the “island ethic of aloha, attunement, and exchange” is replaced with “institutional ethics through . . . Environmental Impact Assessments” under NEPA.<sup>71</sup> Native Hawaiians’ relationship with their islands thus has been reduced “to the level of recreation” and economic gain.<sup>72</sup>

#### IV. CURRENT ENVIRONMENTAL STATUTORY STRUCTURE (FEDERAL)

##### *A. The National Environmental Policy Act (NEPA)*

NEPA is “considered to be one of the most important pieces of environmental legislation ever adopted.”<sup>73</sup> Congress enacted NEPA as a

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<sup>65</sup> MacKenzie et al., *supra* note 28, at 37–38 (internal citations omitted).

<sup>66</sup> Bryant, *supra* note 18, at 237.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Sproat, *supra* note 6, at 164.

<sup>70</sup> *Id.*

<sup>71</sup> PUALANI KANAKA’OLE KANAHELE ET AL., KĪHO’IHO’I KĀNĀWAI: RESTORING KĀNĀWAI FOR ISLAND STEWARDSHIP 5 (n.d.), <https://perma.cc/5P7Q-RD7N>.

<sup>72</sup> *Id.*

<sup>73</sup> Peter S. Knapman, Comment, *A Suggested Framework for Judicial Review of Challenges to the Adequacy of an Environmental Impact Statement Prepared Under the Hawaii Environmental Policy Act*, 18 U. HAW. L. REV. 719, 719–20 (1996) (internal citation omitted).

way to ensure “[f]ederal agencies [] assess the environmental effects of proposed federal actions prior to making decisions.”<sup>74</sup> NEPA compels federal agencies to identify and evaluate the impacts of “major Federal actions significantly affecting the quality of the human environment”<sup>75</sup> by preparing an environmental assessment (EA) or an environmental impact statement (EIS).<sup>76</sup> An EIS is a lengthy public analytical document that outlines the environmental effects of an action before the action is undertaken.<sup>77</sup> The EIS, like NEPA as a whole, imposes no substantive requirements on agency decision-making—only *procedural* requirements.<sup>78</sup>

Furthermore, NEPA “requires agencies ‘to take a hard look at environmental consequences’ of their proposed actions, consider alternatives, consult with stakeholders, and publicly disseminate their analyses and proposals before taking final action.”<sup>79</sup> Additionally, “[w]hile NEPA prescribes the process for environmental review, it does not ‘mandate’ that federal agencies alter their proposed actions because of the review.”<sup>80</sup> In other words, NEPA does not allow environmental justice advocates to stop a project because of harmful environmental impacts. It only assists advocates with delaying projects by forcing agencies to think through their permit decisions entirely.

Currently, NEPA does not require agencies to consider environmental justice. However, some agencies do consider it as part of their NEPA processes as a result of Executive Order (EO) 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, issued in 1994.<sup>81</sup> EO 12898 encourages all federal agencies to consider environmental justice “‘by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations,’ including tribal

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<sup>74</sup> *Welcome*, NAT’L ENV’T POL’Y ACT, <https://perma.cc/LX53-XE3X> (last visited Apr. 16, 2023).

<sup>75</sup> NEPA, 42 U.S.C. § 4332(C) (2018).

<sup>76</sup> Kurt E. Dongoske, Theresa Pasqual, & Thomas F. King, *The National Environmental Policy Act (NEPA) and the Silencing of Native American Worldviews*, 17 ENV’T PRAC. 36, 36 (2015).

<sup>77</sup> *Id.* at 37; Tiffany Middleton, *What is an Environmental Impact Statement?*, AM. BAR ASS’N. (Mar. 2, 2021), <https://perma.cc/PZ4D-SJX6> (explaining what needs to be in an EIS, and the process of creating one); COUNCIL ON ENV’T QUALITY EXEC OFF. OF THE PRESIDENT, LENGTH OF ENVIRONMENTAL IMPACT STATEMENTS (2013–2018) 1, 4 (2020), <https://perma.cc/FL3V-EVQU> (showing how CEQ found that the average length of an EIS was over 660 pages).

<sup>78</sup> Dongoske et al., *supra* note 76, at 37 (emphasis added); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349–50 (1989) (explaining that NEPA, through procedures such as its EIS requirement, “does not mandate particular results, but simply provides the necessary process.”).

<sup>79</sup> NINA M. HART & LINDA TSANG, CONG. RSCH. SERV., LSB10590, ADDRESSING ENVIRONMENTAL JUSTICE THROUGH NEPA 2 (2021).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; Exec. Order No. 12898, 60 Fed. Reg. 27 (Feb. 9, 1995).

populations.”<sup>82</sup> EO 12898 is meant to emphasize the importance of environmental justice in NEPA by calling on agencies to consider the “significant adverse environmental effects” on low-income and communities of color.<sup>83</sup>

In light of EO 12898, in December 1997, the White House Council on Environmental Quality (CEQ) issued Environmental Justice: Guidance Under the National Environmental Policy Act to provide guidance on how to implement environmental justice under NEPA.<sup>84</sup> The guidance provides six principles on how to determine if there will be a disproportionately high impact on low-income and communities of color.<sup>85</sup>

CEQ’s guiding principles are:

1. “Consider the composition of the affected area to determine whether low-income, minority, or tribal populations are present and whether there may be disproportionately high and adverse human health or environmental effects on these populations[;]
2. Consider relevant public health and industry data concerning the potential for multiple exposures or cumulative exposure to human health or environmental hazards in the affected population, as well as historical patterns of exposure to environmental hazards[;]
3. Recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed action[;]
4. Develop effective public participation strategies[;]
5. Assure meaningful community representation in the process, beginning at the earliest possible time[;]
6. Seek tribal representation in the process.”<sup>86</sup>

Thus, environmental justice has become an important lens through which environmental harms and conditions are viewed, especially in relation to Indigenous lands.<sup>87</sup> “In battles over environmental degradation, land rights, sacred sites, food security, climate change, local ecological knowledge and more, indigenous groups have embraced diverse notions of environmental justice.”<sup>88</sup> However, “[t]he legal system finds

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<sup>82</sup> *Environmental Justice and National Environmental Policy Act*, U.S. ENV’T PROT. AGENCY (Mar. 27, 2023) [hereinafter *EJ & NEPA*], <https://perma.cc/Y7XL-9MVX>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; COUNCIL ON ENV’T QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 1 (1997), <https://perma.cc/M2UA-287A>.

<sup>85</sup> *EJ & NEPA*, *supra* note 82.

<sup>86</sup> *Id.*

<sup>87</sup> David Schlosberg & David Carruthers, *Indigenous Struggles, Environmental Justice, and Community Capabilities*, 10 GLOB. ENV’T POL., Nov. 2010, at 12, 12.

