KĀNĀWAI FROM AHI: REVITALIZING THE HAWAIʻI WATER CODE IN THE WAKE OF THE MAUI WILDFIRES

When the Maui wildfires in August 2023 forced Tereariʻi Chandler-ʻĪao to flee Lahaina, she could take only the necessities: food, clothes, and a box of water use–permit applications.[1] The final item reflects an important quality of the fires: their focal point was not fire, but water.[2] Since the birth of Hawaiʻi's sugar industry, recurrent water conflicts have pitted foreign landowners (first sugar-plantation owners, then their corporate successors[3]), who view water as "a commodity for private use,"[4] against kānaka maoli (Native Hawaiians[5]), who view it as a communally owned resource with sociocultural importance.[6] Though kānaka maoli have secured victories protecting their use of this precious resource, their opponents have long dominated the political landscape, appropriating water for commercial enterprises such as residential developments[7] and bending Hawaiian water law toward their interests.[8]

But the fires have "sparked new tension" in Hawaiʻi's historic fights over water.[9] Land developers have criticized the impotence of Hawaiʻi's water management and advocated for a relaxation of the state Water Code and a removal of West Maui's water protections; both would further privatize water for commercial use.[10] Disaster-preparedness logic following the fires might provide the political momentum for these landowners to roll back Hawaiʻi's water law. The "dynamics have changed," they assert; the entire regime must be reconsidered.[11] Concerningly, they

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[1] *See* Naomi Klein & Kapuaʻala Sproat, *Why Was There No Water to Fight the Fire in Maui?*, THE GUARDIAN (Feb. 9, 2024, 10:38 PM), https://www.theguardian.com/commentisfree/2023/aug/17/hawaii-fires-maui-water-rights-disaster-capitalism [https://perma.cc/459P-MR2F].

[2] *Id.*

[3] *Id.*

[4] D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawaiʻi's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 141 (2011).

[5] *Id.* at 127 n.3.

[6] *See id.* at 140.

[7] *See* Alida Cantor et al., *Legal Geographies and Political Ecologies of Water Allocation in Maui, Hawaiʻi*, 110 GEOFORUM 168, 168, 171–72 (2020).

[8] CAROL A. MACLENNAN, SOVEREIGN SUGAR 1–3 (2014).

[9] Jennifer Sinco Kelleher & Jae C. Hong, *Maui Fires Renew Centuries-Old Tensions over Water Rights. The Streams Are Sacred to Hawaiians*, AP NEWS (Aug. 24, 2023, 2:31 PM), https://apnews.com/article/hawaii-maui-fires-water-streams-531263684bf5106d635f29aec91115e4 [https://perma.cc/L2XJ-N73D].

[10] *See* Anita Hofschneider & Jake Bittle, *The Libertarian Developer Looming over West Maui's Water Conflict*, GRIST (Nov. 27, 2023), https://grist.org/indigenous/developer-peter-martin-west-maui-water-wildfire [https://perma.cc/TBG7-RR33]; *see also* Stewart Yerton, *The Lahaina Fire Could Prompt the State to Change How It Manages Water on Maui*, HONOLULU CIV. BEAT (Aug. 16, 2023), https://www.civilbeat.org/2023/08/the-lahaina-fire-could-prompt-the-state-to-change-how-it-manages-water-on-maui [https://perma.cc/L97J-8GSL].

[11] *See* Yerton, *supra* note 10.

are also characterizing traditional water rights as antithetical to disaster-preparedness efforts.[12]

Native Hawaiians have been skeptical of corporate landowners' alleged concerns over disaster preparedness and characterization of traditional water rights.[13] They blame the prioritization of corporate water interests, the privatization of water, and the harms of colonialism for the severity of the fires.[14] And they worry that Lahaina's destruction could be used to furtively pass "unpopular laws and policies" that prioritize commercial uses and exacerbate political inequality.[15]

As Chandler-ʻĪao's box of water-permit applications illustrates, the Maui fires represent an inflection point for Hawaiian water law. But we did not arrive at this point overnight. Rather, the fires were the byproduct of a century of colonialism that imposed a resource-management regime that razed the environment and externalized its harms on kānaka maoli.[16] Because of this legacy, Maui was "a ticking time bomb" for wildfires.[17] When it is remembered that the ancient Hawaiian system of watershed management was sustainable before it was ravaged by colonialism,[18] Maui's current state is even more heart wrenching.

This Note proceeds in three Parts. Part I explains how we arrived at the present, providing a history of Hawaiian colonialism and plantation capitalism that details the distortion of the traditional system of resource management into today's regime. Part II describes current conditions, summarizing the 2023 Maui wildfires, Hawaiian water law and its criticisms, and Water Code–reform debates in the fires' aftermath. Finally, Part III suggests possible reforms for the Water Code, endorsing a framework of restorative justice and proposing amendments that ensure state decisionmaking incorporates Hawaiʻi's colonial history and political landscape, as well as the sociocultural importance of water.

I. COLONIALISM IN HAWAIʻI AND ITS ENVIRONMENTAL IMPACT

Current Hawaiian water law is a profound departure from the ancient Hawaiian water-management system, produced by a history of

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[12] *See id.*

[13] *See* Klein & Sproat, *supra* note 1.

[14] *Id.*

[15] Stewart Yerton, *The Lahaina Blaze Is Rekindling an Old Debate over Using Water to Fight Fires*, HONOLULU CIV. BEAT (Aug. 30, 2023), https://www.civilbeat.org/2023/08/the-lahaina-blaze-is-rekindling-an-old-debate-over-using-water-to-fight-fires [https://perma.cc/4M9Y-9R5X].

[16] Kaniela Ing, *The Climate Crisis and Colonialism Destroyed My Maui Home. Where We Must Go from Here*, TIME (Aug. 17, 2023, 11:58 AM), https://time.com/6305817/maui-wildfires-climate-change-colonialism-essay [https://perma.cc/YH45-YMXP].

[17] Carolyn Kormann, *Why Maui Burned*, NEW YORKER (Oct. 30, 2023), https://www.newyorker.com/magazine/2023/11/06/maui-wildfire-response-recovery [https://perma.cc/CAT2-W3H3].

[18] *See* Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 849 (1975).

colonialism that eroded Native Hawaiians' cultural integrity vis-à-vis water. History helps explain the Water Code's shortcomings and the Maui wildfires' devastation, and it suggests only a fundamental rethinking of Hawaiian water law can achieve justice for kānaka maoli.

A. Ancient Hawaiian Water Management

Ancient Hawaiians maintained a robust land-management system known as the ahupua'a system,[19] deriving its name from its basic units, *ahupua'a*: watersheds extending from the shoreline to the mountains with abundant natural resources such as *kalo* (taro).[20] *Ali'i* (chiefs) ruled the ahupua'a and assumed stewardship over its resources.[21] Water was particularly important. Hawaiians relied on continuous *mauka* to *makai* ("from the mountains to the ocean") stream flow, which provided potable water and enabled agriculture and cultural practices like kalo growing.[22] The *maka'āinana* (people of the land) were obligated to provide care and guardianship to water as a corollary of the principle of *kuleana* (responsibility) and kānaka maoli's "interdependent, familial relationship" with it.[23]

Ancient Hawaiian resource management viewed water as a "true public trust resource" managed for the entire community; private ownership over water was inconceivable.[24] Ali'i delegated authority to *konohiki* (resource stewards) to oversee the distribution and use of water in the ahupua'a.[25] Konohiki apportioned water according to need and amount of labor provided, and if residents ignored their kuleana to care for the source, the konohiki would withhold their water.[26] During times of scarcity, those with sufficient access to water customarily shared any excess diversion with those in need.[27] *Kōkua*, the requirement of sharing resources and the responsibility to maintain resources, avoided

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19 *See* 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, 167–69 (2016).

20 *See* DAVIANNA PŌMAIKA'I MCGREGOR & MELODY KAPILIALOHA MACKENZIE, OFF. OF HAWAIIAN AFFS., MO'OLELO EA O NĀ HAWAI'I: HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAI'I 33, 99 (2015).

