Reoccurring Cultural Insensitivity: Confronting the Abdication of Core Judicial Functions

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The cultural impact assessment prepared for the University of Hawai'i in 1999 concerning Mauna Kea[1] became part of the administrative agency record on remand from *Mauna Kea Anaina Hou v. Board of Land & Natural Resources* (*Mauna Kea I*),[2] upon submission as an exhibit by Mauna Kea Anaina Hou (MKAH), Kealoha Pisciotta, Clarence Kūkauakahi Ching, the Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and Kāhea: The Hawaiian Environmental Alliance (collectively, the MKAH Appellants):[3]

> To Native Hawaiians, the natural elements of the physical environment – the land, sea, water, winds, rains, plants, and animals, and their various embodied spiritual aspects – comprise the very foundation of all cultural life and activity – subsistence, social, and ceremonial; to Native Hawaiians, the relationship with these natural elements is one of family and kinship.
>
> The Native Hawaiian cultural practices identified as currently associated with the University of Hawaii Mauna Kea Science Reserve Master Plan project area . . . [include] experiential activities focused on "becoming one" with natural setting; that is, behaviors relating to spiritual communication and

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[1] Paul H. Rosendahl, Ph.D., Inc. (PHRI), CULTURAL IMPACT ASSESSMENT STUDY: NATIVE HAWAIIAN CULTURAL PRACTICES, FEATURES, AND BELIEFS ASSOCIATED WITH THE UNIVERSITY OF HAWAI'I MAUNA KEA SCIENCE RESERVE MASTER PLAN PROJECT AREA (Aug. 1999) (Report 1876-040199, prepared by PHRI for University of Hawaii – Institute for Astronomy c/o Group 70 International), https://dlnr.hawaii.gov/mk/files/2016/10/Ex.-A-067.pdf [hereinafter MAUNA KEA CIA STUDY].

[2] 136 Hawai'i 376, 363 P.3d 224 (2015).

[3] E-mail from MKAH President Kealoha Pisciotta to author (Feb. 3, 2021) (on file with author); *In re* Conservation District Use Application (CDUA) HA-3568 (*Mauna Kea II*), 143 Hawai'i 379, 387 n.5, 431 P.3d 752, 760 n.5 (2018) (identifying the MKAH Appellants); *see also infra* note 222 (citing testimony about corporate efforts to tamper with cultural impact assessment, which urged "no further development" at Mauna Kea).
Notwithstanding (now retired) Hawai'i Supreme Court Associate Justice Richard W. Pollack's use of the short form *In re TMT* in two subsequent opinions—viz., *Lāna'ians for Sensible Growth v. Land Use Comm'n* (*LSG IV*), 146 Hawai'i 496, 509 n.14, 463 P.3d 1153, 1166 n.14 (2020), and *Ching v. Case*, 145 Hawai'i 148, 170, 449 P.3d 1146, 1168 (2019)—this article opts for the short form *Mauna Kea II* as more recently used by *Mauna Kea I* author Associate Justice Sabrina S. McKenna in *In re Gas Co.* (*Gas Co.*), 147 Hawai'i 186, 206, 465 P.3d 633, 653 (2020), in recognition of the fact that both Justice McKenna's majority opinion and Justice Pollack's partial concurring opinion in *Mauna Kea II* referenced the court's prior opinion as "*Mauna Kea I*[.]" *Mauna Kea II*, 143 Hawai'i at 387, 431 P.3d at 760; *see also id.* at 410, 431 P.3d at 783 (Pollack J., concurring in part and concurring in the judgment, Wilson, J., joining as to Parts I–III).

interaction that reaffirm and reinforce familial and kinship relationships with the natural environment.

. . . [S]everal of the identified practices and beliefs would appear to fall within . . . the purview of Article XII, Section 7, of the [Hawai'i] State Constitution ("Traditional and Customary Rights"), particularly as reaffirmed in 1995 by the [Hawai'i] State Supreme Court in the decision commonly referred to as the "*PASH* decision," and further clarified in the 1998 decision in "State v. Hanapi," and which would include various cultural practices and beliefs associated with the general geographical area of the summit region, rather than a clearly definable property or site. While certain other practices, such as prayer and ritual observances involving the construction of new *kuahu* (altars), or the releasing of cremated human remains rather than interment on *pu'u*, might seem to be contemporary cultural practices, they may as well be considered to be reasonable cultural developments evolving from earlier traditional practices.

. . . While knowledgeable informants and cultural practitioners acknowledge that several of the *pu'u* have been damaged by past construction activities, they also appear to believe that the *pu'u* have not been so substantially damaged as to destroy their integrity. . . .

With regard to the current practices identified by Maly (1999) as contemporary cultural practices, it would seem that they all bear close enough relationships to earlier traditional cultural practices associated with the upper slopes and summit region of Mauna Kea so that no purpose would be served by distinguishing them as something different. Furthermore, as has been pointed out previously, it is likely that they represent reasonable cultural evolution from earlier traditional practices.

. . . SHPD [State Historic Preservation Division] staff have recently indicated that they will be proposing a historic district designation for the summit region of Mauna Kea which they believe will meet the eligibility criteria for inclusion in both the [Hawai'i] State and the National Register of Historic Places. A historic district is defined as a historic property that " . . . possesses a significant concentration, linkage, or continuity of sites . . . united historically or aesthetically by plan or physical development" (NPS 1990:5).

. . . The proposed district includes the total of 93 archaeological sites identified within the Science Reserve, three landscape features within the reserve believed to qualify as traditional cultural properties, and the Mauna Kea Adze Quarry Complex situated within the Natural Area Reserve.

Consideration of the properties included within this proposed historic district, and their associated practices and beliefs, suggests it to represent a type of historic property best referred to as a cultural landscape. A cultural landscape is a geographical[ly] definable area that clearly reflects patterns of occupation

> and land use over a long time period, as well as the cultural values and attitudes which guide and regulate human interaction with the physical environment. Based on the Native Hawaiian traditional cultural practices and beliefs associate[d] with Mauna Kea, as documented in the Maly (1999) oral history and consultation study, the proposed historic district could perhaps even more appropriately be considered to be a special type of cultural landscape referred to by the National Park Service as ethnographic landscapes: "those landscapes imbued with such intangible meanings that they continue to be deemed significant or even sacred by contemporary people who have continuous ties to the site or area". Such an ethnographic landscape would seem to be embodied in the concept of "cultural attachment" used by Maly (1999:27) to describe the connection of many Native Hawaiians to Mauna Kea.[4]

The agency's final decision and order on remand from *Mauna Kea I* includes just one citation to this MAUNA KEA CIA STUDY (merely defining traditional and customary rights),[5] and there is *no mention* of the Mauna Kea Summit Region Historic District in the Hawai'i Supreme Court's *Mauna Kea II* decision.

By comparison, Figure 1 below provides a partial map of traditional Hawaiian view planes emanating from the lele (altar) where solstice and equinox ceremonies are currently performed at Mauna Kea, drawing from information provided by MKAH President Kealoha Pisciotta and utilizing University of Hawaii Institute for Astronomy planning documents that show a

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[4] MAUNA KEA CIA STUDY, *supra* note 1, at 42–45 (citing Kepa Maly, "Mauna Kea Science Reserve and Hale Pohaku Complex Development Plan Update: Oral History and Consultant Study, and Archival Literature Research; Ahupua'a of Ka'ohe (Hamakua District) and Humu'ula (Hilo District), Island of Hawai'i" (Feb. 1999) (Report HiMK-21 (120199), including Appendices A thru E, prepared by Kumu Pono Associates (Hilo) for Group 70 International (Honolulu)). Pisciotta explains that MKAH introduced this exhibit to rebut the University's newly raised argument on remand that mere "contemporary" practices are not entitled to protection as traditional and customary rights. Telephone Interview with Kealoha Pisciotta (Apr. 24, 2021). *See infra* Section III.C.2., notes 157–92 and accompanying text (discussing the *Mauna Kea II* court's clarification, upon reconsideration, that Hawai'i law requires consideration of a proposed project's impacts on "contemporary (as well as customary and traditional) Native Hawaiian cultural practices" outside the area at issue, in addition to within the project site and its immediate vicinity).