<sup>88</sup> *Id.*

itself at a crossroads:” while there is acknowledgement that environmental justice concerns need to be addressed, there are no proper mechanisms or remedies in effect to ensure they are adequately considered in all federal actions.<sup>89</sup> While attention towards environmental justice is growing, environmental justice “plaintiffs still lack means to take direct action in the courts.”<sup>90</sup> Currently, the main remedy available to environmental justice plaintiffs is only through challenging the agency’s final decision under NEPA.<sup>91</sup> Although NEPA is the main way to bring an environmental justice claim, there are many shortcomings, leaving plaintiffs with little success.

Thus far, courts have played a very limited role in reviewing environmental justice claims under NEPA.<sup>92</sup> This limited role is due to the fact that EO 12898 “does not create enforceable rights to challenge federal agency . . . in court.”<sup>93</sup> This lack of enforcement has been confirmed by one district court and six federal courts of appeals.<sup>94</sup> Thus, the ability to seek judicial review on the basis of lack of consideration of environmental justice concerns under EO 12898 has been foreclosed to plaintiffs.<sup>95</sup> However, because many agencies have started to include environmental justice analyses in their NEPA reviews, these analyses are available for judicial review.<sup>96</sup> Although EO 12898 does not create a cause of action on its own, courts have allowed review of environmental justice analyses when they are included in their final NEPA documents.<sup>97</sup> Thus, these NEPA analyses are subject to “arbitrary and capricious’ review under the Administrative Procedure Act (APA).”<sup>98</sup> However, like most arbitrary and capricious reviews under the APA, it does not require agencies to reach certain decisions, only that they have performed a “hard look” at environmental justice concerns.<sup>99</sup>

Environmental justice plaintiffs that seek redress or remedies of “citing and permitting processes that will clearly result in disproportionate burdens” have started to use NEPA as a way to assert environmental justice claims in court.<sup>100</sup> However, this means that

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<sup>89</sup> Lauren Godshall & Devin Lowell, *Environmental Justice in Judicial Opinions*, AM. BAR ASS’N (Oct. 28, 2022), <https://perma.cc/6HQA-PSUF>.

<sup>90</sup> *Id.*; but see Clifford J. Villa, “No Box to be Checked”: *Environmental Justice in Modern Legal Practice*, 30 N.Y.U. ENV’T L.J. 157, 163 (2022) (arguing that environmental justice has become a legal requirement, given that many courts have begun to compel agency consideration for environmental justice, consistent with the requirements of EO 12898).

<sup>91</sup> Godshall & Lowell, *supra* note 89.

<sup>92</sup> HART & TSANG, *supra* note 79, at 4.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (citing cases in the U.S. Court of Appeals for the First, Fifth, Sixth, Eighth, Ninth, and D.C. Circuits and the Eastern District of Virginia case, *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582 (E.D. Va. 1999)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

<sup>99</sup> HART & TSANG, *supra* note 79, at 4.

<sup>100</sup> Godshall & Lowell, *supra* note 89.

environmental justice claims can only be procedural (“did the agency do a good enough job reviewing the environmental justice concerns before approving the project?”) and cannot be substantive (“did the environmental justice analysis prove the facility could not be lawfully cited [*sic*] in this neighborhood?”).<sup>101</sup> As a result, courts only review environmental justice “as a *process*, not as a *result*”—did the agency take a hard look at environmental justice issues?<sup>102</sup>

Some have argued that “[a]t the core of NEPA documents is the dominant Western worldview of scientific materialism.”<sup>103</sup> By relying only on scientific materialism and evidence, NEPA reviews fail to consider Indigenous knowledge, beliefs, or practices.<sup>104</sup> As mentioned earlier, Native Hawaiians perceive the environment through a familial lens that “embodies a sense of stewardship, manifest through a spiritual . . . connectedness to the natural world.”<sup>105</sup> As a result, Native Hawaiians’ perception and relations with the environment, are at odds with scientific determinations and often left out of environmental impact assessments.<sup>106</sup>

The growing Indigenous environmental justice movement has attempted to fight this disconnect by highlighting the growing threats to their sacred lands and significant sites “by organizing, building political and technical capacity, and working to empower local native communities.”<sup>107</sup> Thus Indigenous activists have argued that “the survival of native nations is directly linked to their sustainable interaction with the land, and with the practices, ceremonies, and beliefs tied to that place.”<sup>108</sup> These activists are attempting to strengthen their judicial challenges by connecting their struggle for “rights and recognitions” to their ability to protect vital lands and resources.<sup>109</sup> Caselaw from the United States illustrates the struggles for environmental justice for indigenous groups under NEPA. The two cases, explored below, in particular showcase the cultural and spiritual relationship that indigenous groups have with the natural resources at issue, and how NEPA deals (or does not deal) with these injustices.

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (emphasis in original); see, e.g., *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (holding that the Federal Energy Regulatory Commission was not obligated to choose the option that most benefited environmental justice communities, so long as they examined potential options).

<sup>103</sup> Dongoske et al., *supra* note 76, at 36.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 36, 38–39.

<sup>106</sup> *Id.* at 36.

<sup>107</sup> Schlosberg & Carruthers, *supra* note 87, at 19.

<sup>108</sup> *Id.* (quoting environmentalist and economist Winona LaDuke).

<sup>109</sup> *Id.*



*B. Caselaw Highlighting Shortcomings Under NEPA**1. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*<sup>110</sup>

This series of cases involves years of legal battles between the Sioux Nation and the U.S. Army Corps of Engineers (U.S. Army Corps). The dispute arose on March 27, 2017 when the Federal District Court of Columbia was notified that the Dakota Access Pipeline was flowing oil “into its pipeline beneath the Missouri River at Lake Oahe in North Dakota, thereby becoming one of more than a dozen pipelines operating beneath the river in North Dakota.”<sup>111</sup> The pipeline became “fully operational” later that year—thus becoming part of the “more than 190,000 miles of liquid petroleum pipelines operating in the continental [United States].”<sup>112</sup>

Lake Oahe is the result of the U.S. Army Corps’ decision to flood acres of Sioux lands in order to construct “the Oahe Dam on the Missouri River, provid[ing] several successor tribes of the Great Sioux Nation with water for drinking, industry, and sacred cultural practices.”<sup>113</sup> “Lake Oahe holds special significance for the Standing Rock and Cheyenne River Sioux Tribes.”<sup>114</sup> Today, along with the sacred and spiritual meaning of the lake, both Tribes rely on it as their main source of water for their residents and community buildings, and agricultural practices.<sup>115</sup>

Underneath Lake Oahe’s waters, the Dakota Access Pipeline (DAPL) transports crude oil through North Dakota to Illinois.<sup>116</sup> Pursuant to the Mineral Leasing Act,<sup>117</sup> “the pipeline could not traverse the federally owned land at the Oahe crossing site without an easement from the Corps.”<sup>118</sup> The Tribes sued, claiming that the U.S. Army Corps had violated NEPA by issuing the required easement for the pipeline without first preparing an EIS and considering the substantial harms the Tribes would face due to this action.<sup>119</sup> While the Court of Appeals in this case agreed with the district court that the U.S. Army Corps acted unlawfully, they disagreed with the district court’s order to the extent it stated that the pipeline be “shut down and emptied of oil.”<sup>120</sup> This case illustrates

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<sup>110</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock I)*, 255 F. Supp. 3d 101 (D.D.C. 2017); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock II)*, 985 F.3d 1032 (D.C. Cir. 2021).