21 *Id.* at 33, 120.

22 D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW: A TREATISE 522, 526 (Melody Kapilialoha MacKenzie et al. eds., 2015).

23 *See* Shawn Malia Kana'iaupuni & Nolan Malone, *This Land Is My Land: The Role of Place in Native Hawaiian Identity*, 3 HŪLILI 281, 285 (2006); *see also* P.L. Jokiel et al., *Marine Resource Management in the Hawaiian Archipelago: The Traditional Hawaiian System in Relation to the Western Approach*, 2011 J. MARINE BIOLOGY 1, 2–3; Sonia Feldberg, Maka'ainana (People of the Land), The Issue of Hawaiian Sovereignty: The Life Cycle of Ka Lahui (1996) (M.A. thesis, University of Nevada, Las Vegas) (on file with the Harvard Law School Library).

24 Sproat, *supra* note 22, at 526; *see also id.* at 529.

25 *Id.* at 526.

26 *See* Emma Metcalf Nakuina, *Ancient Hawaiian Water Rights and Some of the Customs Pertaining to Them*, 20 ORG. & ENV'T 506, 507–08 (2007).

27 *Id.* at 508.

overexploitation and instilled an ethos of cooperation over resources.[28] "[W]ater disputes were rare, and . . . a system of mutual respect and interdependence developed . . . ."[29]

The system thrived "[f]or nearly a millennium," sustaining a population of approximately 200,000.[30] However, disruption began with Captain James Cook's arrival in 1778; soon Hawai'i was overrun with "Western mercantilistic and capitalistic intruders."[31] The system was ruptured by the Māhele in 1848, which divided the land to prevent further encroachment,[32] and the Kuleana Act of 1850, which established a fee simple ownership regime permitting alienation "to parties with no historical interest in sustaining the *ahupua'a* as a whole."[33] The institution of private property extracted "konohiki stewardship over vital water resources . . . from its social context and treated [it] as exclusive ownership rights that could be freely sold."[34] The cooperative ethos that characterized ancient Hawaiian society was corrupted by resource competition,[35] and water reduced to a mere commodity.

B. Sugar Barons and the Rise of Plantation Capitalism

The perversion of the ahupua'a system made corporate domination of Hawai'i's natural resources possible. Since the nineteenth century, commercial sugar plantations have defaced the environment and pushed Hawai'i's water law toward serving plantation interests. In the early 1800s, there were only a few small plantations in Hawai'i, but they foundered, lacking the protections of private property rights and unable to "command the labor of Hawaiians" without the ali'i's approval.[36]

However, the foreign private-property system permitted hundreds of thousands of acres of land to be sold to foreign businesspeople, who used the land to create new plantations.[37] These "sugar barons"[38] catalyzed the rise of Hawai'i's plantation agriculture. As Western influence made Hawai'i's economy more commercial and reliant on sugar,[39] the new plantations also benefitted from technological innovations that

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[28] *See* Jokiel et al., *supra* note 23, at 3.

[29] Sproat, *supra* note 22, at 527.

[30] *See* Jokiel et al., *supra* note 23, at 3.

[31] *See* Maivân Clech Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 237–38 (1989).

[32] MCGREGOR & MACKENZIE, *supra* note 20, at 255, 272–73.

[33] Jokiel et al., *supra* note 23, at 4.

[34] Elizabeth Ann Ho'oipo Kāla'ena'auao Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 93 (1996).

[35] MCGREGOR & MACKENZIE, *supra* note 20, at 296, 301.

[36] MACLENNAN, *supra* note 8, at 24.

[37] *See* MCGREGOR & MACKENZIE, *supra* note 20, at 295–96. Not all of the foreigners acquired lands through legitimate transactions — some used "overreaching or actual fraud," for instance, underreporting an ahupua'a's size to reduce its sale price. Levy, *supra* note 18, at 859–60.

[38] Ing, *supra* note 16.

[39] MACLENNAN, *supra* note 8, at 24.

increased their productivity.[40] By the 1860s, the industry had exploded in size,[41] and sugar had become the lifeblood of Hawai'i.[42]

But industrial sugar did not benefit Native Hawaiians. Instead, it created an upper class of foreign sugar capitalists in Hawai'i. Because successful plantations required significant investment, industry was limited to wealthy foreigners, and smaller plantations (like those owned by Native Hawaiians) were forced to close or sold to "*haole* [(non-Native)] capitalists."[43] Hawai'i's economy was soon subsumed by Western sugar growers, thanks to expanded protectionist measures.[44] "By the turn of the century[,] Hawaiians were a minority in their own homeland."[45]

As a core part of Hawai'i's "eco-industrial heritage," the plantations significantly altered Hawaiian law and ecology.[46] First, they weaponized Hawaiian water law. The plantations "complicated the resolution of water disputes" because they "appropriated water beyond the amount tied to the land based on appurtenant rights."[47] Thus, in *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*,[48] the Supreme Court of the Territory of Hawai'i authorized the private ownership of surplus water, reasoning that by Hawaiian custom, it was "the property of the konohiki, to do with as he pleases, and [was] not appurtenant to any particular portion of the ahupuaa."[49] But the court's reading of custom was erroneous, articulating a "concept of ownership of 'konohiki water rights'" that contravened custom that the konohiki's "right" to distribute water was not ownership in the traditional sense — it was accompanied by a reciprocal duty to allocate it according to need and to manage it on behalf of all the ahupua'a's residents.[50] The court also misconstrued Hawaiian custom in *Territory of Hawaii v. Gay*,[51] where it erroneously concluded that konohiki retained the power to use surplus water however they wanted, regardless of any negative effects on downstream users,[52] despite history suggesting that ahupua'a residents were explicitly encouraged to consider negative downstream effects of their water uses.

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40 *Id.* at 36–37.

41 *Id.* at 32 ("[B]eginning in the 1860s and for the following sixty years, acreage of cane cultivation soared from about 10,000 acres in 1867 to 236,000 acres in 1920.").

42 *See* Melody Kapilialoha MacKenzie, Ke Ala Loa — *The Long Road: Native Hawaiian Sovereignty and the State of Hawai'i*, 47 TULSA L. REV. 621, 625 (2012).

43 MACLENNAN, *supra* note 8, at 37 (footnote omitted). This dynamic was common "[t]hroughout the sugar world": "[C]apital arrived from outside the plantation region and replaced local planters. . . . [T]he costs of erecting and equipping large sugar mills required funds that regional planters just did not have." *Id.*

44 Levy, *supra* note 18, at 858.

45 *Id.*

46 MACLENNAN, *supra* note 8, at 3; *see id.* at 3–4.

47 Sproat, *supra* note 22, at 533.

48 15 Haw. 675 (1904).

49 *Id.* at 680.

50 Martin et al., *supra* note 34, at 93 n.49; Sproat, *supra* note 22, at 526.

51 31 Haw. 376 (1930).

52 *Id.* at 385–88 (quoting *Hawaiian Com. & Sugar Co.*, 15 Haw. at 680–82).

Later decisions acknowledged the mischaracterization of Hawaiian custom to further plantation interests. In *Reppun v. Board of Water Supply*,[53] Chief Justice Richardson recognized that while purporting to divine a "system of rights" from Hawaiian custom,[54] "prior courts had largely ignored . . . the traditions of the native Hawaiians in their zeal to convert these islands into a manageable western society."[55] He attempted to correct the historical record, noting that while konohiki controlled water allocation, the ancient water-management system was based on a "spirit of mutual dependence," guaranteed water to residents who needed it, and "aimed to secure equal rights . . . and to avoid disputes."[56] "However, the creation of private and exclusive interests in water . . . compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom."[57] The recognition of past errors was long overdue. But in the intervening decades, the plantations had rendered Hawaiian water law unrecognizable.