[5] *In re* Conservation Dist. Use Application (CDUA) HA-3568, Case No. BLNR-CC-16-002, Findings of Fact, Conclusions of Law and Decision and Order, at 116 (Haw. Bd. of Land & Nat. Res. Sept. 28, 2017) (citing MAUNA KEA CIA STUDY, *supra* note 1, at 1–2), https://dlnr.hawaii.gov/mk/files/2017/09/882-BLNR-FOFCOLDO.pdf [hereinafter BLNR Decision].

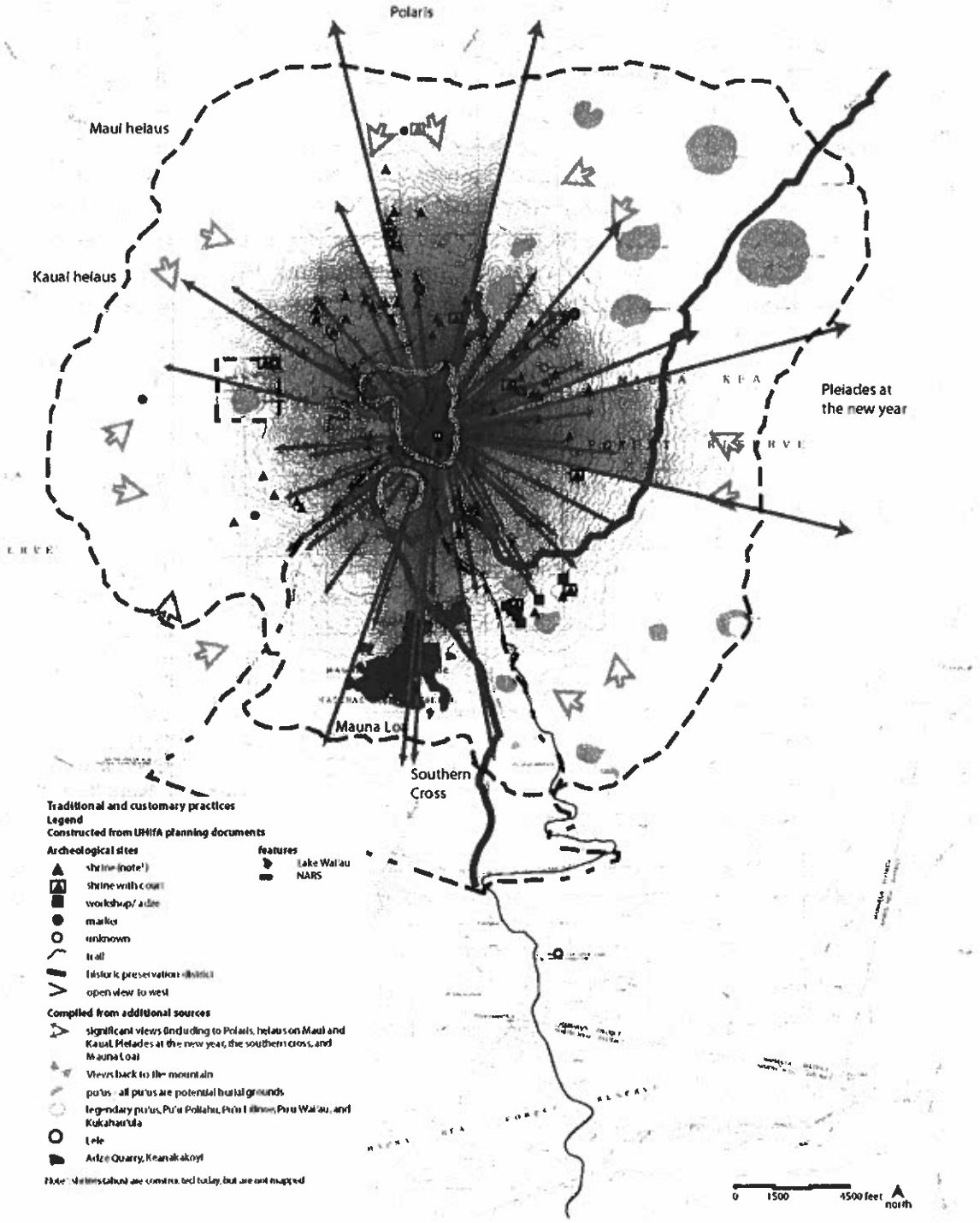

Fig 1. Traditional Viewsheds from Mauna Kea (partial map). Map by Community by Design.

"ring of shrines" in the Mauna Kea Summit Region Historic District.[6] Of course, traditional kilo hōkū practices (observation and study of stars) involve views both from Mauna Kea as well as looking back toward Mauna Kea, occurring much more frequently than just four times a year marked by the winter/summer solstices and equinoxes.[7] According to the University's own environmental impact statement, "[h]istorical documents reveal that most shrines are located on the summit plateau (mostly on the north and northeast side of the mountain), not the core summit region or the tops of cinder cones, suggesting that *the* [summit] *area was likely avoided because of its high degree of sacredness*."[8]

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[6] Community By Design is a planning group from the University of California-Berkeley powered by industrious students who arrived in Hawai'i thanks to donated frequent flier miles arranged by Lea Hong. Zoom Interview with Kealoha Pisciotta (Dec. 16, 2020). The map was submitted as Exhibit C-5 in the 2011 contested case hearing, and Exhibit B.01t in the 2017 contested case hearing. *Id.*

As a civil and commercial litigator with Alston Hunt Floyd & Ing (AHFI), now known as Dentons, I assisted then AHFI partner Lea Hong in representing OHA—on behalf of Native Hawaiian members of MKAH, who are also OHA beneficiaries—in *Office of Hawaiian Affairs v. O'Keefe*, Civ. No. 02-00227 SOM/BMK (D. Haw. July 13, 2003) (granting motion for summary judgment on inadequacy of the National Aeronautical and Space Administration's environmental assessment for the KECK Outrigger Telescopes project). The importance of traditional and customary practices involving view planes to the preservation of indigenous cultural knowledge will be explored further in a subsequent article applying critical race theory to indigenous environmental justice issues. *See, e.g.*, *infra* notes 140, 175–177, 181, 187, 224, 227, 239 and accompanying text (regarding view plane impacts on traditional and customary practices at Mauna Kea, Haleakalā, Kalaemanō, and Kohanaiki).

[7] *See generally, e.g.*, Exhibit B.01a, Written Direct Testimony of Ms. K. Kealoha Pisciotta, Conservation Dist. Use Application (CDUA) HA-3568, Case No. BLNR-CC-16-002 (Haw. Bd. of Land & Nat. Res. Sept. 28, 2017), https://dlnr.hawaii.gov/mk/files/2016/10/B.01a-Kealoha-Pisciotta-WDT-2016-C-1-amend.pdf [hereinafter Pisciotta Written Testimony]; Exhibit B.01h, Kealoha Pisciotta's testimony and cross at 86–87, 89–90, 94–96, 99, 103, *In re* Conservation Dist. Use Application (CDUA) HA-3568, Case No. BLNR-CC-16-002 (Haw. Bd. of Land & Nat. Res. Sept. 28, 2017), https://dlnr.hawaii.gov/mk/files/2016/10/B.01h-Kealoha-Pisciotta-testimony-and-cross-9.26.11.pdf [hereinafter Pisciotta Oral Testimony].