<sup>111</sup> Daryl Owen, *The Untold Story of the Dakota Access Pipeline: How Politics Almost Undermined the Rule of Law*, 6 LA. ST. U. J. ENERGY L. & RES. 347, 347 (2018).

<sup>112</sup> *Id.*

<sup>113</sup> *Standing Rock II*, 985 F.3d at 1039.

<sup>114</sup> *Standing Rock I*, 255 F. Supp. 3d at 114.

<sup>115</sup> *Id.*

<sup>116</sup> *Standing Rock II*, 985 F.3d at 1039.

<sup>117</sup> 30 U.S.C. §§ 181–287 (2018).

<sup>118</sup> *Standing Rock II*, 985 F.3d at 1039; 30 U.S.C. § 185(a)–(b).

<sup>119</sup> *Standing Rock II*, 985 F.3d at 1039.

<sup>120</sup> *Id.*

that the remedies available to environmental justice and Indigenous plaintiffs are ineffective when an agency violates NEPA.

The Standing Rock Sioux Tribe (Standing Rock), a federally recognized successor of the Great Sioux Nation, objected to the pipeline because it would cross their ancestral lands.<sup>121</sup> The ancestral lands, spread across North and South Dakota, have shrunk significantly due to western expansion and invasion.<sup>122</sup>

In 2014, the DAPL applied to the U.S. Army Corps “for approval of over 200 river crossings, permission to lay pipe beneath seven locations used by the Corps for navigation and flood control . . . and a real estate easement . . . to allow the pipe to traverse beneath Corps-owned flood control lands at Lake Oahe.”<sup>123</sup> The U.S. Army Corps published their draft EA for comments in 2015; the draft EA considered the environmental effects of DAPL, including the effects to Lake Oahe.<sup>124</sup> The draft EA stated that “construction of the proposed Project [was] not expected to have any significant direct, indirect, or cumulative impacts on the environment.”<sup>125</sup> The Corps finalized its EA on July 25, 2016, including a Finding of No Significant Impact stating that no historic sites were unacceptably impacted.<sup>126</sup>

Finally, in February 2017, the U.S. Army Corps released a memorandum which concluded that the 2016 EA “satisf[ied] the NEPA requirements for evaluating the easement required for the DAPL to cross Corps-managed federal lands at Lake Oahe.”<sup>127</sup> The U.S. Army Corps concluded, after reviewing all comments received, that the final EA was “sufficient and did not need further supplementation.”<sup>128</sup>

In response to the EA, Standing Rock sued, claiming that the U.S. Army Corps had violated NEPA by failing to create an EIS for Lake Oahe and the Mississippi River.<sup>129</sup> In response, Judge Boasberg issued the third opinion in the series of cases.<sup>130</sup> Judge Boasberg reviewed the procedures and requirements of NEPA and noted that it did not mandate any particular outcome, just “that the statute merely prohibits uninformed—rather than unwise—agency action.”<sup>131</sup> This meant that an agency could “approve a project with adverse environmental consequences if it

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<sup>121</sup> Owen, *supra* note 111, at 351.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 350.

<sup>124</sup> *Id.* at 350–51.

<sup>125</sup> *Id.* at 351 (internal citation omitted) (revision in original).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 364 (internal citation omitted).

<sup>128</sup> *Id.* at 364–65; Memorandum on Dakota Access Technical and Legal Review and Recommendation to the Department of the Army from Lt. Gen. Todd T. Semonite 11 (Feb. 3, 2017).

<sup>129</sup> *Id.* at 367.

<sup>130</sup> *Standing Rock I*, 255 F. Supp. 3d 101, 111 (D.D.C. 2017) (“Now that the Court has rejected [the two previous substantial claims], Standing Rock and Cheyenne River here take their third shot, this time zeroing in DAPL’s environmental impact.”).

<sup>131</sup> *Id.* at 113 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193–94 (D.C. Cir. 1991) and *Robertson*, 490 U.S. 332, 351 (1989)).

concludes ‘competing policy values outweigh those costs.’<sup>132</sup> Thus, the U.S. Army Corps’ EA and easement were upheld and they did not need to conduct an EIS.<sup>133</sup> However, the U.S. Army Corps’ record did fail in three areas, one being “the failure to justify its decision under the requirements for environmental justice.”<sup>134</sup> The case was remanded, and the DAPL remained in operation.<sup>135</sup>

In the next case of the series, the U.S. Army Corps’ 2019 analysis was again challenged by the Tribes under NEPA, claiming that they failed to remedy the previous violations.<sup>136</sup> The D.C. District Court concluded that the easement was “highly controversial” due to the many public comments “point[ing] to serious gaps in crucial parts of the Corps’ analysis.”<sup>137</sup> The district court decided to remand the case to the U.S. Army Corps for them to complete an EIS, but decided to reserve the issue of whether there should be an easement.<sup>138</sup> The court ruled that the DAPL should be shut down and emptied of all oil by August 2020.<sup>139</sup> DAPL and the U.S. Army Corps appealed the 2020 decisions.<sup>140</sup>

Finally, with its most recent decision, the Court of Appeals for the District of Columbia held that while the district court did not abuse its discretion in vacating the easement itself, the injunction requiring the pipeline to be shut down was improper.<sup>141</sup> Here, the court unfortunately concluded that it “could not order the pipeline to be shut down without . . . making the findings necessary for injunctive relief.”<sup>142</sup> Since the district court could not make the findings necessary for injunctive relief, it could not order the pipeline to be shut down and emptied of oil.<sup>143</sup>

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<sup>132</sup> *Id.* (citing *Ohio Valley Env’t Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009)).

<sup>133</sup> *Id.* at 147.

<sup>134</sup> *Id.*; Owen, *supra* note 111, at 374.

<sup>135</sup> Owen, *supra* note 111, at 376; *Standing Rock I*, 255 F. Supp. 3d at 139.

<sup>136</sup> See *Standing Rock II*, 985 F.3d 1032, 1042 (D.C. Cir. 2021) (discussing case history).

<sup>137</sup> *Id.* (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’r*, 440 F. Supp. 3d 1, 11 (D.C. Cir. 2020)).

<sup>138</sup> *Id.* (quoting *Standing Rock Sioux Tribe*, 44 F. Supp. 3d at 29–30).

<sup>139</sup> *Id.* (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’r*, 2020 WL 3634426 No. 16 cv-01434 at 2 (D.C. Cir. July 6, 2020)).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1054.

<sup>142</sup> *Id.* In order for a court to determine that an injunction should issue, a plaintiff must satisfy a four-factor test.

A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

<sup>143</sup> *Standing Rock II*, 985 F.3d at 1054.