Second, empowered by their legal victories, the plantations diverted significant amounts of water, "permanently mark[ing] the Hawaiian islands" and causing unprecedented ecological change.[58] "[S]ugarcane is a thirsty crop"; "[o]ne ton of sugar requires a million gallons of water."[59] But much of Hawai'i was covered with dry landscapes lacking the water to support an industrial sugar enterprise.[60] Thus, private companies took it upon themselves to develop Hawai'i's surface water.[61] The plantations "rerouted the flow from Maui's watersheds" using concrete infrastructure such as ditches.[62] They sought licenses from the government to divert water and created privately held water companies to secure use and access — by 1915, the Hawaiian government had granted water licenses to several companies.[63] "By 1920, the industry was diverting an average of 800 million gallons of surface water" per day.[64] These efforts were crucial. Without the ability to transport water out of the watershed, the plantations would have struggled.[65]

Unlike the kalo agriculture at the heart of ancient Hawaiian society, which returned diverted water to streams so it remained in the

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[53] 656 P.2d 57 (Haw. 1982).

[54] *Id.* at 68.

[55] *Id.* at 67.

[56] *Id.* at 64 (quoting Jon Van Dyke et al., *Water Rights in Hawaii*, *in* LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141, 152–53 (1979)).

[57] *Id.* at 68.

[58] MACLENNAN, *supra* note 8, at 3; *see id.* at 3–4.

[59] Kormann, *supra* note 17.

[60] *See* CAROL WILCOX, SUGAR WATER: HAWAII'S PLANTATION DITCHES 24 (1996).

[61] *Id.* at 16. The development of Hawaiian water infrastructure by the private sector was anomalous — the western United States had a "parallel history of water development," but its water projects were government led. *Id.*

[62] Kormann, *supra* note 17.

[63] WILCOX, *supra* note 60, at 17–19.

[64] *Id.* at 20.

[65] *Id.* at 16.

watershed, the sugar industry transported vast amounts of water permanently out of the watershed.[66] This "wholesale appropriation . . . spiritually disemboweled Kānaka Maoli communities."[67] Subsistence users were left with insufficient water to carry on their enterprises.[68] And the landscape was disfigured. The plantations killed preexisting vegetation, clearing the natural landscape to accommodate new infrastructure and introducing nonnative flora and fauna.[69] This disrupted Hawai'i's sacred ecosystems and further strained the familial relationship between kānaka maoli and the environment.[70]

With the last plantation having shut down in 2016,[71] the "heyday of plantation agriculture [has] come[] to a close."[72] But its harms persist. When the plantations were abandoned, owners did not restore the environment. Instead, diversions were left in place.[73] Companies like West Maui Land Company (WML) began purchasing the abandoned plantations in bulk (including their irrigation systems) and started to develop.[74] The resulting residential communities and resorts continue to divert and stockpile water at the expense of kānaka maoli.[75] And they continue to treat water as a commodity, influencing the uses they seek to get approved and coloring their legal arguments in water disputes.[76]

History also explains the devastation of the Maui wildfires and the risk of future fires. For most of Hawai'i's history, fire was not "part of the islands' ecology,"[77] as the native vegetation had low levels of flammability.[78] But colonists' agriculture and ranching operations slowly

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[66] *Id.* at 29.

[67] Sproat, *supra* note 4, at 128.

[68] *See* Sproat, *supra* note 19, at 201; *see also* Cantor et al., *supra* note 7, at 170–71.

[69] *See* Elizabeth Kolbert, *The Burning of Maui*, NEW YORKER (Aug. 20, 2023), https://www.newyorker.com/magazine/2023/08/28/the-burning-of-maui [https://perma.cc/UAS6-TD4J]; Simon Romero & Serge F. Kovaleski, *How Invasive Plants Caused the Maui Fires to Rage*, N.Y. TIMES (Aug. 15, 2023), https://www.nytimes.com/2023/08/13/us/hawaii-wildfire-factors.html [https://perma.cc/SG89-MQD7]; *Mongoose*, HAW. INVASIVE SPECIES COUNCIL, https://dlnr.hawaii.gov/hisc/info/invasive-species-profiles/mongoose [https://perma.cc/SS9L-5C8R]; *cf.* Michael S. Spencer et al., *Environmental Justice, Indigenous Knowledge Systems, and Native Hawaiians and Other Pacific Islanders*, 92 HUM. BIOLOGY 45, 47–49 (2020) (discussing settler colonialism's commodification logic, which "turns aspects of the environment . . . into goods, allowing for their removal for the . . . benefit of settler-colonial powers," *id.* at 47).

[70] *See* Spencer et al., *supra* note 69, at 48–49.

[71] Lawrence Downes, Opinion, *The Sun Finally Sets on Sugar Cane in Hawaii*, N.Y. TIMES (Jan. 16, 2017), https://www.nytimes.com/2017/01/16/opinion/the-sun-finally-sets-on-sugar-cane-in-hawaii.html [https://perma.cc/Z6GU-4A52].

[72] Sproat, *supra* note 4, at 128.

[73] *See id.*; *see also* WILCOX, *supra* note 60, at 9 ("Who will be responsible for maintaining (or dismantling) the ditches, reservoirs, dams, and tunnels?").

[74] Kormann, *supra* note 17.

[75] Klein & Sproat, *supra* note 1.

[76] Sproat, *supra* note 22, at 538.

[77] Kolbert, *supra* note 69.

[78] Clifford W. Smith & J. Timothy Tunison, *Fire and Alien Plants in Hawai'i: Research and Management Implications for Native Ecosystems*, *in* ALIEN PLANT INVASIONS IN NATIVE ECOSYSTEMS OF HAWAI'I 394, 396 (Charles P. Stone et al. eds., 1992).

destroyed native vegetation and introduced harmful nonnative plants.[79] Unlike Hawai'i's native plants, the introduced plants were "highly flammable" and regenerated quickly after fires.[80] Hawai'i's endemic fire defenses were undermined.[81] The fall of the plantations exacerbated the problem, leaving large, unmanaged grasslands overrun with nonnative plants and turning Hawai'i into a "tinderbox" begging to be ignited.[82]

II. THE CURRENT STATE OF HAWAIIAN WATER LAW

A. An Initial Spark: The Maui Wildfires

The morning of August 8, 2023, two brush fires ignited: one in Olinda and another in Lahaina, possibly resulting from downed power lines that were toppled by powerful winds.[83] Despite Maui County announcing at 10 A.M. that the Lahaina fire was "100% contained," the fire reignited.[84] The blaze grew exponentially and exceeded firefighters' capabilities: eventually, "[a]ll they could do was try to save lives."[85] "By 7 P.M. the docks and boats in the harbor were lit up as if in a coal-fired oven . . . ."[86] The fire's devastation was immense. After days of burning, more than 2,800 acres had been burned.[87] The fire killed approximately 100 people[88] and forced tens of thousands to evacuate Maui.[89] This was the deadliest U.S. wildfire in over a century.[90]

Fierce contests over water lurked in the background of the wildfires, again pitting corporate interests against Native Hawaiian interests. On the day the wildfires started, Glenn Tremble — an executive for WML,

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[79] Thomas W. Gillespie et al., *Non-native Plant Invasion of the Hawaiian Islands*, 2 GEOGRAPHY COMPASS 1241, 1245 (2008).

[80] *See* Kolbert, *supra* note 69; *see also* Jeffrey Kluger, *Invasive Plants Brought to Maui by Colonists Helped Fuel the Wildfires*, TIME (Aug. 17, 2023, 10:23 AM), https://time.com/6305735/invasive-plants-from-colonists-fueled-maui-wildfires [https://perma.cc/F654-BUQN].

[81] *See* Kluger, *supra* note 80.

[82] *See* Sophie Kevany, *Non-native Grass Species Blamed for Ferocity of Hawaii Wildfires*, THE GUARDIAN (Aug. 16, 2023, 9:30 PM), https://www.theguardian.com/global-development/2023/aug/16/non-native-grass-species-blamed-for-ferocity-of-hawaii-wildfires [https://perma.cc/WW8W-QDSJ].

[83] *See* Kormann, *supra* note 17.