[8] UNIV. OF HAWAI'I AT HILO, FINAL ENVIRONMENTAL IMPACT STATEMENT, VOLUME 1, at P-2 (2010) (emphasis added), http://www.malamamaunakea.org/uploads/management/plans/TMT_FEIS_vol1.pdf; *id.* at 3-15 ("[T]here are *at least 222 shrines around the circumference of the summit area*, between the 11,000 and 13,000 foot elevation") (emphasis added); *id.* at 3-31 (acknowledging that the view of the summit from "a few of the shrines on the northern plateau" will be impacted by the TMT Observatory); *id.* at 3-33 ("The TMT Observatory will add a new visual element to the northern plateau area that will be visible to varying degrees from the shrines along the northern slopes of Maunakea[.]"); *id.* at 3-50 ("[T]he TMT Observatory . . . will be visible to varying degrees from the northern ridge of Kūkahau'ula, Pu'u Pōhaku, Pu'u Poli'ahu, and some of the historic shrines and other historic properties along the northern slopes of

Over objections by the MKAH Appellants and other intervening practitioners, the State of Hawai'i Board of Land and Natural Resources (BLNR) nevertheless issued, and the Hawai'i Supreme Court affirmed, a conservation district use permit (CDUP) authorizing construction of a Thirty Meter Telescope (TMT) at Mauna Kea on the island of Hawai'i, pursuant to a conservation district use application (CDUA) submitted by the University of Hawai'i (University) on behalf of TMT Observatory Corporation, later renamed TMT International Observatory, LLC (TIO).[9]

ROAD MAP

Before discussing the *Mauna Kea II* court's inappropriate deference to agency decision making that privileged cultural insensitivity, this article begins by taking the reader on a guided tour of footnotes from the landmark *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* (*PASH*) decision relating to the doctrine of custom as it applies under Hawai'i law.[10] Regrettably, many agency decisionmakers, lawyers, and judges skip over these *PASH* Guidelines during what appear to be fleeting (if any) visits to the *PASH* opinion. As a result, restorative justice efforts initiated by the people of Hawai'i through the 1978 constitutional convention continue to be hampered by ongoing failure to give the *PASH* Guidelines their due consideration.

Part I introduces the most recent member of the *PASH* progeny (as of mid-2021), an unpublished Intermediate Court of Appeals (ICA) memorandum opinion that exposes allegedly consistent refusals by the Maui County Planning Commission (MPC) to implement the core holding in *PASH*. Correcting erroneous legal interpretations by both the agency and the lower court, the ICA framed the dispositive question around the applicable standard of review: highlighting *PASH*'s conclusion that restrictive agency interpretations of their own administrative regulations are

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Maunakea[.]").

[9] *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 384–87, 387 n.5, 409, 431 P.3d 752, 757–60, 760 n.5, 782 (2018).

[10] 79 Hawai'i 425, 437–51, 903 P.2d 1246, 1258–72 (1995), *cert. denied*, 517 U.S. 1163 (1996). Under the leadership of Hawai'i Supreme Court Chief Justice Ronald T. Y. Moon (1993 to 2010), the "Moon Court" authorized me to disclose that I performed substantial research and drafted opinions for the court as a law clerk to the Honorable Robert G. Klein, Associate Justice of the Hawai'i Supreme Court (Jan. 1994 to Aug. 1996), including the court's unanimous decisions authored by Justice Klein in: *PASH*; *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 891 P.2d 729 (1995); and *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210 (1994). *See also Bush v. Watson* (*Bush II*), 81 Hawai'i 474, 918 P.2d 1130 (1996).

not entitled to deference and must, instead, be reviewed *de novo* under the right/wrong standard.[11]

Next, Part II identifies the Hawai'i Supreme Court's latest (June 2020) citation to *PASH*: *In re Application of The Gas Co.* (*Gas Co.*).[12] The *Gas Co.* decision references the element of "reasonable[ness]" under the doctrine of custom as it applies in Hawai'i (hereinafter Hawai'i's Custom Doctrine), also briefly discussed two years earlier in *Mauna Kea II*.[13] Part II continues by casting the *PASH* Guidelines as an effort to implement a measure of restorative justice under the Hawai'i Constitution by providing "badly needed judicial guidance" and enforcement,[14] but also acknowledging the case-specific nature of traditional and customary rights inquiries under HRS section 1-1[15] and article XII, section 7 of the Hawai'i Constitution.[16]

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[11] "Anew; afresh; a second time." *De Novo*, BLACK'S LAW DICTIONARY 435 (6th ed. 1990), *quoted in* State v. Hoshijo *ex rel.* White, 102 Hawai'i 307, 315, 76 P.3d 550, 558 (2003) (explaining "[b]y way of illustration, [that] it is 'as if the reviewing court is the front-line judicial authority and, therefore, accords no deference to the lower courts' [or the agency's] determinations"; in other words, "the agency's conclusions of law are freely reviewable" under the right or wrong standard pursuant to the Hawai'i Administrative Procedure Act (HAPA), Hawai'i Revised Statutes (HRS) § 91-14(g)(1), (2), (4)) (2012 & Supp. 2019) (citations and alterations omitted).

[12] 147 Hawai'i 186, 206, 465 P.3d 633, 653 (2020).

[13] *Id.* (citing *Mauna Kea II*, 143 Hawai'i at 395, 431 P.2d at 768).

[14] Stand. Comm. Rep. No. 57, *in* 1 Proceedings of the Constitutional Convention of 1978, at 640 (1980), *quoted in* Ka Pa'akai O Ka 'Āina v. Land Use Comm'n (*Ka Pa'akai*), 94 Hawai'i 31, 50, 7 P.3d 1068, 1087 (2000), and Pele Def. Fund v. Paty (*PDF v. Paty*), 73 Haw. 578, 619–20, 837 P.2d 1247, 1271 (1992), *cert. denied*, 507 U.S. 918 (1993); *see also* Kalipi v. Hawaiian Trust Co. (*Kalipi*), 66 Haw. 1, 5, 656 P.2d 745, 748 (1982) (quoting page 637 of the same source). *Cf.* Mana Maoli, *"Hawai'i '78" | Song Across Hawai'i | Playing for Change Collaboration*, YOUTUBE (June 29, 2019), https://www.youtube.com/watch?v=HVuvKIFa6kc (reimagining the official video: ISRAEL KAMAKAWIWO'OLE, HAWAI'I '78 (Mountain Apple Co. 2010)).

[15] HRS section 1-1 provides that:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of [Hawai'i] in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage;* provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

HAW. REV. STAT. § 1-1 (2009 & Supp. 2019) (emphasis added); *see also PASH*, 79 Hawai'i at 437, 903 P.2d at 1258 (quoting HAW. REV. STAT. § 1-1). *PASH* traces the recognition of usage in this provision back before the origins of Hawai'i's constitutional democracy in the early nineteenth century and the establishment of private property in the Kingdom of Hawai'i. *Id.* at 437 n.21, 903 P.2d at 1258 n.21 ("[T]he Hawaiian kingdom was *governed*

Part III then places the court's *Mauna Kea I* and *Mauna Kea II* decisions in the context of ongoing Native Hawaiian claims for restorative justice, more than twenty-five years after the *PASH* decision, and more than four decades after the 1978 constitutional amendments. Recognizing that it would be premature to offer a definitive assessment of the jurisprudence issued under Chief Justice Mark E. Recktenwald's capable leadership, Part III nevertheless offers a critical preliminary examination of select Recktenwald Court opinions: identifying occasional lapses in the application of established jurisprudential principles, to the detriment of constitutionally protected public trust resources that include traditional and customary rights.[17] To illustrate this fact, Part IV briefly summarizes an octet of striking analogies between *Mauna Kea II* and two Moon Court opinions (*Wai'ola* and *Kukui I*), which vacated agency decisions that erroneously shifted the burden of proof in contested case hearings[18] from

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until the year 1838, without other system than usage, and with a few trifling exceptions, without legal enactments."); *see also id.* at 440 n.24, 445 n.33, 903 P.2d at 1261 n.24, 1266 n.33 (quoting reservation of tenant rights in land titles and an 1846 law requiring Land Commission decisions to be made in accordance with native usage).

[16] "The State reaffirms and *shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes* and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, *subject to the right of the State to regulate such rights.*" *Id.* at 437, 903 P.2d at 1258.

[17] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 11–13 (2008); *see also infra* note 210 and accompanying text (rejecting deference to agency determinations about witness credibility and conflicting testimony, as unsuccessfully urged by the Commission on Water Resource Management in *In re Wai'ola O Moloka'i, Inc.* (*Wai'ola*), 103 Hawai'i 401, 441, 83 P.3d 664, 704 (2004)); *infra* notes 148–49, 154–55 and accompanying text (discussing *Mauna Kea II*'s failure to address a point of error based on shifting the burden of proof from applicants to intervening practitioners in violation of *Wai'ola* and *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc.* (*Kukui I*), 116 Hawai'i 481, 174 P.3d 320 (2007)); *infra* notes 230–46, 250–51 and accompanying text (contrasting applicable limitations on the principle of agency deference under Hawai'i law with Hawai'i Supreme Court decisions that appear to treat standards of review as boilerplate—i.e., inappropriate "lawyering by headnote"—including, but certainly not limited to: *Kilakila 'O [Haleakalā] v. Board of Land & Natural Resources* (*Kilakila III*), 138 Hawai'i 383, 396, 406, 382 P.3d 195, 208, 218 (2016), and *Lāna'ians for Sensible Growth v. Land Use Comm'n* (*LSG IV*), 146 Hawai'i 496, 504, 463 P.3d 1153, 1161 (2020)).