As of April 2023, the Corps still plans to release its draft EIS by spring 2023.<sup>144</sup> The DAPL, however, is still in operation. As a result of this long, complicated legal process and the court's decisions to keep the pipeline in operation, low water levels in Lake Oahe have created a situation where DAPL's already inadequate emergency plan is not working, increasing the danger to Standing Rock, native wildlife, and to *Unci Maka* (Grandmother Earth).<sup>145</sup> Additionally, the DAPL runs through important cultural and burial sites for Standing Rock and other tribal nations.<sup>146</sup> The Standing Rock Sioux Tribe has already issued statements stating that the project has "demolished an area that contained 'significant Native artifacts and sacred sites'" while constructing the pipeline.<sup>147</sup> A tribal member, Tim Mentz, stated that he surveyed the land and "confirmed multiple graves and specific prayer sites . . . have been taken out entirely."<sup>148</sup>

This case highlights how difficult it can be for Indigenous groups to bring a legal case against agency actions that are detrimental to a culturally significant environment. Here, the Standing Rock Sioux Tribe spent years and years of litigation to try to prevent and halt the Dakota Access Pipeline.<sup>149</sup> With the litigation also came protests and violence.<sup>150</sup> In the end, the court of appeals reversed the order mandating that the pipeline be shut down and emptied of oil, returning the Standing Rock Sioux Tribe to the same position as they were in prior to the litigation.<sup>151</sup> Although agencies violate the statutory provisions of NEPA, all they must do is "fix the error" in order to comply with NEPA.<sup>152</sup> As mentioned earlier, this does not mean that they need to stop their actions or projects because of the harmful effects on the environment or towards the communities that live around the proposed action; rather, they simply must acknowledge (i.e., take a "hard look" at) these harmful effects.<sup>153</sup> The fact that NEPA is a procedural, not substantive, federal statute is its biggest shortcoming.

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<sup>144</sup> See *Recent Project Update*, U.S. ARMY CORPS ENG'RS, <https://perma.cc/24VF-MAUY> (last visited Apr. 18, 2023) (stating the draft EIS for the DAPL is expected to be released in spring 2023).

<sup>145</sup> *The Next Stop to End DAPL*, STANDING ROCK SIOUX TRIBE, <https://perma.cc/FK9A-T5J6> (last visited Apr. 18, 2023) (displaying a statement from Standing Rock Chairwoman, Janet Alkire).

<sup>146</sup> Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), <https://perma.cc/L2YW-8HXP>.

<sup>147</sup> *Id.* (internal quotation omitted) (discussing the timeline of the litigation and statements made regarding the DAPL).

<sup>148</sup> *Id.*

<sup>149</sup> See discussion *supra* Part IV.B.1.

<sup>150</sup> See Hersher, *supra* note 146 (discussing clashes between demonstrators and law enforcement).

<sup>151</sup> *Standing Rock II*, 985 F.3d 1032, 1039 (D.C. Cir. 2021).

<sup>152</sup> See *supra* notes 119–120 and accompanying text.

<sup>153</sup> HART & TSANG, *supra* note 79, at 1.

2. Navajo Nation v. U.S. Forest Service<sup>154</sup>

Additionally, a Ninth Circuit decision from 2008 demonstrates how agencies can shortcut even the procedural requirements of NEPA and still survive judicial review. *Navajo Nation* illustrates the “battle for land, the preservation of natural processes, and the necessity of cultural practices for the very functioning and reproduction of native nations.”<sup>155</sup> Furthermore, this case shows that agencies receive substantial deference under the APA, and that NEPA’s “hard look” requirement equates to an acknowledgment rather than an in-depth analysis of environmental effects.

Plaintiffs, the Navajo Nation and Hopi Tribe (Tribes), “consider the San Francisco Peaks in Northern Arizona to be sacred in their religion,”<sup>156</sup> and believe that the Peaks are a living entity. The Peaks hold much significance to these Tribes for a number of reasons. First, the plants and soil found on the Peaks are used by the Navajo nation for medicine bundles, and these bundles are used not only for medicinal purposes, but also as a way of “communicating healing prayers to the mountain.”<sup>157</sup> Second, the Peaks are the home of the *Katsina* spirits that are “responsible for bringing rain to the nearby Hopi villages and crops.”<sup>158</sup> According to the Hopi tribe, if these spirits are not treated with respect, then the rain will not come.<sup>159</sup> Finally, the Peaks are significant for the Hualapai because they are the “site of their creation story.”<sup>160</sup> As often is the case for many sacred sites around the world, the Peaks today are also a popular recreation area.<sup>161</sup> Atop the peaks in the Coconino National Forest resides the privately-owned Arizona Snowbowl.<sup>162</sup> The main issue of this case involves a proposal that the Snowbowl made to the Forest Service in 2002 to use reclaimed sewage water to create artificial snow. The purpose of this proposal was to create a more “predictable and profitable ski season.”<sup>163</sup> Of course, this was a very controversial proposal, as using reclaimed sewage water to create snow could adversely impact the environment and in turn, impact the practices of traditional religious and cultural customs mentioned above. More importantly, this called into question the mere recognition of the value of these traditions for the Tribes. By approving this proposal, it would be as if the significance of the Tribes and their practices are lesser than profits, ultimately diminishing the Tribes’ culture altogether. As a result, the Tribes sued, claiming that

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<sup>154</sup> 535 F.3d 1058 (9th Cir. 2008).

<sup>155</sup> Schlosberg & Carruthers, *supra* note 87, at 19.

<sup>156</sup> *Navajo Nation*, 535 F.3d at 1063 (internal citation omitted).

<sup>157</sup> Schlosberg & Carruthers, *supra* note 87, at 20.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

the use of recycled water would “spiritually contaminate the entire mountain and devalue their religious exercises.”<sup>164</sup>

The Forest Service conducted a review of the proposal to determine if, and to what extent, the use of recycled wastewater by Snowbowl would impact the Tribes.<sup>165</sup> A Memorandum of Agreement in December of 2004 was issued, detailing what the Forest Service committed to regarding this new proposal.<sup>166</sup> First, the Forest Service agreed to “continue to allow the tribes access to the Peaks for cultural and religious purposes.”<sup>167</sup> Second, the Forest Service said that they would “work with the tribes to . . . inspect the conditions of the religious and cultural sites on the Peaks,” as well as “ensure that the tribes’ religious activities are uninterrupted.”<sup>168</sup> A year later, the Snowbowl’s proposal to use recycled wastewater to make artificial snow was approved, and the Forest Service issued a Final EIS (FEIS) and a Record of Decision.<sup>169</sup> Unsatisfied with this result, the Tribes appealed this decision to a Forest Service administrative appeal board, where the approval of the proposal was affirmed, and a final administrative decision was issued.<sup>170</sup>

After their unsuccessful appeal, the Tribes filed a suit claiming that the Forest Service’s “authorization of the use of recycled wastewater on the Snowbowl violated,” among other statutes, NEPA.<sup>171</sup> The district court initially found for the Forest Service on all NEPA claims.<sup>172</sup> The Tribes appealed, and a three-judge panel affirmed the finding for the Forest Service on five NEPA claims: two of which are relevant to this Comment:

(1) the Final Environmental Impact Statement (FEIS) failed to consider a reasonable range of alternatives to the use of recycled wastewater; . . .