[84] *Id.*; *see also* Ashley R. Williams et al., *"Everything Was on Fire": The Hours that Brought Lahaina to Ruins*, CNN (Aug. 18, 2023), https://www.cnn.com/interactive/2023/08/hawaii-wildfires-timeline-maui-lahaina-dg/index.html [https://perma.cc/MKU6-XYW5].

[85] Kormann, *supra* note 17.

[86] *Id.*

[87] *See* Jonathan Oatis, *Maui Fires: What to Know About Hawaii's Deadliest Disaster, Damage and Death Toll*, REUTERS (Aug. 21, 2023, 2:52 PM), https://www.reuters.com/world/us/how-did-hawaii-wildfires-start-what-know-about-maui-big-island-blazes-2023-08-11 [https://perma.cc/PC9Y-JB7Y].

[88] Jennifer Sinco Kelleher, *Fatalities from Maui Wildfire Reach 100 After Death of Woman, 78, Injured in the Disaster*, AP NEWS (Nov. 16, 2023, 2:52 PM), https://apnews.com/article/hawaii-maui-lahaina-wildfire-death-toll-35763e242761a34249b98f9ec84ef52f [https://perma.cc/H72Q-9N9X].

[89] Oatis, *supra* note 87.

[90] *Id.*

whose "land development and private water companies"[91] operate near Lahaina — reached out to the Water Commission to request approval to divert water from a nearby stream to WML's reservoir in case the fire spread to WML's residential community.[92] Tremble assured that WML would also offer diverted water to the Maui Fire Department.[93]

However, there was a delay in approving WML's request. As Tremble conceded, it was unclear if the water would have helped, but during an emergency, "it would be better to err on the side of caution."[94] Accordingly, M. Kaleo Manuel — the Deputy Director for Water Resource Management at the Department of Land and Natural Resources (DLNR), known for incorporating "indigenous knowledge" into his water-management philosophy[95] — wanted WML to first get permission from a downstream taro farm to ensure the diversion would not impact the farmer's operations.[96] The diversion was eventually approved.[97] But by then, the equipment used for diversion "was engulfed in flames,"[98] and the request became "a symbol of the fight over using reservoir waters to control fires on Maui."[99] While WML and conservative pundits criticized Manuel, kānaka maoli celebrated him, applauding his scrutiny of corporate water diversions.[100]

Actions by the state government provoked more controversy. Governor Josh Green's administration issued a series of emergency proclamations to combat the fires.[101] Most significantly, Governor Green suspended the Water Code to increase the availability of water.[102] Following this suspension, Tremble again wrote to the Commission, requesting "ongoing authorization" to fill WML's reservoirs during active

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91 Yerton, *supra* note 10.

92 Stewart Yerton, *Kaleo Manuel Became a Cause Celebre for Maui Water. Now He's Leaving the State Water Commission Without Saying Why*, HONOLULU CIV. BEAT (Dec. 29, 2023), https://www.civilbeat.org/2023/12/kaleo-manuel-became-a-cause-celebre-for-maui-water-now-hes-leaving-the-state-water-commission-without-saying-why [https://perma.cc/4LDY-GR8K]. Tremble claimed that the water could be used for "'fire suppression,' essentially using sprinkler systems to wet the ground in the luxury neighborhood to prevent the fire from spreading." *Id.*

93 Yerton, *supra* note 10.

94 *Id.*

95 *Deputy Director*, STATE OF HAW., DEP'T OF LAND & NAT. RES.: COMM'N ON WATER RES. MGMT., https://dlnr.hawaii.gov/cwrm/aboutus/deputy [https://perma.cc/2ELP-4FQG].

96 Stewart Yerton, *A State Official Refused to Release Water for West Maui Fires*, HONOLULU CIV. BEAT (Aug. 15, 2023), https://www.civilbeat.org/2023/08/a-state-official-refused-to-release-water-for-west-maui-fires-until-it-was-too-late [https://perma.cc/AX58-VQ63].

97 *Id.*

98 Yerton, *supra* note 92.

99 Yerton, *supra* note 15.

100 *Id.*

101 *See* Yerton, *supra* note 10. Hawai'i affords its governor the power to declare a state of emergency, as well as an array of powers relating to emergency management. *See* HAW. REV. STAT. §§ 127A-14, 127A-16 (2022).

102 *See* OFF. OF THE GOVERNOR, STATE OF HAW., FOURTH PROCLAMATION RELATING TO WILDFIRES 6 (2023), https://governor.hawaii.gov/wp-content/uploads/2023/08/4th-EP-on-Wildfires.pdf [https://perma.cc/T9GT-HTJ5].

fires and to increase the amount of water available in the emergency period.[103] The chair of the Commission granted the requests that day, citing the suspension of the Code.[104] Critics worried that approval permitted companies to take advantage of the tragedy and afforded them a dangerous new tool: disaster-preparedness rhetoric to justify diverting more water than necessary while obscuring their pursuit of profit.[105]

The fires revived old tensions, demanding the balancing of two goals: ensuring enough water to use in fighting fires and respecting Native Hawaiians' skepticism of corporate water diversion. As the flames burned out, attention turned to the water-management regime.

B. Hawaiian Water Law and the Water Code

In ʻŌlelo Hawaiʻi (the Native Hawaiian language), *wai* is the word for water and *kānāwai* is the word for law — law "[was] and continue[s] to be defined by access to and appropriate management of Hawaiʻi's fresh water."[106] The modern regime reflects water's cultural significance for kānaka maoli — at least facially.[107] At its center is the public trust doctrine, whose principles have always been a core part of kānaka maoli custom and a tenet of pre-Māhele law.[108] The doctrine has since been recognized by Hawaiian common law, enshrined in the state constitution, and supplemented by the Code.[109] It "refers to the general fiduciary obligation of government"[110] to hold resources of a public character in trust for the public and for purposes benefitting the public interest.[111] In Hawaiʻi, it obligates the state to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people."[112]

The Hawaiʻi Supreme Court endorsed the doctrine as early as 1899 in *King v. Oahu Railway & Land Co.*[113] But the modern articulation occurred in 2000, in *In re Water Use Permit Applications (Waiāhole*

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[103] Michelle Broder Van Dyke, *Battles Brew over Maui Water Grabs in Wake of Wildfires*, SPECTRUM NEWS (Aug. 24, 2023, 10:08 AM), https://spectrumlocalnews.com/hi/hawaii/news/2023/08/24/battles-brew-over-maui-water-grabs-in-wake-of-wildfires [https://perma.cc/H45L-8PC4].

[104] *Id.*

[105] *See* Yerton, *supra* note 10; *see also* Van Dyke, *supra* note 103.

[106] Sproat, *supra* note 4, at 140.

[107] *See* Sproat, *supra* note 19, at 202.

[108] *See, e.g.*, HAW. CONST. of 1840 ("Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the islands to the other, though it was not his own private property. It belonged to the chiefs and people in common . . . .").

[109] Sproat, *supra* note 22, at 553.

[110] Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 286 (2014).

[111] *Id.* at 287; *see also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436 (1892) ("The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment . . . ."); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484–85 (1970).

[112] HAW. CONST. art. XI, § 7.

[113] 11 Haw. 717 (1899); *see also id.* at 723–25 (citing *Ill. Cent. R.R.*, 146 U.S. at 452–55).

I).[114] The court noted that Hawai'i's public trust obligations applied to surface and groundwater resources and had evolved beyond preserving public rights like navigation to include protecting natural resources and Native Hawaiian rights.[115] While the doctrine seeks to balance competing interests, it establishes a presumption in favor of public trust uses.[116] Indeed, the "original intent" of the doctrine was to preserve kānaka maoli rights during the transition to a Western property system.[117]

Waiāhole I also confirmed Hawai'i's adoption of the doctrine as a "fundamental principle of constitutional law."[118] In 1978, Hawai'i amended its constitution to add provisions protecting natural resources, specifically water, and kānaka maoli.[119] The amendments mandated the creation of "a water resources agency which . . . shall set overall water conservation, quality and use policies."[120] Nearly a decade later, the Water Code was enacted to supplement the public trust doctrine[121] and finalize the establishment of the Water Commission.[122]

The Commission is tasked with "general administration of the state water code" and possesses a set of enumerated powers that assist it in effectuating its public trust obligations and its obligations to Native Hawaiians.[123] It has seven members, all required to have "substantial experience in the area of water resource management."[124] Five are appointed by the Governor, and one seat is reserved for someone with "experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage."[125]

One key component of the Commission's regulatory power is the ability to designate Water Management Areas (WMAs). When the Commission can "reasonably determine[]" that an area's water resources

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114 9 P.3d 409 (Haw. 2000).