[18] HAPA defines "contested case" (circularly) as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing" where "agency hearing" is defined as "only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14." HAW. REV. STAT. § 91-1 (2012 & Supp. 2019). *See also id.* § 91-10(5) (2012 & Supp. 2019) ("Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the

applicants to intervening Native Hawaiian practitioners.[19] After initially mischaracterizing *PASH* and its Progeny, the *Mauna Kea II* majority deleted the offending language upon reconsideration *without bothering to address fundamental due process issues*.

The Recktenwald Court's inexplicable decision(s) to ignore binding precedent in *Mauna Kea II* is no isolated error, unfortunately. That opinion is, instead, sandwiched between the court's initial missteps in *Kilakila III* and its later decision in *LSG IV* compounding those errors. To avoid what appears to be a looming constitutional crisis, this article pulls back the judicial curtains and urges both greater respect and fidelity to the powers enshrined in Hawai'i Constitution article VI, section 1[20]—along with other unique provisions developed in response to Hawai'i's colonial history, including the 1978 constitutional amendments. By embracing its core judicial functions, the court can correct course by reestablishing the restorative justice legacy of our Law School's founder, former Chief Justice William S. Richardson (affectionately known as "CJ"), as dutifully carried out, for example, by three of CJ's former law clerks who participated in this symposium: Professor Emerita Melody MacKenzie, and former Hawai'i Supreme Court Associate Justices Robert G. Klein and Simeon R. Acoba.

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burden of persuasion."); Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 391, 363 P.3d 224, 239 (2015) (observing that contested case hearing procedures including the opportunity to issue subpoenas, cross-examine witnesses, and present evidence through documents and testimony "are designed to ensure that the record is fully developed and subjected to adversarial testing *before* a decision is made").

[19] *Kukui I*, 116 Hawai'i at 507–09, 174 P.3d at 346–48; *Wai'ola*, 103 Hawai'i at 441–42, 83 P.3d at 704–05.

[20] In *Alaka'i Na Keiki, Inc. v. Matayoshi*, 127 Hawai'i 263, 277 P.3d 988 (2012), Justice Simeon R. Acoba distinguished Article III of the U.S. Constitution from article VI, section I of the Hawai'i Constitution as follows: "the existence, structure, and composition of our judiciary is established by the Hawai'i Constitution and cannot be altered by the legislature. This indicates that the power to administer justice and adjudicate disputes that is conferred upon the courts is *presumed* and will be available to the people of the state" through the "constitutional power to administer justice" including the inherent, corollary power, which provides "that parties should have appropriate access to the courts of this state in resolving disputes." *Id.* at 283, 277 P.3d at 1008 (emphasis added). *Compare id.* at 288, 277 P.3d at 1013 (Recktenwald, C.J., concurring in part and dissenting in part, Nakayama, J., joining) ("I would hold that the legislature clearly intended to preclude judicial review of these protest decisions under . . . HRS chapter 103F. I would further hold that preclusion of judicial review does not raise *separation of powers concerns* in the circumstances presented here.") (emphasis added).

I. AGENCY INTERPRETATIONS OF THEIR OWN ADMINISTRATIVE REGULATIONS ARE NOT ENTITLED TO DEFERENCE UNDER *PASH*

In September 2020, the ICA issued an unpublished memorandum opinion, *Protect and Preserve Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n* (*PPKAA*),[21] which represents the most recent of more than eighty appellate court decisions in Hawai'i that cite to *PASH*. *PPKAA* cites *PASH* for the proposition that "restrictive interpretations of standing requirements imposed by an agency are not entitled to deference and may be reviewed *de novo* on appeal."[22] At the urging of an applicant seeking a shoreline management area (SMA) use permit to develop a mix of affordable and market units and housing types on undeveloped and vacant land along the shoreline in Lāhainā, Maui,[23] the MPC applied a restrictive interpretation of the following administrative regulation: "[a]ll persons who . . . can demonstrate they will be so directly and immediately affected by the matter before the commission that their interest in the proceeding is *clearly distinguishable from that of the general public* shall be admitted as parties upon timely application for intervention."[24]

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[21] No. CAAP-15-0000478, 2020 WL 5512512 (Haw. Ct. App. Sep. 14, 2020), *cert. granted*, 2021 WL 195053 (Haw. Jan. 20, 2021). Joined by six individual petitioner-appellants, Protect and Preserve Kahoma Ahupua'a Association (PPKAA) is "an unincorporated organization whose mission is to preserve, protect, and restore the natural and cultural environment of the Kahoma Ahupua'a, including the Alamihi cultural area" and "[m]any of PPKAA's officers, members, and supporters are homeowners or lessees within the Kahoma Ahupua'a and reside within 500 feet of the proposed project site." *Id.* at *2.

[22] *Id.* at *4 (citing Public Access Shoreline Hawaii v. Hawai'i County Plan. Comm'n (*PASH*), 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1995), in addition to the court's earlier reference to *Wai'ola*, 103 Hawai'i at 425, 83 P.3d at 688, for the proposition that "an agency's interpretation of its own rules is entitled to deference *unless it is plainly erroneous or inconsistent with the underlying legislative purpose*") (emphasis added). *PPKAA* cites *PASH* three additional times for the proposition that such "restrictive" interpretations are subject to de novo review and/or not entitled to deference. *Id.* at *6 & n.4, *8.

[23] *Id.* at *1 (describing the project as covering 21.6 acres located within the Urban district and including "203 housing units, parking, landscaping, roadways, utility improvements, and 1.75 acres of residential parks"); *id.* at *2 (noting motion in opposition to PPKAA's petition to intervene, which argued failure to meet intervenor standing requirements under the MPC Rules).

[24] *Id.* at *4–5 (quoting Maui Planning Commission Rules of Practice and Procedure (MPC Rules) § 12-201-41(b) (2010)) (emphasis added). *See also PASH*, 79 Hawai'i at 432 n.9, 903 P.2d at 1253 n.9 (observing that MPC actions on SMA use permit applications are final and appealable under HAPA rather than to the Zoning Board of Appeals); Chang v. Plan. Comm'n, 64 Haw. 431, 450–51, 643 P.2d 55, 60 (1982) (citing an earlier version of the MPC Rules which, likewise, makes HRS chapter 91 applicable to proceedings on SMA use permit applications in Maui County).

By a vote of five-to-one, the MPC denied PPKAA's petition to intervene and orally approved the developer's SMA use permit application.[25] In their objection to this oral ruling, PPKAA noted the MPC's "*practice of always denying* complete Petitions to Intervene claiming that all petitioners' interests are not distinguishable from the general public."[26] After the MPC refused to reconsider PPKAA's initial decision denying the petition to intervene, the association filed an appeal with the Circuit Court for the Second Circuit of Hawai'i (Second Circuit Court)—which entered its (1) Findings of Fact, Conclusions of Law, Decision and Order Denying Appeal, and (2) Final Judgment on June 19, 2015, affirming the MPC's refusal to grant PPKAA's petition and instead approving the SMA use permit application.[27] On secondary appeal, the ICA agreed with PPKAA's argument that the MPC abused its discretion by denying the petition to intervene as a matter of right based on a restrictive interpretation of the agency's standing requirements.[28] The ICA also concluded that constitutional due process requires that PPKAA be afforded a contested case hearing on the SMA use permit application.[29]

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[25] *PPKAA*, 2020 WL 5512512, at *3.

[26] *Id.* (emphasis added); *see also id.* (arguing further that the MPC's "*consistent denial* of petitions to intervene on this basis amounted to the enforcement of 'a new rule regarding those who have standing to intervene in SMA permit application proceedings' that was promulgated without following the rule making procedures under HRS chapter 91") (emphasis added).