(2) the FEIS failed [to] adequately [] consider the social and cultural impacts of the Snowbowl upgrades on the Hopi people.<sup>173</sup>

The Tribes argued that the district court erred in finding for the Forest Service on their NEPA claims.<sup>174</sup> Despite the plaintiffs’ legitimate claims, NEPA has a very low threshold that agencies need to meet for compliance with NEPA, and agencies receive substantial deference when courts review their NEPA documents. As mentioned earlier, NEPA does

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<sup>164</sup> *Navajo Nation*, 535 F.3d 1058, 1063 (9th Cir. 2008).

<sup>165</sup> *Id.* at 1065–66.

<sup>166</sup> *Id.* at 1066.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1067, 1079 (citing *Navajo Nation v. U.S. Forest Service (Navajo Nation I)*, 479 F.3d 1024, 1054–59 (9th Cir. 2007)).

<sup>174</sup> *Id.* at 1079.

not mandate particular results, it simply ensures that federal agencies take a “hard look” at the environmental consequences of their actions.<sup>175</sup> Courts often employ a “rule of reason” standard when considering if NEPA documents contain “a reasonably thorough discussion of the significant aspects of the probable environmental consequences.”<sup>176</sup> When reviewing NEPA documents, courts cannot substitute their own judgment for the agency’s; instead the court must uphold the agency’s decisions as long as they have shown that they “considered the relevant factors and articulated a rational connection between the facts found and the choice made.”<sup>177</sup>

The Tribes argued that the Forest Service failed to consider an adequate range of alternatives when drafting its FIES.<sup>178</sup> The Tribes argued that other documents—the pre-scoping memoranda in particular—showed that the Forest Service purposefully took actions to foreclose alternatives; additionally, the Tribes pointed to the scripted “Key Messages” in the Forest Services’ 2002 “Tribal Consultation Plan” for support:

1. We [the Forest Service] think it’s a good idea, and we already know you [tribes] don’t approve of it, but Snowbowl is there & isn’t going away.
- .....
6. Upgrade can’t be done without snowmaking
7. Recycled water IS clean, disease-free.
8. How can YOU help U.S. make it work???<sup>179</sup>

The court, however, stated that despite what the scripted responses above suggested, there was enough in the record to show that the Forest Service considered all alternatives before foreclosing them.<sup>180</sup> Even though NEPA does not require a particular outcome, federal agencies, like the Forest Service, are allowed to go into the process with a particular outcome in mind.<sup>181</sup>

The Tribes also claimed that the “FEIS inadequately analyze[d] the social and cultural impacts of the proposed action.”<sup>182</sup> While NEPA

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<sup>175</sup> HART & TSANG, *supra* note 79, at 1.

<sup>176</sup> *Navajo Nation I*, 479 F.3d at 1050, *on reh’g en banc*, 535 F.3d 1058, 1110 (9th Cir. 2008) (*Navajo Nation II*) (internal citation omitted).

<sup>177</sup> *Id.* (quoting *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953–54 (9th Cir. 2003) (internal citation omitted)).

<sup>178</sup> *Navajo Nation II*, 535 F.3d at 1079 (arguing that the Forest Service failed to meet their statutory requirement because they failed to consider health impacts and purposely foreclosed other alternatives).

<sup>179</sup> *Navajo Nation I*, 479 F.3d at 1055 (emphasis in original).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1058–59.

requires all federal agencies prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment,” it defines “human environment” broadly and allows agencies to consider other factors when they are “interrelated.”<sup>183</sup> Such “effects” as “aesthetic, historic, cultural, economic, social, or health” should be discussed—“whether direct, indirect, or cumulative[]”—when they are present.<sup>184</sup>

Due to this low “rule of reason standard” used by the courts when reviewing NEPA documents, the court concluded that the FEIS did not violate NEPA.<sup>185</sup> The court determined that the FEIS adequately addressed the human environment through “lengthy discussions of the relationships of the Hopi and others to the San Francisco Peaks and the impact of the proposed action on those relationships.”<sup>186</sup> Despite these “lengthy discussions,” the FEIS merely acknowledged that “it is difficult to be precise in the analysis of the impact of the proposed undertaking on the cultural and religious systems on the Peaks, as much of the information stems from oral histories and a deep, underlying belief system of the indigenous peoples involved.”<sup>187</sup>

Nevertheless, despite the FEIS’s gaps, the court believed that it clearly showed that the Forest Service extensively reviewed the issue, “drawing from existing literature and extensive consultation with the affected tribes.”<sup>188</sup> The FEIS went in-depth describing the “religious beliefs and practices of the Hopi and the Navajo and the ‘irretrievable impact’ the proposal would likely have on those beliefs and practices.”<sup>189</sup> Since the Forest Service acknowledged all of the detrimental impacts this new proposal would have on the Tribes’ spiritual and cultural beliefs and practices, the Forest Service satisfied its NEPA obligations and thus, the FEIS was adequate.<sup>190</sup>

This case is a clear example of how strong agency deference allows for the survival of judicial review, despite agencies shortcutting NEPA’s procedural requirements. It is hard to imagine where indigenous groups such as the Navajo and Hopi tribes in this case can go from here when the main remedy in these sorts of cases remains to be federal challenges

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<sup>183</sup> *Id.* at 1059 (“The regulations define ‘human environment’ broadly to ‘include the natural and physical environment and the relationship of people with that environment’”); 42 U.S.C. § 4332(2)(C) (2018) (defining what can be considered in an EIS); 40 C.F.R. § 1508.14 (2020) (stating that human environment includes such impacts as “economic or social and natural or physical environmental effects [when they] are interrelated” to the EIS).

<sup>184</sup> *Navajo Nation I*, 479 F.3d at 1059; 40 C.F.R. § 1508.8.

<sup>185</sup> *Navajo Nation I*, 479 F.3d at 1050, 1059; *see* *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (noting that the rule of reason standard is akin to the arbitrary and capricious standard of review under the APA and “consists only of ensuring that the agency has taken a ‘hard look’ at the environmental effects of the proposed action.”).