115 *Id.* at 445, 448–49.

116 Sproat, *supra* note 22, at 554; *see also Waiāhole I*, 9 P.3d at 454.

117 *See Waiāhole I*, 9 P.3d at 449.

118 *Id.* at 444 (citing Payne v. Kassab, 361 A.2d 263, 272 (Pa. 1976); State v. Bleck, 338 N.W.2d 492, 497 (Wis. 1983); Save Ourselves, Inc. v. La. Env't Control Comm'n, 452 So.2d 1152, 1154 (La. 1984); Owsichek v. Guide Licensing & Control Bd., 763 P.2d 488, 493–96 (Alaska 1988)).

119 *See* HAW. CONST. art. XI, § 7; *id.* art. XII, § 7 (obligating the state to protect "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes" by precontact Hawaiians). The 1978 constitutional convention was notable for "add[ing] Hawaiian features to the 'bare-bones'" 1950 constitution. Amy K. Trask, *A History of Revision: The Constitutional Convention Question in Hawai'i, 1950–2008*, 31 U. HAW. L. REV. 291, 310 (2008).

120 HAW. CONST. art. XI, § 7.

121 *Waiāhole I*, 9 P.3d at 445 ("The Code and . . . the Commission . . . do not override the public trust doctrine or render it superfluous. . . . [T]he doctrine continues to inform the Code's interpretation, define its permissible 'outer limits,' and justify its existence."); *see also* HAW. REV. STAT. § 174C-2(a) (2022).

122 *See* HAW. REV. STAT. § 174C-7(a) (2022) (establishing "a commission on water resource management consisting of seven members which shall have exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code").

123 *See id.* § 174C-5 (enumerating the commission's powers and duties).

124 *Id.* § 174C-7(a)–(b).

125 *Id.* § 174C-7(b).

may be threatened by "existing or proposed withdrawals or diversions of water," it must designate the area as a WMA to establish administrative control to ensure "reasonable-beneficial use of the water resources in the public interest."[126] Designation is a prerequisite to enforcement of the Code — the common law governs water outside of WMAs.[127]

In WMAs, water uses are regulated through the Code's permitting scheme. The Code generally prohibits any withdrawal or diversion of surface or ground water that has not yet received a permit from the Commission.[128] Those seeking to commence or continue any consumption must therefore first apply for a permit, and applicants bear the burden of showing that they meet the legal requirements to receive one.[129] Specifically, applicants must show that their use accords with seven statutory requirements, including that it (1) can be accommodated with the available water source, (2) is a reasonable-beneficial use, (3) will not interfere with any existing legal use, and (4) is consistent with the public interest.[130] The Commission determines whether the applicant has met these conditions; if so, the permit is issued.[131]

The Commission's permit determinations would seem to require consideration of Native Hawaiian traditional rights. Indeed, the Commission has "an 'affirmative [statutory and constitutional] duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.'"[132] In practice, the Commission's protection of kānaka maoli is far less than expected given the robustness of Hawai'i's public trust doctrine.

C. Contemporary Criticism of the Water Code

Hawaiian advocates have criticized Hawaiian water law for decades. The criticism has commonly occurred along two vectors. First, the prioritization of corporate interests: Hawai'i's water law has often remained ignorant of water's importance to kānaka maoli and colonialism's restriction of their access to water. The system diminishes the significance of kānaka maoli claims to traditional water rights and glorifies corporate water uses, transforming an approach that requires casting a gimlet eye on corporate uses into one that subsidizes them.

The case of Nā Wai 'Ehā, "The Four Great Waters," provides a helpful example. Nā Wai 'Ehā is a watershed in central Maui comprising

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126 *Id.* § 174C-41(a).

127 Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt., 927 P.2d 1367, 1374 (Haw. 1996) ("Hawai'i, therefore, has a bifurcated system of water rights. In WMAs, the permitting provisions of the Code prevail; water rights in non-designated areas are governed by the common law.").

128 HAW. REV. STAT. § 174C-48(a).

129 *Id.* §§ 174C-48 to -49.

130 *Id.* § 174C-49(a)(1)–(4).

131 *Id.* § 174C-53(a).

132 *Waiāhole I*, 9 P.3d 409, 453 (Haw. 2000) (emphasis omitted) (footnote omitted) (quoting Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709, 728 (Cal. 1983) (en banc)).

four streams, revered by kānaka maoli for its abundant freshwater.[133] Historically, the region "boasted 'the largest continuous area of wetland taro cultivation' in all of the Hawaiian Islands."[134] Now, these waters are "a mere trickle of their former selves,"[135] as a result of still-extant diversion systems once required to sustain plantation agriculture.[136] In 2004, advocates petitioned the Commission to restore 53.4 million gallons per day (mgd) of flow to Nā Wai 'Ēha, over two-thirds of the water flow that companies took for over a century.[137] Waikulu Water Company (WWC) and Hawaiian Commercial & Sugar Company (HC&S) objected to the proposed restoration, and a hearing followed.[138] Despite a Proposed Decision and Order provided by the hearings officer that would have restored 34.5 mgd, the Commission restored a mere 12.5 mgd to only two streams over a "scathing dissent" from the hearings officer.[139]

In his proposed ruling, the hearings officer, Commissioner Lawrence Miike, demonstrated a profound understanding of water's importance to kānaka maoli and the devastating effects of the plantation industry's water diversion.[140] "For nearly 150 years," he acknowledged, "the waters of Nā Wai 'Ehā . . . have been diverted, primarily to irrigate sugar cane," "the dominant industry."[141] Yet this lack of freshwater flow has limited Native Hawaiians' ability to engage in traditional rights and practices.[142] "Restoration of mauka to makai flow to the streams [was] critical to the perpetuation and practice of Hawaiian culture in Nā Wai 'Ehā" — for example, kalo cultivation.[143] Thus, Commissioner Miike concluded water should be returned to all of Nā Wai 'Ehā's streams.[144]

But the Commission was not persuaded by Commissioner Miike's reasoning, instead adopting HC&S's proposal to restore flow to only two streams.[145] While the Commission included testimony asserting the importance of free-flowing water to kānaka maoli (as the Proposed

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133 Sproat, *supra* note 4, at 127–28.

134 Sproat, *supra* note 22, at 569 (quoting TY P. KĀWIKA TANGAN, REPORT ON THE ARCHIVAL, HISTORICAL AND ARCHAEOLOGICAL RESOURCES OF NĀ WAI 'EHĀ 1, 8–9 (2007)).

135 *Id.*

136 *Id.* at 570.

137 Sproat, *supra* note 4, at 129–30, 193.

138 Commission on Water Resource Management's Findings of Fact, Conclusions of Law, and Decision and Order at 6–8, *Contested Case Hearing*, No. CCH-MA06-01 (June 10, 2010) [hereinafter Commission's D&O].

139 Sproat, *supra* note 4, at 191–92.

140 No doubt Commissioner Miike was informed by his experience producing scholarship in the Hawaiian water law space. *See generally* LAWRENCE H. MIIKE, WATER AND THE LAW IN HAWAI'I (2004) (discussing ancient Hawaiian land management and contemporary water law).

141 Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order at 1, *Contested Case Hearing*, No. CCH-MA06-01 (Apr. 9, 2009) [hereinafter Proposed D&O].

142 *Id.* at 10.

143 *Id.* at 12.

144 *Id.* at 187–89.