[27] *Id.* at *1, *3 (summarizing the relevant part of the Second Circuit Court's conclusions as follows: the MPC properly considered and applied MPC Rule section 12-201-41(b); the MPC did not abuse its discretion in denying permissive intervention; PPKAA's due process rights were not violated; the MPC's determination that the project was exempted from the General Plan was not clearly erroneous; and the MPC did not improperly engage in *de facto* rule making or fail to promulgate rules in compliance with HRS chapter 91).

[28] *Id.* at *4–8 (concluding that the ICA need not reach the points of error pertaining to the MPC's denial of permissive intervention and its alleged *de facto* rule making).

[29] *Id.* at *9–11. The ICA also concluded that before the MPC may approve the SMA use permit application on remand, the agency must make specific findings on the project's consistency with the Maui County General and Community Plans under HRS section 205A-26(2)(C), notwithstanding Maui County's designation of the project as an HRS section 201H-38 housing development via County Council Resolution 14-14. *Id.* at *11–12. HRS section 201H-38 purports to exempt certain housing projects "from all statutes, ordinances, charter provisions, and rules of any government agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of dwelling units thereon." On the same day it accepted the application for certiorari by MPC and Stanford Carr Development, LLC, the Hawai'i Supreme Court issued a supplemental briefing order instructing the parties to address "whether HRS [Hawai'i Revised Statutes] § 201H-38 allows for exemptions from HRS § 205A-26(2)(C)." *PPKAA*, No. SCWC-15-0000478 (Haw. Jan. 20, 2021).

Rather than deferring to another county planning commission's interpretation of its administrative regulations, *PASH* applied *de novo* review in evaluating whether the putative intervenor satisfied standing requirements necessary to establish appellate jurisdiction under HRS section 91-14(a):[30]

> Although the HPC [Hawai'i County Planning Commission] Rules allow formal intervention through specified procedures, PASH was denied standing to participate in a contested case hearing because the agency found that its asserted interests were "substantially similar" to those of the general public. The HPC's restrictive interpretation of standing requirements is *not entitled to deference. See* [*Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 67 & 70, 881 P.2d 1210, 1213 & 1216 (1994)] (citing *Hawaii's Thousand Friends v. Anderson*, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989); *Akau v. Olohana Corp.*, 65 Haw. 383, 388–89, 652 P.2d 1130, 1134 (1982)). *Cf. Mahuiki*, 65 Haw. at 515, 654 P.2d at 880 (recognizing that "a decision to permit the [proposed] construction . . . on undeveloped land in the [SMA] could only have an adverse effect on" the appellants' "essentially aesthetic and environmental" interests). Accordingly, we review *de novo* whether PASH has demonstrated that its interests were injured.[31]

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[30] HAPA includes a provision entitled "Judicial review of contested cases" that provides in relevant part:

> Any *person aggrieved* by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

HAW. REV. STAT. § 91-14(a) (2012 & Supp. 2019) (emphasis added). The standing analysis in *PASH* derives from this requirement that appellate jurisdiction of contested case hearings under HAPA extends only to persons who are "aggrieved" by an agency action.

[31] Public Access Shoreline Hawaii v. Hawai'i County Plan. Comm'n (*PASH*), 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1995) (initial emphasis added) (footnote omitted). *PASH* footnote 15 explains further that:

> individuals or groups requesting contested case hearing procedures on a SMA [Shoreline Management Area] permit application before the HPC must demonstrate that they will be "directly and immediately affected by the Commission's decision[.]" HPC Rule 4-2(6)(B). However, standing requirements are not met where a petitioner merely asserts "value preferences," which are not proper issues in judicial (or quasi-

Similar to MPC Rules § 12-201-41(b), HPC Rules § 4-2(6)(B) applied to persons who file timely requests demonstrating that they "will be so directly and immediately affected by the [HPC's] decision that that person's interest in the proceeding is *clearly distinguishable from that of the general public*"—language that the HPC erroneously relied upon to determine PASH did not have standing to participate in the contested case.[32] On certiorari from the ICA, the Hawai'i Supreme Court agreed that PASH sufficiently demonstrated "[t]hrough unrefuted testimony" its standing to participate in the contested case based on interests clearly distinguishable from those of the general public—viz., based on Native Hawaiian members' exercise of rights customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands.[33]

Although the ICA correctly applied the twenty-five-year-old *PASH* decision in *PPKAA*, the court nevertheless missed an important opportunity to highlight ongoing failures by government agencies to properly implement the *PASH* Guidelines. As previously explained by the Hawai'i Supreme Court in *PASH* footnote 15:

> The *cultural insensitivity* demonstrated by Nansay and the HPC in this case—particularly their failure to recognize that issues relating to the subsistence, cultural, and religious practices of native Hawaiians amount to interests that are clearly distinguishable from those of the general public—emphasizes the need to avoid "foreclos[ing] challenges to administrative determinations through restrictive applications of standing requirements."[34]

Coincidentally, the Hawai'i County Planning Director who presumably provided the HPC with technical advice prior to the *PASH* decision, subsequently assumed BLNR's Hawai'i County seat from 1990 to 1998

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judicial) proceedings. *Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216. Although the HPC Rules do not expressly require petitioners to detail the nature of their asserted interests in writing until *after* the HPC has determined whether a contested case hearing is required, *see* HPC Rules 4-6(b) and (c), a petitioner who is denied standing without having had an adequate opportunity to identify the nature of his or her interest may supplement the record pursuant to HRS § 91-14(e).

Id. at 434 n.15, 903 P.2d at 1255 n.15.

[32] *Id.* at 429 & n.4, 903 P.2d at 1250 & n.4 (emphasis added).

[33] *Id.* at 434, 903 P.2d at 1255.

[34] *Id.* at 434 n.15, 903 P.2d at 1255 n.15 (emphasis added) (citing Mahuiki v. Plan. Comm'n, 65 Haw. 506, 512, 654 P.2d 874, 880 (1982)). For the sake of clarity, given the titles provided for both the symposium and its initial panel, this article conforms to the short form *PASH* subsequently utilized by the Hawai'i Supreme Court, notwithstanding my previous effort to infuse a Hawaiian sense of place through use of the alternative short form *PASH/Kohanaiki*. David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 HAW. B.J. 13, 1997, at 1 & n.1.

(before returning as Hawai'i County Planning Director from 2000 to 2008), then serving another term with BLNR from 2014 to 2020, and ultimately receiving confirmation by the Hawai'i State Senate to BLNR's Hawai'i County seat again in 2020.[35]

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[35] Michael Brestovansky, *State Senate reappoints Yuen to BLNR*, HAW. TRIBUNE HERALD (July 11, 2020 12:05AM), https://www.hawaiitribune-herald.com/2020/07/11/hawaii-news/state-senate-reappoints-yuen-to-blnr/ (reporting that the State Senate voted 16-9 to confirm, after the Senate Committee on Water and Land voted 4-1 to issue a negative recommendation under the leadership of the committee's Hawai'i Island chair). *See, e.g.*, *In re* Conservation District Use Application (CDUA) HA-3568 (*Mauna Kea II*), 143 Hawai'i 379, 394, 431 P.3d 752, 767 (2018) (holding that constitutional due process did not require Yuen's disqualification based on comments made in a 1998 interview which "did not indicate he would approve all future telescope applications" and, thus, "did not fairly give rise to an appearance of impropriety and did not reasonably cast suspicion on Yuen's impartiality") (footnote omitted); *An Interview with Chris Yuen As He Leaves the Land Board*, ENV'T HAW. (July 1998), https://www.environment-hawaii.org/?p=3393 ("Once the state decided to have the astronomical facilities on Mauna Kea, the way the landscape looks is pretty changed. To me that's an *irrevocable* decision.") (emphasis added).