<sup>186</sup> *Navajo Nation I*, 479 F.3d at 1059.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*



under NEPA.”<sup>191</sup> In the U.S. Constitution, there is no right to a healthy environment, so federal statutes like NEPA are the only legal recourse that citizens can rely upon to try to protect natural resources. In short, courts have been increasingly recognizing the importance of environmental justice but there remains limited ways for plaintiffs to pursue substantial protections “without any direct causes of action available” to them.<sup>192</sup>

So long as agencies state the harmful effects that their actions will have on the natural resources that are culturally and religiously significant to affected Indigenous groups, they satisfy NEPA’s procedural requirements.<sup>193</sup> Therefore, there is no other course of action left for these affected Indigenous groups. What is even more frustrating is that even if a court determines that an agency did not meet its low burden of merely mentioning the harmful effects of their actions on the cultures of indigenous groups, all an agency needs is to re-do its NEPA documents and simply state these harmful effects without having to change the outcome.<sup>194</sup>

While the options left to Indigenous groups under NEPA are slim, there is the possibility to act at the state level, albeit through a very similar NEPA process. The fact that some states, including Hawai‘i, have a constitutional right to a healthy environment is extremely beneficial in order to move away from a procedural environmental framework to one that is substantive and rooted in Indigenous traditions and jurisprudence, like the rights of nature concept.<sup>195</sup> The shift would be significant: nature moves from being an object of the law to being a subject of the law and a holder of its own rights. The development of the right to a healthy environment in the Hawai‘i state constitution with Hawai‘i’s version of NEPA provides the foundation needed to make this shift, as discussed below. Given the scope of this Comment and the fact that HEPA is a mini version of NEPA, this next Part focuses on the history of Hawai‘i’s constitutional right to a healthy environment in relation to HEPA, rather than the large amount of HEPA caselaw that explains the HEPA process itself.

## V. AT THE STATE LEVEL

### A. *The Hawai‘i Environmental Policy Act (HEPA)*<sup>196</sup>

After NEPA’s enactment, “little NEPAs” were adopted by many states. Little NEPAs are essentially the state equivalent to NEPA, as they

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<sup>191</sup> Godshall & Lowell, *supra* note 89.

<sup>192</sup> *Id.*

<sup>193</sup> See discussion *supra* Part IV.A.

<sup>194</sup> See discussion *supra* Part IV.A.

<sup>195</sup> See discussion *infra* Part VI–V.

<sup>196</sup> The original bill was called “A Bill for an Act Relating to Environmental Impact Statements.” 1974 Haw. Sess. Laws 706. And was originally coded as part of the

“mandate similar environmental reviews for proposed actions permitted or funded by state and local governments.”<sup>197</sup> However, there are a few differences. The main difference is that some states have substantive as well as procedural provisions, not just procedural requirements.<sup>198</sup> Unfortunately, HEPA is a little NEPA that consists of *procedural* provisions only.<sup>199</sup> Additionally, the processes amongst little NEPAs vary by state.

HEPA, adopted in 1974, was passed to “establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.”<sup>200</sup> The same year HEPA was passed, the Hawai‘i Legislature also passed the Hawai‘i Revised Statutes Chapter 344—creating “a broad statement of policy regarding environmental issues.”<sup>201</sup> HEPA requires the disclosure of a proposed action’s potential environmental effects, as well as the effects on the economic and social welfare, and cultural practices of the affected community.<sup>202</sup> The law also requires an analysis of alternatives and the measures proposed to mitigate adverse effects.<sup>203</sup> In short, HEPA integrates environmental concerns and considerations into the planning process and requires “certain actions” that significantly affect Hawai‘i’s environment to undergo an “environmental review process” designed to reveal the proposed action’s potential environmental effects.<sup>204</sup>

HEPA acted as a “compromise bill” between no action at all and incorporating NEPA into “Hawai‘i law in its entirety,” as suggested by HEPA’s legislative history.<sup>205</sup> NEPA’s review process and its EIS concept was the first of its kind. Without it, there would be no requirements for agencies to study and consider the adverse impacts on the environment due to their proposed actions and projects. There is no doubt that NEPA’s

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“Environmental Impact Statements” chapter. HAW. REV. STAT. ch. 343 (2022). However, the is commonly referred to as “Hawai‘i Environmental Policy Act” (HEPA). Bryant, *supra* note 18, at 251 n.135. This Comment will refer to it as HEPA as well.

<sup>197</sup> Bryant, *supra* note 18, at 265.

<sup>198</sup> *Id.* at 265–66.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 268 (quoting HAW. REV. STAT. § 343-1; citing HAW. CODE R. § 11-200.1 (2018)).

<sup>201</sup> Knapman, *supra* note 73, at 726. The full statutory language reads:

The purpose of this chapter is to establish a state policy which will encourage productive and enjoyable harmony between people and their environment, promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humanity, and enrich the understanding of the ecological systems and natural resources important to the people of Hawaii.

HAW. REV. STAT. § 344-1; Knapman, *supra* note 73, at 726 n.40.

<sup>202</sup> HAW. REV. STAT. § 343-2.

<sup>203</sup> *Id.*

<sup>204</sup> *See id.* § 343-1 (“[A]n environmental review process will integrate the review of environmental concerns with existing planning processes . . . and alert decision makers to significant environmental effects which may result from the implementation of certain actions.”).

<sup>205</sup> Knapman, *supra* note 73, at 726 (internal citations omitted).

procedural requirements are important. However, as detailed above and echoed by a Hawai‘i senator who commented on the HEPA bill, “there is an inherent contradiction” between the EIS concept that assures agencies “take into consideration the environmental consequences of their actions” and the fact that it is procedural rather than substantive in nature.<sup>206</sup> How do you enforce a regulation that is meant to “obtain compliance” when it is merely procedural, and “what action will ensure that the legislative policy is complied with?”<sup>207</sup>

Once again, as seen above in the NEPA discussions,<sup>208</sup> the fact that HEPA is procedural rather than substantive leaves the Indigenous peoples of Hawai‘i with limited opportunities and remedies for stopping federal actions that will affect their important cultural and spiritual relationships with the environment. Although HEPA’s EIS process has shown that proper completion of the procedures can lead to substantial environmental benefits and further important policies set out by the legislature,<sup>209</sup> imagine what would happen if there was a substantive legal framework in place that truly embraced the holistic native Hawaiian worldview of the environment.

### *B. State Constitution—Right to a Healthy Environment*

The Hawai‘i State Constitution offers safeguards to cultural resources that may not otherwise be protected under federal regimes.<sup>210</sup> Article IX, section 7 of the Hawai‘i State Constitution gives the state power to “conserve . . . places of historic or cultural interest,”<sup>211</sup> while Article XII, section 7 declares that “[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians.”<sup>212</sup> Additionally, Article XI, sections 1 and 9 state:

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

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<sup>206</sup> *Id.* at 726–27.

<sup>207</sup> *Id.*

<sup>208</sup> See discussion *supra* Part IV.

<sup>209</sup> See, e.g., Knapman, *supra* note 73, at 732–34 (discussing the previous examples of cases under HEPA and the EIS process under HEPA).

<sup>210</sup> Bryant, *supra* note 18, at 275.

<sup>211</sup> HAW. CONST. art. IX, § 7.

<sup>212</sup> *Id.* art. XII, § 7.

All public natural resources are held in trust by the State for the benefit of the people.

...