145 Sproat, *supra* note 4, at 193–94.

Decision and Order did), unlike Commissioner Miike, it did not treat the testimony as fact.[146] And Hawaiian history and culture were an afterthought. The majority concluded that the excluded streams did not merit restoration, one because the assessment of whether "continuous flows might have existed in the pre-diversion period . . . can be deferred" and the other because its restorative potential was limited due to topography.[147] Such logic ignores the importance that immediate water flow has for kānaka maoli and views their water uses as residual.[148]

Second, advocates criticize the influence of interest groups: Law has the potential to be nonneutral toward indigenous people.[149] Much of Hawai'i's water law was enacted to resolve ongoing problems caused by a century of plantation extraction.[150] But rather than resolving these harms, it provided a new vehicle for plantations' self-perpetuation — appeals to purportedly neutral legal reasoning that obfuscate the influence of political and economic interests.[151] For example, the Nā Wai 'Ehā majority defended its conclusion claiming it "followed the mandates of the law" and reached a result that "represented the best balance of the mandated values and trust responsibilities."[152] But during oral argument, HC&S's manager warned that adopting the proposed decision would result in hundreds of lost jobs and millions of lost dollars,[153] which appears to have motivated the Commission's adoption of HC&S's proposal. The Commission's appeal to purportedly neutral balancing hid the distributional consequences of its outcome; the neglected streams remained "completely dewatered below the Companies' diversions," harming kānaka maoli cultural practices.[154]

Pointing to the use of pressure tactics throughout the hearing, scholars have argued the Nā Wai 'Ehā decision was influenced by agribusiness lobbying.[155] The Commission's receptiveness to such interests might be explained by its composition. It has always included

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[146] *Compare, e.g.*, Commission's D&O, *supra* note 138, at 12 ("*Testimony contended* that 'Restoration of mauka to makai flow to the streams is critical . . . .'" (emphasis added)), *with* Proposed D&O, *supra* note 141, at 12 ("Restoration of mauka to makai flow to the streams is critical . . . .").

[147] Commission's D&O, *supra* note 138, at 179.

[148] Dissenting Opinion of the Hearings Officer/Commissioner Lawrence H. Miike at 4, *Contested Case Hearing*, No. CCH-MA06-01 (June 10, 2010) (arguing the Commission took "a residual — not a balanced — approach"); *see also id.* at 2 ("Where uncertainty exists, they choose presumptions that protect offstream uses for private commercial purposes and provide the least protection feasible or no protection at all to the waters of Nā Wai 'Ehā.").

[149] *See* D. Kapua'ala Sproat & MJ Palau-McDonald, *The Duty to Aloha 'Āina: Indigenous Values as a Legal Foundation for Hawai'i's Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525, 551 (2022) (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)).

[150] *See* Sproat, *supra* note 4, at 146–48.

[151] *See id.* at 195.

[152] Commission's D&O, *supra* note 138, at 191.

[153] Sproat, *supra* note 4, at 195–96, 196 n.342.

[154] *See id.* at 194.

[155] *See id.* at 133, 205–06.

representatives with ties to plantation agriculture and left kānaka maoli voices underrepresented.[156] Despite the Code's requirement that there be one member of the Commission with experience in kānaka maoli culture, critics have argued the requirement has been ignored.[157] Even if the requirement were to be heeded, given the Commission's size, it is easy for plantation interests to overwhelm the sole kānaka maoli representative. That dynamic explains why many believe the Commission has "a terrible track record."[158] They claim water allocation has "never been balanced . . . because [companies have] been taking it all."[159]

D. Water Code Debates After the Lahaina Fires

These criticisms have "[r]ekindl[ed]" century-old debates over the use of Hawai'i's freshwater resources in the wake of the Lahaina fires.[160] Testimony from the first Commission meeting after the fires confirmed that kānaka maoli and large landowners agreed on one thing: that the fire should "serve as a major wakeup call to how the resource is managed."[161] However, they differed in their preferred reforms.

Private interests have characterized their positions modestly: "All [they] have asked is for the ability to make water available for fire prevention and suppression."[162] But despite their stated intentions, their proposals regress Hawai'i's water law. Beyond altering the Code, WML has proposed removing West Maui's WMA designation, a move opponents decry as turning Maui into the "'Wild Wild West' of water conflicts."[163] This would jettison the Code's permitting requirements; new water uses would no longer require approval by the Commission.[164]

Kānaka maoli advocates argue that the disaster-preparedness concerns of landowners are pretextual. They point to the fact that the water that WML requested would not have helped firefighting efforts, as WML's reservoir is not connected to Lahaina's fire hydrants and firefighting helicopters that could have used the water were unable to fly due to high winds.[165] They worry that these "large players" are using the threat of natural disaster to "grab west Maui's water for good."[166]

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156 *See* Cantor et al., *supra* note 7, at 176.

157 *See id.*

158 *Id.*

159 *Id.*

160 *See* Yerton, *supra* note 15.

161 Paula Dobbyn, *Water Commission Implored to "Hit the Reset Button" Following Maui Fires*, HONOLULU CIV. BEAT (Oct. 24, 2023), https://www.civilbeat.org/2023/10/water-commission-implored-to-hit-the-reset-button-following-maui-fires [https://perma.cc/E2Z2-KDK8].

162 Kelleher & Hong, *supra* note 9.

163 Yerton, *supra* note 10.

164 *See* HAW. REV. STAT. § 174C-48 (2022); Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt., 927 P.2d 1367, 1374 (Haw. 1996).

165 *See* Yerton, *supra* note 92.

166 Klein & Sproat, *supra* note 1.

Corporate groups, however, have doubled down on the inadequacy of Hawai'i's disaster response, blaming the Commission and the Code. Tremble claimed that "the problem is the process, or lack thereof, to provide water to Maui Fire Department and to the community."[167] Peter Martin, a notorious development mogul in West Maui and WML's CEO,[168] argued that the Commission's draconian management prevented residential development and the creation of irrigation systems, which would have made Maui more fire resistant.[169] To Martin, the timing of the fires was no coincidence — days prior, WML was filling applications "justifying [its] current water usage and seeking more."[170]

Developers have also blamed the water law regime's prioritization of Native Hawaiian water rights and the efforts of advocates to seek greater protections. Martin has dismissed the idea of protecting water for Native cultural practices as a "crock of shit" and claimed that "this stupid climate-change thing" had "nothing to do with the fire."[171] The state government has also cast blame on Native Hawaiians, with Governor Green claiming that "[t]here are currently people still fighting in our state [about] giving us water access to fight and prepare for fires."[172]

Kānaka maoli have argued such a tradeoff is incorrect and instead, the "historical and modern plantation economy" has monopolized the water, "devoured the island's natural resources," and transformed Maui into a "parched desert" vulnerable to fires.[173] Many kānaka maoli communities currently lack sufficient access to water to provide for their basic needs and engage in cultural practices.[174] They therefore want less water to be diverted to luxury subdivisions and more to be available for traditional use, also claiming that free-flowing water would restore the environment to a state more resistant to climate change.[175]

The political climate of Hawai'i is conducive to fundamental alterations to the state of Hawaiian water law "next legislative session."[176] But improving Hawaiian water law requires appreciating and reckoning with the legacy of plantation colonialism.

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167 Hofschneider & Bittle, *supra* note 10.

168 *Id.* (detailing Martin's history of diverting water away from Native Hawaiians, filing quiet title claims against Native landowners, and circumventing the permitting process).

169 *See id.*

170 *Id.*

171 Kormann, *supra* note 17.

172 *See* Klein & Sproat, *supra* note 1 (second alteration in original).

173 *See id.*

174 *Id.*

175 *See id.*

176 *See* Elena Bryant, *How Maui's Wildfire Sparked a Disaster Capitalist Power Grab for Hawai'i's Public Water*, EARTHJUSTICE (Aug. 28, 2023), https://earthjustice.org/experts/elena-bryant/how-mauis-wildfire-sparked-a-disaster-capitalist-power-grab-for-hawaiis-public-water [https://perma.cc/44NL-L3LN].