In the restorative justice context, it is worth noting retired William S. Richardson School of Law (WSRSL) Professor Chuck Lawrence's argument that courts should examine the cultural meaning of laws to determine the presence of collective, unconscious racism rather than looking for discriminatory motives, then demonstrating further how (i) the intent requirement in antidiscrimination law restricts notions of causation, and (ii) the individual fault model prevents collective healing from the wounds of racism. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324–25 (1987), *cited in* Mari J. Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2202 n.33 (2000). In the context of tort reform, WSRSL Professor Mari Matsuda sounds an analogous call to exchange egocentric notions for more communal and connected understandings of social responsibility. *Id.* at 2195. These parallel analyses by Professors Lawrence and Matsuda deserve further scrutiny in the context of unsuccessful efforts by Native Hawaiian practitioners in both *Kilakila III* and *Mauna Kea II* to meet the high bar required to disqualify decisionmakers and/or the agency's legal counsel.

Professors Lawrence and Matsuda are among our country's most-cited law review authors. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 757 n.24, 769 (1996) (identifying Lawrence as the *only* minority author on the all-time list of the 100 most-cited articles); *id.* at 761 (listing Matsuda and Lawrence among a select group of authors with *multiple* publications on a second list consisting of the top-ten most-cited articles published each year for the ten most recent years); *id.* at 775–77 (listing articles written by Matsuda in 1987, 1989 and 1991, along with Lawrence's 1987 article above and a subsequent article written in 1990); *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 368-88 (1987) (including a call to provide reparations for Kānaka Maoli), *cited in* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1492 (2012); *id.* at 1489 (listing Lawrence's 1987 article *eighth* on the updated all-time top 100 list); *id.* at 1490, 1492, 1504 (identifying Matsuda among the authors with *multiple* articles on the updated all-time top 100 list, including her thirty-third ranked 1989 article and

II. REVISITING THE *PASH* GUIDELINES: ELEMENTS OF HAWAI'I'S CUSTOM DOCTRINE AND OTHER "BADLY NEEDED JUDICIAL GUIDANCE"

Just a few months before the Intermediate Court of Appeal's *PPKAA* decision, the Hawai'i Supreme Court reiterated in *Gas Co.*, *supra*, that *PASH* "reaffirmed the State's obligation to protect the *reasonable* exercise of customary and traditionally exercised rights of Hawaiians to the extent feasible."[36] Interestingly, this reference to the element of "reasonable[ness]"—one of seven elements under Hawai'i's Custom Doctrine addressed by the *PASH* Guidelines[37]—is the *one and only* proposition in the court's amended *Mauna Kea II* opinion that explicitly relies on *PASH*.[38] *PASH* addressed *numerous* other issues that touch upon "confusion surrounding the nature and scope of customary Hawaiian rights under HRS § 1-1,"[39] thereby seeking to effectuate (at least implicitly) the 1978 constitutional convention delegates' desire to ensure that "enforcement by the courts of these rights is guaranteed."[40] By further describing the *PASH* Guidelines as "applicable requirements for establishing such rights *in the instant case*," the court simultaneously acknowledged the case-by-case nature of inquiries concerning traditional and customary rights.[41] The following sections lay out some of these guidelines in greater detail, highlighting the agency-approved cultural insensitivity and unjustifiable lack of respect facilitated by *Mauna Kea II*.

A. PASH *footnote 43*

> The State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights, *see* Haw. Const. article XII, § 7, necessarily allows the State to permit development that interferes with such rights in certain circumstances—for example, where the preservation and protection of such rights would result in "actual harm" to the "recognized interests of others." *Kalipi,* 66 Haw. at 12, 656 P.2d at 752. Nevertheless, the State is obligated to

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ninety-seventh ranked 1987 article).

[36] 147 Hawai'i 186, 206, 465 P.3d 633, 653 (2020) (citing *Mauna Kea II*, 143 Hawai'i at 395, 431 P.3d at 768) (emphasis added).

[37] 79 Hawai'i at 441 n.26, 903 P.2d at 1262 n.26 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 76–78 (Sharwood ed. 1874)).

[38] *Mauna Kea II*, 143 Hawai'i at 395, 431 P.3d at 768 (citing *PASH*, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43).

[39] 79 Hawai'i at 448, 903 P.2d at 1269.

[40] *See supra* note 14 and accompanying text.

[41] 79 Hawai'i at 448, 903 P.2d at 1269 (emphasis in original).

> protect the *reasonable* exercise of customarily and traditionally exercised rights of Hawaiians *to the extent feasible.*[42]

PASH footnote 43 recognized that an agency is authorized to permit development when it is *not feasible* to protect the exercise of such constitutionally protected rights without causing actual harm to other people's *recognized interests*—as opposed to "value preferences"[43] or mere privileges subject to agency discretion (and as further distinguished from various *constitutional* obligations).

In this regard, it is important to remember that the parties in *PASH* did not brief—nor did the court attempt to address—the interplay between article XII, section 7 and other constitutional public trust obligations.

B. PASH *footnotes 23 and 25*

> "All the witnesses who testified regarding traditional custom testified that the custom requires that anyone seeking access to the ahupua'a may only exercise those rights in the *uninhabited portions* of the ahupua'a where that person is a tenant, *always respecting the private areas* of other tenants." Kalipi's Reply Brief (No. 6957) at 11 (emphases added). Furthermore, as Kalipi understood his asserted gathering rights, "custom require[d] that *anything planted and cared for by people should be left alone.*" Kalipi's Opening Brief (No. 6957) at 49 (emphasis added).[44]

A little later in the same section of the *Mauna Kea II* opinion discussed in Section II *supra*,[45] the court references BLNR's reliance on an earlier part of the *PASH* decision where the court explains that:

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[42] *Id.* at 450 n.43, 903 P.2d at 1271 n.43 (emphases added). *Cf.* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 174, 623 P.2d 431, 438, 439–40 (1981) (discussing "injury to legally-recognized rights or interests which are personally and peculiarly theirs" and citing Dalton v. City and Cnty., 51 Haw. 400, 403, 462 P.2d 199, 202 (1969), as requiring a "concrete interest" in a "legal relation" subject to protection).

[43] *See PASH*, 79 Hawai'i at 434 n.15, 903 P.2d at 1255 n.15 (quoting *Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216), *supra* quoted note 31.

[44] *Id.* at 439 n.23, 903 P.2d at 1260 n.23; *id.* at 429 n.1, 903 P.2d at n.1 (defining ahupua'a as "a land division usually extending from the mountains to the sea along rational lines, such as ridges or other natural characteristics"). *See also id.* at 440 & n.25, 903 P.2d at 1261 & n.25 (acknowledging that "Plaintiff's witnesses [in Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982),] testified at trial that there have continued in certain [ahupua'a] a range of practices associated with the ancient way of life which required the utilization of the *undeveloped property* of others and which were not found in § 7-1" including "the gathering of items *not delineated* in § 7-1 and the use of defendants' lands for *spiritual and other purposes*") (emphases added); *infra* Section II.C. (discussing *PASH* footnotes 24 and 27).

[45] 143 Hawai'i at 396, 431 P.3d at 769 (noting that BLNR "concluded that the two ahu

> [T]he non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances. *See, e.g., supra* note 23 and *infra* note 43. In any event, we reiterate that the State retains the ability to *reconcile* competing interests under article XII, section 7. We stress that *unreasonable* or *non-traditional* uses are not permitted under today's ruling. . . .
>
> There should be little difficulty accommodating the customary and traditional Hawaiian rights asserted in the instant case with Nansay's avowed purposes. A community development proposing to integrate cultural education and recreation with tourism and community living represents a promising opportunity to demonstrate the *continued viability* of Hawaiian land tenure ideals in the modern world.[46]

PASH footnote 23 directly contradicts the asserted rationale for *Kalipi*'s judicially crafted requirement purporting to limit traditional and customary gathering practices to "undeveloped lands"[47]:

> The requirement that these rights be exercised on undeveloped land is not, of course, found within the statute. However, if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the [ahupua'a], including fully developed property, to gather the enumerated items.[[48]] *See, Pacific Ins. Co., Ltd. v. Oregon Ins. Co.*, 53 Haw. 208, 490 P.2d 899 (1971) (departure from express language permitted to avoid absurd and unjust result and is clearly inconsistent with purpose of the Act). *In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers. Moreover, it would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture.*[49]

In other words, the *Kalipi* court invoked a canon of statutory interpretation applicable to ambiguous statutory language: "[e]very construction which leads to an absurdity shall be rejected."[50] As explicated by the *PASH* court, however, *all* the witnesses who testified regarding traditional and customary gathering practices in *Kalipi* indicated that the private areas of

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built on the Access Way in 2015 as protests against the TMT [Thirty Meter Telescope] did not constitute a traditional and customary right or practice, and in any event *did not meet* PASH*'s requirement of reasonableness*") (emphasis added) (citing *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268).