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.<sup>213</sup>

Over the course of about twenty years, the Hawai'i courts have shown through their decisions and analyses that they take these constitutional mandates seriously.<sup>214</sup> The courts have consistently taken a more expansive approach in "interpreting and protecting Kānaka Maoli rights to cultural resources."<sup>215</sup> In 2000, the State Legislature and Judiciary mandated that "agencies independently assess impacts on cultural resources before development occurs."<sup>216</sup> Taking this issue a step further, the Hawai'i State Legislature amended HEPA by passing Act 50. This Act clarified that "impacts on traditional and customary native Hawaiian rights and cultural practices of the community and the State must be assessed as part of the EIS process."<sup>217</sup> The legislature realized that the provisions of the Hawai'i State Constitution and other laws requiring the protection and preservation of the traditional and customary rights of native Hawaiians essentially serve no purpose if the EIS process does not reflect this as well. The disclosure of "the effect of a proposed action on cultural practices" was necessary in order for these provisions and laws to work in practice.<sup>218</sup> Additionally, following the passage of the Act, the Hawai'i Supreme Court "provided government agencies with an analytical framework to help ensure that a 'careful balance between native Hawaiian rights and private interests' is maintained."<sup>219</sup>

The Court acknowledged that prior to the passing of Act 50, the lack of requirement to consider cultural impacts led to the "loss and

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<sup>213</sup> *Id.* art. XI, §§ 1, 9.

<sup>214</sup> Bryant, *supra* note 18, at 276.

<sup>215</sup> *Id.* (internal citation omitted). Due to the subject and limitations of this Comment, this Comment does not expand on the case law that establishes Kānaka Maoli rights to cultural resources and how Hawai'i courts have expanded on their interpretations and protections of these rights. For a full timeline and explanation of the hundreds of years' worth of caselaw, see *id.* at 276–81.

<sup>216</sup> *Id.* at 281.

<sup>217</sup> *Id.* at 281.

<sup>218</sup> *Id.* at 281–82; see also H. Standing Comm. Rep. 20-689, Reg. Sess. 1235 (Haw. 2000) ("The purpose of [Act 50] is to require that environmental assessments and environmental impact statements include the disclosure of the effects of proposed action on the cultural practices of the community and State.").

<sup>219</sup> Bryant, *supra* note 18, at 282; see also *Ka Pa'akai O Ka'Āina v. Land Use Comm'n*, 7 P.3d 1068, 1072 (Haw. 2000) (providing the analytical framework that the state and its agencies must follow to "to help ensure the enforcement of traditional and customary native Hawaiian rights while reasonably accommodating competing private development interests.").

destruction of many important cultural resources” to native Hawaiians.”<sup>220</sup> The Court also determined that although the state constitution, statutes, and caselaw protect Kānaka Maoli rights [on paper], “in order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable.”<sup>221</sup>

The clear stance that the Hawaiian courts and legislature took left no doubt that Kānaka Maoli traditions, customs and rights are meant to be protected and considered.<sup>222</sup> Regarding agency application of HEPA, the Hawai‘i Supreme Court has made it clear that “blind deference” is not the “appropriate” approach.<sup>223</sup> It is correct to assume then that Hawaiians and advocates rely heavily on the state statutes and regulations in order to carry out the constitutional requirement that each person has the right to a clean and healthful environment.<sup>224</sup> Indeed, the state heavily relies on HEPA, as “the types of actions subject to HEPA are quite broad, extending to numerous local land use actions.”<sup>225</sup> These actions range from “amendments to county plans, the use of conservation lands and shoreline areas, and the reclassification of conservation lands.”<sup>226</sup> This heavy reliance on HEPA, however, has resulted in Hawai‘i’s environmental rights to be viewed as ineffective. For starters, HEPA is just like NEPA in the sense that it is procedural, not substantive, in nature. HEPA also “leaves gaps in the environmental review of land use[;]” since it contains “categorical exemptions for certain land use activities.”<sup>227</sup> Thus, a lot of criticism has “largely focused on the lack of enforcement of these environmental statutes.”<sup>228</sup>

While the Hawai‘i state legislature and courts have made much progress and adopted meaningful standards that “allow Kānaka Maoli and other organizations to challenge land use decisions and assert environmental and traditional customary rights,” in actuality these standards are merely a dream rather than reality.<sup>229</sup> The 1978 amendments to the state constitution represent a cultural and environmental holistic approach that is unfortunately difficult to implement. Given that these new standards exist, it is time to find a new way to actually implement what is on paper into practice in order to better protect Hawai‘i’s limited natural and cultural resources, as well as its

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<sup>220</sup> *Ka Pa‘akai O Ka‘Āina*, 7 P.3d at 1084 n.28.

<sup>221</sup> *Id.* at 1083.

<sup>222</sup> Bryant, *supra* note 18, at 283.

<sup>223</sup> Michelle Bryan Mudd, *A “Constant and Difficult Task”: Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment*, 38 *ECOLOGY L.Q.* 1, 34 (2011); *see, e.g.*, *Sierra Club v. Dep’t of Transp.*, 167 P.3d 292, 310–11, 311 n.26 (Haw. 2007) (discussing agency exemptions and noting, in comparison, that California courts employ de novo review of agency exemptions).

<sup>224</sup> Mudd, *supra* note 223, at 34.

<sup>225</sup> *Id.* at 34–35 (internal citation omitted).

<sup>226</sup> *Id.*

<sup>227</sup> *See id.* at 35 (noting exemptions for “single-family residences, multiplexes involving less than four units, small businesses, and zoning variances, to name a few”).

<sup>228</sup> *Id.* (internal citation omitted).

<sup>229</sup> Bryant, *supra* note 18, at 283.

people. With HEPA and a constitutional right to a healthful environment as the foundation, the rights of nature concept can be the culturally-sensitive holistic approach that Hawai'i needs.

## VI. THE RIGHTS OF NATURE LEGAL FRAMEWORK

The “Rights of Nature” is a growing global environmental movement that seeks to vest natural features with legal rights “like the rights to exist, evolve, and flourish, with concomitant standing in the relevant courts to bring lawsuits to protect themselves.”<sup>230</sup> Indigenous traditions and jurisprudence aligns with the rights of nature framework and approach because both seek to treat “humans as part of nature, rather than distinct from it.”<sup>231</sup> Additionally, Hawai'i's right to a healthy environment serves as the perfect foundation to extend Indigenous rights and approaches to cooperation with nature in order to formally incorporate rights of nature.<sup>232</sup>

At the international level, several declarations and resolutions also support the rights of nature approach, in particular the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which affirms Indigenous Peoples' right to protection of the environment,<sup>233</sup> and the United Nations General Assembly Resolution that declares access to a clean, healthy, and sustainable environment as a universal human right.<sup>234</sup> In particular, Article 25 of UNDRIP states: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”<sup>235</sup>

Given this foundation, many countries around the world, including the United States, have recognized the rights of nature in their constitutions and established rights of nature laws.<sup>236</sup> Recently, in November 2021, New Yorkers voted to include environmental rights in the Bill of Rights of the state constitution.<sup>237</sup> Article 1, section 19 states: “Each person shall have a right to clean air and water, and a healthful environment.”<sup>238</sup> In Orange County, Florida, an ordinance known as the

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<sup>230</sup> Robin Kundis Craig, *Rights of Nature Is Becoming a U.S. Reality*, AM. BAR ASS'N. (Dec. 2, 2022), <https://perma.cc/Z8VQ-AFM8>.