III. A PATH FORWARD

The previous Parts demonstrate the necessity of reforming Hawaiian water law to account for the ways in which colonialism has enabled and infected it. Given concerns over the efficacy of the Commission and the protracted nature of using litigation to change the water regime, this Note advocates for legislative change to the Code. Beyond creating a more equitable water future for kānaka maoli, legislative reform also affords the possibility of minimizing the devastation of future wildfires.

A. A Plea for Legislative Action

It is inaccurate to suggest that kānaka maoli have gone without victory in the water-rights arena. The 1978 Constitution implemented a variety of protections for Native Hawaiians. The Code and the Commission were motivated by a desire to better protect customary water rights. And the Hawai'i Supreme Court has affirmed a capacious public trust doctrine that commits the state to protect kānaka maoli. Yet many Native Hawaiians find themselves without water or political power.

Accordingly, advocates have called for a greater infusion of Native Hawaiian history, culture, and tradition into state decisionmaking. Professor Kapua'ala Sproat argues that Hawaiian law should incorporate four values of restorative justice that embody kānaka maoli traditions and can undo the damage of colonial exploitation: cultural integrity (*mo'omeheu*), land and natural resources (*'āina*), social welfare and development (*mauli ola*), and self-government (*ea*).[177]

The four values recognize that colonialism has undermined kānaka maoli sovereignty and necessitates remediation.[178] They are interconnected and serve as vectors along which "history and current socioeconomic conditions" should be analyzed when evaluating decisions implicating Hawaiian water rights.[179] A recognition of cultural integrity would appreciate kānaka maoli's struggles to maintain their culture given the realities of colonial subjugation and analyze whether "decisions support and restore cultural integrity as a partial remedy for past harms, or perpetuate conditions that continue to undermine cultural survival."[180] To evaluate a decision's effect on the value of the land and natural resources would acknowledge freshwater's cultural and spiritual significance to Native Hawaiians. For kānaka maoli, a loss of water is more than a loss of a subsistence resource — it is a loss of their way of life. Considering a decision's impact on social welfare and development requires accepting that because colonizers "plundered biocultural

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177 *See* Sproat, *supra* note 4, at 173; Sproat & Palau-McDonald, *supra* note 149, at 567.

178 S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 331–42 (1994).

179 *See* Sproat, *supra* note 4, at 177.

180 *Id.* at 179.

resources for profit,"[181] kānaka maoli are among the most economically and socially disadvantaged segments of Hawai'i's population.[182] Finally, self-government entails affording kānaka maoli the opportunity to meaningfully participate in water-management decisions.[183]

Hawaiian water law should incorporate the four values. By encouraging decisionmakers to reckon with Hawai'i's history of colonialism and the current conditions of kānaka maoli, the four values might yield more equitable decisions. The four values are an apt solution to the Commission's decisionmaking problems because of their "ground-level applicability: regardless of the political, economic, social, or historical constraints of any case, analyzing the impacts on [the four values] will bring an action closer to conceptualizing 'justice' for impacted communities."[184] They guide "the actual interactive dynamics of local decisionmaking," facilitating a more localized environmental justice.[185]

While the Commission is at liberty to utilize the four values,[186] the vagueness and generality of the Code's requirements allow it to claim compliance while "subverting the values that law was designed to protect."[187] The factors in the Commission's calculus that purport to protect kānaka maoli such as "consisten[cy] with the public interest"[188] are malleable and provide a safe harbor for commercially biased reasoning, both intentional and not.[189] Nā Wai 'Ehā provides a clear example.

But Sproat observes that the Hawai'i Supreme Court, without acknowledging it, has rendered decisions that are "attentive to politics, economics, and culture, both historically and in terms of current conditions."[190] This should not be surprising; the four values are a framework for legal reasoning, not a novel legal rule. That legal decisions in Hawai'i already incorporate the decisionmaker and the legal system's values suggests that this Note's proposal is modest: substituting an implicit, corporate-leaning set of values with an explicit, indigenous one.

Judicial correction alone is inadequate. Courts' difficulties in analyzing Hawaiian custom is one reason. And while the supreme court has at times been a positive force,[191] litigation has issues with "cost,

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181 Sproat & Palau-McDonald, *supra* note 149, at 570.

182 Sproat, *supra* note 4, at 182 (quoting Anaya, *supra* note 178, at 317).

183 *See* Anaya, *supra* note 178, at 355.

184 Sproat & Palau-McDonald, *supra* note 149, at 575.

185 Sproat, *supra* note 19, at 161.

186 *See* Sproat, *supra* note 4, at 196–98.

187 *See id.* at 195; *see also* Commission's D&O, *supra* note 138, at 142 ("The law does not prescribe a specific method for weighing . . . ."); *cf.* Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt., 927 P.2d 1367, 1372 (Haw. 1996) (highlighting "inartful drafting of the Code").

188 HAW. REV. STAT. § 174C-49(a)(4) (2022).

189 *See* Sproat, *supra* note 4, at 170.

190 *Id.* at 170 n.221 (citing, inter alia, *Waiāhole I*, 9 P.3d 409 (Haw. 2000)).

191 For more on the court's role in creating a more equitable water law, see generally D. Kapua'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law*, 33 U. HAW. L. REV. 537 (2011); Williamson B.C. Chang, *The Life of the Law Is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson*, 33 U. HAW. L. REV. 99 (2010).

delay, and . . . [court] 'politics.'"[192] Legislative change thus presents the logical next step to Sproat's proposal. It takes advantage of the political mechanism that produced the 1978 amendments and the modern water apparatus, which (while imperfect) demonstrate the legislature's power to effect profound regime changes. Historically, where executive and judicial action have been unhelpful, Native peoples have turned to the legislature with great success.[193] Kānaka maoli should follow their lead.

B. Reforming the Water Code

The Code must be reformed to force decisionmakers to consider the four values. This section provides two complementary ways that the state legislature could effect this change: The first enshrines the four values in the Code. The second ensures that the Commission transparently factors these principles into its decisionmaking.

First, the Code can be amended to explicitly require the Commission to consider the four values. Currently, when the Commission evaluates permits, it must find that the proposed use can be accommodated with available water, is a reasonable-beneficial use, will not interfere with any existing legal use, and is consistent with the public interest.[194] The Commission must also heed the public trust doctrine and protect Native Hawaiian rights to the extent feasible.[195] The legislature could make the Code's definition of "public interest" more exacting by enumerating the four values and demanding the Commission consider them in water disputes involving kānaka maoli. Enumeration of similar specificity already exists in the Code to afford discrete protections. For instance, traditional rights "shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, oʻopu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes."[196] Enumeration of the four values would require the Commission to reckon with the legacy of plantation colonialism and give Native Hawaiian rights the priority they are legally due.[197] Legislative amendment could provoke decisions with greater cognizance of the stakes of water disputes for Native Hawaiians.

Nā Wai ʻEhā shows that simply having substantive law that intends to protect Native Hawaiian water rights is inadequate to vindicate those rights in practice. Even with perfectly drafted statutory factors, the imprecision of language might still permit the Commission to hide the nonneutral interests that impact its decisionmaking. Thus, as a second

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192 Martin et al., *supra* note 34, at 78.

193 *See* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2211–12 (2023).

194 HAW. REV. STAT. § 174C-49(a) (2022).

195 *Id.* §§ 174C-2, 174C-101(c).

196 *Id.* § 174C-101(c).

197 *See Waiāhole I*, 9 P.3d 409, 449, 451 (Haw. 2000) (citations omitted).

complementary measure, the Code might be altered to force the Commission to thoroughly articulate its reasoning under the four values.

This would allow a reviewing court to analyze whether a decision properly heeded the Code's directives. As the Hawai'i Supreme Court has acknowledged, judicial review's efficacy depends on sufficient explanation of the Commission's decision.[198] Where the record "demonstrates considerable conflict or uncertainty in the evidence," the Commission "must articulate its factual analysis with reasonable clarity, giving some reason for discounting the evidence rejected."[199] This is crucial in water disputes, which involve dire cultural, economic, and political consequences.[200] If the Commission plans on prioritizing corporate interests, it should be forced to do so explicitly, in clear terms.