[46] 79 Hawai'i at 447, 903 P.2d at 1268 (emphasis added).

[47] 66 Haw. at 7–9, 656 P.2d at 749–50.

[48] *But see supra* text accompanying note 44 (quoting *PASH* footnote 23).

[49] *PASH*, 79 Hawai'i at 439, 903 P.2d at 1260.

[50] HAW. REV. STAT. § 1-15(3) (2009 & Supp. 2019).

others were *always respected* and these practices were only exercised in uninhabited areas within the ahupua'a.[51]

Available evidence thus rebutted the absurdity conjured up by the *Kalipi* court, thereby undermining this judicially crafted interpretation—which the opinion's author, perhaps, may have included to ensure his colleagues' unanimous support.[52]

C. PASH *footnote 26*

Among other things, *PASH* footnote 26 cites BLACKSTONE'S COMMENTARIES for the proposition that "continuous exercise is not required: 'the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove'"—in other words, "the alleged custom must be, or have been . . . without interruption (as to the *right* versus *exercise* thereof . . .)."[53] Accordingly, *PASH* reconciled Chief Justice Richardson's initial references to what a casual reader might interpret as the imposition of a "continued use" requirement,[54] with the CJ's subsequent use of *future* tense as follows: "the *Kalipi* court also indicated that the traditional practices enumerated under HRS § 7-1 remain 'available to those who *wish to continue* those ways.'"[55]

A crabbed interpretation of this particular *PASH* Guideline arose in relation to the Kūkaniloko Birthstones State Monument (Wahiawā, O'ahu). A Deputy Attorney General (who, coincidentally, represented BLNR in both *Mauna Kea I* and *Mauna Kea II*) responded to a legislator's inquiry about the extent to which article XII, section 7 codifies the traditional and customary right to subsistence with this misleading statement: "Hawaiian

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[51] *PASH*, 79 Hawai'i at 439 n.23, 903 P.2d at 1260 n.23.

[52] In preparation for an upcoming Native Hawaiian Land Rights Seminar, Professor Mackenzie asked me to prepare a memorandum for her and CJ (who "agrees with the discussion of *Kalipi* in *PASH*"). Memorandum from David M. Forman to Melody K. MacKenzie and CJ Richardson, Dec. 4, 1995 (on file with author; presumably misdated given textual discussion of two subsequent events: a December 8, 1995 "Island Issues" television broadcast, and a December 18, 1995 forum). The following year, CJ Richardson reportedly said he would have voted the same way had he been sitting on the court for the *PASH* decision. Janice Otaguro, *Islander of the Year*, HONOLULU MAG. 33, 69 (Jan. 1996).

[53] *Id.* at 441 n.26, 903 P.2d at 1262 n.26 (emphasis in original), *cited supra* note 37.

[54] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 10–12, 656 P.2d 745, 751–52 (1982), *cited with approval in* Pele Def. Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992); *PASH*, 79 Hawai'i at 440, 903 P.3d at 1261.

[55] *PASH*, 79 Hawai'i at 449, 903 P.2d at 1270 (emphasis added) (quoting *Kalipi*, 66 Haw. at 9, 656 P.2d at 750); *see also id.* at 439, 903 P.2d at 1260 (quoting *Kalipi*, 66 Haw. at 8–9, 656 P.2d at 749–50).

usage must be based on an actual traditional practice that has been continued[.]"[56] However, the Deputy's letter notably omits reference to the *PASH* court's unmistakable clarification provided on one of the cited pages:

> [T]he right of each ahupua'a tenant to exercise traditional and customary practices *remains intact, notwithstanding arguable abandonment of a particular site*, although this right is potentially subject to regulation in the public interest. *See supra* note 26 (citing Blackstone's Commentaries for the proposition that *continuous exercise is not absolutely required* to maintain the validity of a custom).[57]

D. PASH *footnote 27*

The very next footnote in *PASH* recognizes the importance of considering both the original Native Hawaiian language and English language versions of legislation adopted during the Kingdom of Hawaii. More specifically, the court acknowledged incorporation of traditional Native Hawaiian world views reflecting a cultural link to the land when the constitutional monarchy created private property rights to preserve the "political existence" of the Kingdom,[58] while continuing to protect the rights of native tenants.[59] Thus, *PASH* footnote 27 provides:

> *Kalipi* implicitly rejected the Hawaiian Trust Company's argument, which was based on language in [*Oni v. Meek*, 2 Haw. 87 (Haw. Kingdom 1858),] to the effect that the rights provided by the Act of August 6, 1850, were declarative of "*all* the specific rights of the [*hoa'āina*] (except fishing rights) which should be held to prevail against the fee simple title of the konohiki[.]" 2 Haw. at 95.[60]

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[56] Letter from Deputy Att'y Gen. Julie H. China to Rep. Amy Perruso, (Nov. 27, 2019) (citing *PASH*, 79 Hawai'i at 449–50, 903 P.3d at 1270–71).

[57] *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271 (emphasis added).

[58] *Id.* at 444, 903 P.2d at 1265 (quoting 1 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 3 (1845–46)). *See also id.* at 437 n.21, 903 P.2d at 1258 n.21 (tracing the origins of protections for traditional and customary rights under HRS section 1-1 to unwritten laws predating the Kingdom's first constitution in 1840).

[59] *Id.* at 443–44, 903 P.2d at 1264–65 (observing that the 1839 Declaration of Rights incorporated in the 1840 constitution, provided that "nothing whatever shall be taken from any individual except by express provision of the laws" and citing Kekiekie v. Dennis, 1 Haw. 42, 43 (1851), for the proposition that the rights of each hoa'āina—or ahupua'a tenant—were secured by the 1840 Constitution); *id.* at 445 n.33, 903 P.2d at 1266 n.33 (quoting the Act of April 27, 1846, requiring the Land Commission to make its decisions "in accordance with . . . native usages in regard to landed tenures").

[60] *Compare* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 121–22, 122 n.133 (1998) (arguing that this narrow reading of *Oni* reiterated in Forman & Knight, *supra* note 34, at 8–

> The English version of the 1850 Act uses the term "people," which was held to be synonymous with the word "hoa'āina." *Id.* at 96. The word "hoa'āina" is defined as "[t]enant, caretaker, as on a *kuleana.*" Pukui & Elbert, *Hawaiian Dictionary* 73 (2nd ed. 1986). Meanwhile, the term "tenant" includes "one who holds or possesses real estate or sometimes personal property . . . by *any kind* of right[.]" *Webster's Third New Int'l Dictionary* 2354 (1967 ed.) (emphasis added). Therefore, it is possible to construe the term "tenant" so as to incorporate the traditional native Hawaiian concept of a cultural link to the land. *See McBryde Sugar Co. v. Robinson* [*McBryde II*], 55 Haw. 260, 289 n.29, 517 P.2d 26, 42 n.29 (1973) *cert. denied,* 417 U.S. 976, 94 S. Ct. 3183, 41 L.Ed.2d 1146 (1974) (Levinson, J., dissenting) (suggesting the need for comparative analysis of bilingual statutes because the English version is binding under HRS § 1-13 only when there is a "radical or irreconcilable difference" between the two versions); *In re Ross,* 8 Haw. 478, 480 (1892) ("[t]he effort is always made to have [the two versions] exactly coincide, and the legal presumption is that they do"). *See also infra* note 35 (discussing the definition of "maka'āinana"). Nevertheless, we recognize that the Hawaiian language version of this Act actually uses the word "kanaka." *See supra* note 24.[61]

Surprisingly, it does not appear than *any* opinion issued since *PASH* cites this footnote acknowledging the traditional and customary Native Hawaiian concept of a *cultural link to the land.* Nor is the author aware of any subsequent decision involving the exercise of traditional and customary

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13, "is most difficult to reconcile with the *Oni* court's broad and unqualified language and its manifest awareness of the sweeping consequences of its decision"), *with* Forman & Knight, *supra* note 34, at 12 (quoting the 1839 Declaration of Rights, as incorporated in the 1840 Constitution: "nothing whatsoever shall be taken from any individual except by express provision of the laws"). With all due respect to the late Paul Sullivan—former attorney for the U.S. Navy in Hawai'i and adjunct faculty member of the William S. Richardson School of Law—his interpretation of dicta in *Oni* fails to address the applicable *constitutional* prohibition against implied abrogation.