<sup>231</sup> Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. F. 276, 278 (2011).

<sup>232</sup> *Id.*

<sup>233</sup> G.A. Res. 61/295, at 21 (Oct. 2, 2007).

<sup>234</sup> G.A. Res. 76/300, at 1–2 (July 26, 2022).

<sup>235</sup> G.A. Res. 61/295, *supra* note 233, at 19.

<sup>236</sup> For specific examples, see BOYD, *supra* note 9, at 219, 223–24.

<sup>237</sup> *New York's Environmental Right Repository: Article I Section 19*, PACE UNIV., <https://perma.cc/M28P-6KY3> (last visited Apr. 18, 2023) (stating that the resolution passed by over 70% of the votes).

<sup>238</sup> N.Y. CONST. art. I, § 19.

Right to Clean Water Initiative, was approved on November 3, 2020.<sup>239</sup> This law secures the rights of waterways to “exist, flow, be protected against pollution and maintain a healthy ecosystem;” as well as providing citizens with the ability to file enforcement suites and formally directing courts to enjoin all activities that would violate the rights of waterways.”<sup>240</sup>

In conjunction with new state constitutional amendments and laws, many lawsuits have been filed on behalf of various elements of nature.<sup>241</sup> Most recently in the United States, in the Ninth Judicial Circuit Court of Florida, 5 lakes (and other waterbodies) filed a lawsuit against the nearby residential group in order to protect themselves from the effects of further development.<sup>242</sup> These waters, all located in Orange County, are asserting standing under the Right to Clean Water Initiative to prevent the proposed Meridian Parks Remainder Project.<sup>243</sup> If the project goes through, the waters would be injured by over 100 acres of wetlands and streams being developed.<sup>244</sup>

It is clear that municipalities within the United States are adopting rights of nature laws as a way to strengthen their existing environmental protections.<sup>245</sup> However, most of the current litigation using rights of nature focuses on the rights of Tribes as well as protecting the natural resources.<sup>246</sup> For example, in *Manoomin v. Minnesota Department of Natural Resources*<sup>247</sup> the Tribe was seeking to enforce the right of Manoomin to prevent the Enbridge Line 3 tar sands oil pipeline from crossing the Tribe’s protected lands.<sup>248</sup> In 2018, the White Earth Band, and other relevant Treaty Authorities, adopted laws ensuring Manoomin had the right to “exist, flourish, regenerate, and evolve; to restoration, recovery, and preservation; and to pure water and freshwater habitat, a healthy climate system, and a natural environment free from human-caused global warming impacts and emissions.”<sup>249</sup> Although the Eighth Circuit’s decision is still pending, this case highlights how the rights of nature legal approach offers indigenous peoples another way, other than NEPA claims, to fight the injustices that negatively affect their cultural and spiritual relationships with the natural world.

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<sup>239</sup> Craig, *supra* note 230.

<sup>240</sup> *Id.*

<sup>241</sup> BOYD, *supra* note 9, at 108.

<sup>242</sup> Craig, *supra* note 230 (internal citations omitted).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> No. GC21-0428; Minnesota Dep’t of Natural Res. v. The White Band of Ojibwe, No. 21-cv-1869, 2021 WL 4034582 (Sept. 8, 2021), *rev’d*, 2022 WL 4229028 (8th Cir. 2022). For more information of the case and a copy of the complaint, see Press Release, 1855 Treaty Authority: East Lake, Leech Lake, Mille Lacs, Sandy Lake, & White Earth, Frist “Rights of Nature” Enforcement Case Filed in Tribal Court to Enforce Treaty Guarantees (Aug. 5, 2021), <https://perma.cc/YGB7-RY6T>.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

As discussed throughout the entirety of this Comment, Indigenous peoples play a vitally important role in environmental management. Through the recognition of rights of nature, Indigenous peoples could claim back this role that has been eroded by modern environmental laws. The last question to answer is: What would a Rights of Nature legal framework look like in Hawai‘i?

For one, the Hawai‘i State Constitution already provides a right to a healthy environment to its people.<sup>250</sup> Therefore, a new rights of nature law would emphasize that nature itself should, and can, have legal personhood status within the law. Natural entities holding cultural and spiritual significance to Kānaka Maoli would, through this constitutional right and possibly new rights of nature legislation, be able to claim standing in court and attempt to redress the harms that occurred to them. While the process may not be so simple because standing jurisprudence in the environmental law context is always a major hurdle,<sup>251</sup> it still provides an option for Kānaka Maoli outside environmental justice claims under NEPA to prevent harms to natural resources that they need for their cultural beliefs and practices to survive.

Rivers, mountains, and plants around the world could be granted rights under the law to exist and to flourish.<sup>252</sup> Which in turn recognizes that the cultural and spiritual significance held by Indigenous groups in relation to these rivers, mountains, and plants also have the right to survive and thrive. Native Hawaiians have fought for the protection of, among other things, their access to water for their taro fields and, most recently, the preservation of their beloved Mauna Kea.<sup>253</sup> Granting taro plants and Mauna Kea legal personhood status would provide a tremendous step in the right direction. Rather than being something that agencies take a “hard look at,” the significance of the relationships between Kānaka and their natural resources would be at the forefront.

## VII. CONCLUSION

The rights of nature legal framework can serve as a unique solution to resolve environmental conflicts in Hawai‘i and simultaneously contribute to the ongoing struggle of preserving the special relationship between the cultural and spiritual significance tied to Hawai‘i’s natural resources that the law does not adequately protect.

Rights of nature laws, especially in conjunction with a constitutional right to a healthful environment, can strengthen Indigenous sovereignty and provide a pathway to environmental justice. Indigenous peoples, like Kānaka Maoli, need something substantive, rather than the procedural mechanisms that NEPA has to offer, to protect their land, natural

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<sup>250</sup> See *supra* notes 212–237 and accompanying text.

<sup>251</sup> Marisa Martin & James Landman, *Standing: Who Can Sue to Protect the Environment?*, AM. BAR ASS’N (Oct. 9, 2020), <https://perma.cc/F5DL-ZZFV>.

<sup>252</sup> See *supra* note 230 and accompanying text.

<sup>253</sup> See *supra* note 17 and accompanying text.



processes, and the cultural practices necessary to the functions and continuation of their culture and people. While HEPA and Article XI, Section 9 of the Hawai'i State Constitution offer more environmental protections for cultural natural resources for Native Hawaiians, they still fall short, with no substantive law in place. Thus, implementing a rights of nature legal framework in Hawai'i would not be an extraordinary leap, as other states within the United States have already done it.<sup>254</sup>

With the implementation of a rights of nature legal framework that gives natural entities legal rights, indigenous knowledge and stewardship practices can receive due recognition for working with the land rather than against it. Returning land and, at the very least, returning responsibilities of land stewardship to Indigenous peoples, is not simply an act of conserving resources for the next generation. It is also an acknowledgement of the ways that land theft and capitalism—both essential to the creation of the United States—are co-conspirators in environmental crises.

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<sup>254</sup> See *supra* notes 236–249 and accompanying text.