The requirements imposed on the Army Corps of Engineers by the Clean Water Act[201] (CWA) provide a helpful framework. The CWA establishes a permitting program reviewed by the Corps "to regulate the discharge of dredged or fill material into waters of the United States."[202] The program prohibits discharge where a less damaging practicable alternative exists or if waters would be "significantly degraded."[203] This capacious language, however, is supplemented by an exacting requirement imposed on the Corps's decisions. The Corps's regulations require documented information supporting each factual determination made, a precise description of the permitted activities, and a prediction of their effects.[204] The relevant effects are diverse, including ecological, historic, and cultural.[205] Holistic concerns must be recognized and weighed explicitly.[206] The Code could require the Commission to engage in a similarly rigorous analysis of the historic and cultural effects of a water decision, permitting a more robust judicial review.

The state's ability to prevent and respond to wildfires may at first seem to justify concerns regarding proposals to take kānaka maoli interests into greater account. But a singular focus on water diversion is misguided. Given that Maui's wildfire susceptibility can be explained by vestiges of colonialism, tactics aimed at these relics like restoring

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198 *Id.* at 475 (citing Application of Kauai Elec. Div. of Citizens Utils. Co., 590 P.2d 524, 536–38 (Haw. 1978)) ("The failure of the Commission to address and explain these contradictions precludes effective review of its decision.").

199 *Id.* at 475–76 (citing Green v. Shalala, 51 F.3d 96, 101–02 (7th Cir. 1995); Thompson v. Bowen, 850 F.2d 346, 349 (8th Cir. 1988); Vemco, Inc. v. NLRB, 79 F.3d 526, 528 (6th Cir. 1996)).

200 *Cf.* Sproat, *supra* note 4, at 168 (discussing high-stakes cases generally).

201 33 U.S.C. §§ 1251–1389.

202 *Permit Program Under CWA Section 404*, EPA (Mar. 31, 2023), https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 [https://perma.cc/JD2E-M5NP].

203 *Id.*

204 EPA Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.7 (2024).

205 *See id.* § 1508.8.

206 Claire Krebs, *The Army Corps of Engineers' Permits and Decisions*, *in* THE ADVOCATE'S GUIDE TO EFFECTIVE PARTICIPATION IN ENVIRONMENTAL PERMIT PROCEEDINGS 152, 159 (2022).

traditional flora might rehabilitate Hawai'i's fire resistance.[207] Kānaka maoli would likely support such a solution.[208] Hawaiian resource management philosophy arguably permits using water for firefighting. Though wildfires were historically uncommon, guardianship over water sources and need-based apportionment are consistent with affording more at-risk areas a limited diversion in case of disaster.[209] What raises concern for kānaka maoli are clearly excessive diversions for dubious reasons, not good faith preventative measures. Reasoning using the four values provides the possibility of distinguishing the two.

C. Reimagining the Commission's Decisionmaking

An illustration might demonstrate the proposal's efficacy more concretely. Consider the Commission's decision in 2001 to issue water permits to Kukui Moloka'i, Inc. (KMI) to withdraw 1,018,000 gallons per day (gpd) of water from a well on Moloka'i to use primarily for a resort and commercial properties like golf courses and residential subdivisions.[210] The Commission found that the uses were consistent with the public interest and did not interfere with customary Hawaiian rights.[211] The permits were approved over the opposition of kānaka maoli and the Office of Hawaiian Affairs, a state agency "responsible for improving the wellbeing of all Native Hawaiians."[212] Native Hawaiians would have lost significant amounts of water had the Commission's decision stood, and though the order granting the permits was vacated by the Hawai'i Supreme Court in 2007,[213] KMI's extractions in the meantime required supplementation from Native Hawaiian homesteads and exacerbated water shortages.[214]

The Commission's reasoning in granting the permits was thin. It formalistically reasoned that because the hotels, golf courses, and subdivisions constituted municipal recreation, commercial, and domestic uses, which are included in the Code as examples of public interest uses, the uses were in the public interest.[215] It also concluded that there was

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[207] *Cf.* Kolbert, *supra* note 69.

[208] *Cf.* Klein & Sproat, *supra* note 1 ("[B]iocultural knowledge . . . is needed to navigate the path forward in a time of climate crisis.").

[209] *Cf.* Nakuina, *supra* note 26, at 508 (describing resource sharing in the context of drought).

[210] Findings of Fact, Conclusions of Law, and Decision and Order at 1, 52, 55, *Contested Case Hearing*, No. CCH-MO97-1 (Dec. 19, 2001) [hereinafter Kukui D&O].

[211] *Id.* at 9.

[212] *About*, OFF. OF HAWAIIAN AFFS., https://www.oha.org/about [https://perma.cc/KN9U-GGHE]; *see also* Sproat, *supra* note 22, at 563 (citing *In re* Kukui (Moloka'i), Inc. (*Kukui*), 174 P.3d 320, 324–25 (Haw. 2007)).

[213] *See Kukui*, 174 P.3d at 325.

[214] *See* Glenn Ioane Teves, Letter to the Editor, *Managing Molokai's Water Supply*, MOLOKAI DISPATCH (June 21, 2007), https://themolokaidispatch.com/managing-molokais-water-supply [https://perma.cc/8926-5S4W]; Glenn Teves, *The State of Water Usage on Moloka'i*, MOLOKAI DISPATCH (Jan. 23, 2007), https://themolokaidispatch.com/state-water-usage-molokai [https://perma.cc/GFJ3-BSG9].

[215] *See* Kukui D&O, *supra* note 210, at 46.

no evidence of a measurable adverse effect on traditional kānaka maoli rights and no visible adverse impacts or declines in resources.[216]

Had the Commission been forced to decide in accordance with this Note's proposals, a different outcome might have been reached: the permit may have been denied or the water allocation reduced. That the Commission did not perceive evidence of adverse impacts on kānaka maoli would have been insufficient, as prioritization of cultural integrity and self-governance would require the Commission to engage in active efforts to remediate the harms that past commercial water extractions have had on kānaka maoli cultural practices and self-determination. The Commission would have had to recognize that the privatization of water in any amount inflicts cultural harms, which counsels against finding that there is *absolutely* no abridgement of custom without further comment and requires KMI to make a stronger showing of a public benefit.[217] Consideration of social welfare might have militated against a mechanical understanding of the public interest, given that Native Hawaiians are the victims, not the beneficiaries, of Hawai'i's tourism industry.[218] And requiring the Commission to more explicitly analyze these tensions in light of historical context rather than formulaically applying imprecise statutory provisions might have avoided the state supreme court's criticism that the Commission must not act as "a mere 'umpire[']. . . but instead must take the initiative in . . . advancing public rights in [water] at every stage of the . . . decisionmaking process."[219] Here, adopting the Note's proposal may have been outcome determinative.

CONCLUSION

While the future of Hawai'i's water law is at a crucial juncture, reflecting on colonialism's role in degrading the ancient and current water management systems suggests that the way forward is to change course. Far from risking devastation from future natural disasters, affirming Native Hawaiians' water uses and water-management philosophy would draw on knowledge that helped sustain their society for centuries. Such affirmation must come from the legislature. By using Hawaiian water law to reckon with Hawai'i's colonial history rather than repeat it, a more equitable water future might be realized.

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[216] *Id.* at 48–49.

[217] *See id.* at 49.

[218] *See, e.g.*, Jon Matsuoka & Terry Kelly, *The Environmental, Economic, and Social Impacts of Resort Development and Tourism on Native Hawaiians*, 15 J. SOCIO. & SOC. WELFARE 29, 29–41 (1988).

[219] *Kukui*, 174 P.3d 320, 344 (Haw. 2007) (quoting *In re* Water Use Permit Applications (*Waiāhole II*), 93 P.3d 643, 658 (Haw. 2004)).