[61] *PASH*, 79 Hawai'i at 441 & n.27, 903 P.2d at 1262 & n.27. In addition to defining the word "kanaka," *PASH* footnote 24 is further significant because it reaffirms the following proposition:

> *Territory v. Liliuokalani*, 14 Haw. 88, 95 (Haw. Terr. 1902) (holding that a similar reservation did not incorporate any public right to the use of certain shoreline areas included within a grant of land), does not necessarily dispose of the "kuleana" reservation [in the title to the lands in question] as a source of additional gathering rights beyond HRS § 7-1. [*Kalipi*, 66 Haw.] at 12, 656 P.2d at 752.

PASH, 79 Hawai'i at 440 & n.24, 903 P.2d at 1261 & n.24 (discussing the "other requirements of *Kalipi*"—besides "undeveloped lands" and "no actual harm"—as discussed in *PDF v. Paty*, 73 Haw. at 615-18, 837 P.2d at 1269-71).

rights that undertakes a comparative analysis of the Hawaiian and English versions of relevant statutory provisions.[62]

E. PASH *footnote 28*

PASH exposed another inconsistency in *Kalipi* regarding Billy Kalipi's unaddressed, alternative assertion of traditional and customary gathering rights under HRS section 1-1; the *Kalipi* court erroneously suggested that a special jury verdict decided the issue adverse to the practitioner:

> Immediately prior to its substantive analysis, the court in *Kalipi* summarily stated:
>
> > Kalipi asserts that it has long been the practice of him and his family to travel the lands of the Defendants in order to gather indigenous agricultural products for use in accordance with traditional Hawaiian practices. . . .
> >
> > A trial was had and *the jury, by special verdict, determined that Kalipi had no such right.* He now alleges numerous errors in the trial court's instructions to the jury and conduct of the trial. We find, for the reasons stated below, that none of the alleged errors warrants reversal.
>
> *Kalipi,* 66 Haw. at 3–4, 656 P.2d at 747 (emphases added). Nevertheless, the undisputed facts of the case reveal that the jury asked the trial court, "May we

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[62] *See, e.g.*, David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence*, 30 U. HAW. L. REV. 319, 335–43 (2008) (challenging statements concerning Hawaiian Kingdom law reportedly made by the federal trial court judge who presided over Doe v. Kamehameha Schools, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd in part and rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, 550 U.S. 931 (2007), in addition to a prominent kumu hula, or dance teacher, and stressing the importance of analyzing claims involving traditional and customary usage on a case-by-case basis); *id.* at 343–45 (discussing the continuing relevance of Hawaiian custom and usage relating to the term hānai—viz., the traditional practices of adoption (both formal and informal), sometimes including rights of inheritance or other rights—as reflected in cases including Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974), and Young v. State Farm Mutual Auto. Ins. Co., 67 Haw. 544, 697 P.2d 40 (1985)); *id.* at 347–48 (discussing the reemergence of core Hawaiian values and explaining that "[c]ontinuous exercise is not required to establish a Hawaiian custom or usage" because "Hawaiian culture . . . renews itself in waves or pulses that are 'transformations'") (citations omitted); *id.* at 351–53 (citing scholarship that supports development of an "aloha jurisprudence" along with the "embrace [of] American cultural responsibility . . . in light of the unique historical and legal context of these Hawaiian islands"); *id.* at 354 (concluding with a call for advocates to "pursue a renewed focus upon the Hawaiian usage exception as a vehicle for perpetuating cultural values and resources").

please have the book with the 1892 reference to rights in question . . . [i.e., Special Verdict Interrogatory Number 8]?" The trial court responded by instructing the jury to *disregard* Special Verdict Interrogatory Number 8, which read: "Did Hawaiian custom and usage as of 1892 include the right of a tenant of land in an [ahupua'a] to gather native products from his [ahupua'a]?" *See* Kalipi's Opening Brief (No. 6957) at 14, 53–57; Hawaiian Trust's Answering Brief (No. 6957) at 52–54."

Although Jury Instruction No. 21 already contained the 1892 reference (i.e., the text of HRS § 1–1), it is difficult to reconcile the trial court's response, or the appellate court's conclusion that there was no reversible error, with the implicit rejection of related Jury Instruction No. 19 in *Kalipi. See supra* note 27 & accompanying text (rejecting an argument based on parallel language from *Oni*). Jury Instruction No. 19 read:

> If you find that prior customs, usages and practices with respect to rights of kuleana owners *have been superseded or abrogated by the enactment of [HRS] § 7–1* or its predecessor statutes, then you may find that the specific rights which are enumerated in [HRS] § 7–1 are *all of the rights* . . . which Plaintiff may be entitled to exercise.

Kalipi's Opening Brief (No. 6957) at 54 (emphases added); Hawaiian Trust's Answering Brief (No. 6957) at 10 (emphases added).[63]

Explicitly incorporating by reference the court's earlier discussion,[64] Justice Klein's unanimous *PASH* opinion explained that "[t]he *Kalipi* court *implicitly acknowledged* the possibility of recognizing certain customary rights, under HRS § 1-1, to gather items that are not specifically delineated in HRS § 7-1" without fully embracing "the opportunity to clarify *Oni* with respect to the potential application of the doctrine of custom."[65]

F. PASH *footnote 29*

Kalipi focused on his status as a landowner merely as an attempt to show that he belonged to the class of persons intended to benefit under HRS § 7–1. *See* Kalipi's Opening Brief (No. 6957) at 28 (citing *McBryde Sugar Co. v. Robinson,* 54 Haw. 174, 192, 504 P.2d 1330, 1341 (defining "people" in HRS § 7–1 parenthetically as "meaning owners of land"), *aff'd upon rehearing,* 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed* and *cert. denied,* 417 U.S. 962, . . . *cert. denied,* 417 U.S. 976 . . . (1974)). In other words, Kalipi claimed that the statute preserved access and gathering rights as an incident of ownership, so long as these rights were utilized for valid purposes associated

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[63] 79 Hawai'i at 441–42 n.28, 903 P.2d at 1262–63 n.28.

[64] *Id.* at 440 & n.25, 903 P.2d at 1261 & n.25, *quoted supra* note 44.

[65] *Id.* at 441, 903 P.2d at 1262 (emphasis added).

> with that particular site. *Cf. Damon v. Tsutsui,* 31 Haw. 678, 687 ([Terr. Haw.] 1930); *Smith v. Laamea,* 29 Haw. 750, 755–56 ([Terr. Haw.] 1927); *Haalelea v. Montgomery,* 2 Haw. 62, 71 ([Haw. Kingdom] 1858) (interpreting the term "tenant" as passing the common right of piscary to the grantee, through sale or other conveyance, as an appurtenance to the land). The claim in *Oni* involved a purported right of pasturage arising primarily from the claimant's status as a landowner. 2 Haw. at 90. To the extent that Oni's claims might have otherwise been based on ancient tenure, he abandoned these claims by entering into a special contract to provide labor for the konohiki in exchange for the right to pasture his horses. *Id.* at 91.[66]

Consistent with the discussion of *PASH* footnotes 23, 25, 27 & 28 in Sections II.B., II.D. and II.E. above, the *PASH* court opined that "the *Kalipi* court's preoccupation with residency requirements under HRS § 7-1 obfuscated its cursory examination of Kalipi's alternative claim based on customarily and traditionally exercised Hawaiian rights" and, accordingly, "read the discussion of customary rights in *Oni* and *Kalipi* as merely informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices or exercising otherwise valid customary rights in an *unreasonable* manner."[67]

With that premise in mind, the *PASH* court proceeded to disavow dicta in several cases that might otherwise have supported the adoption of relevant common law principles. First, the court disapproved any additional requirements for the establishment of customary rights based on *Kalipi*'s description of the relevant inquiry as "whether the privileges which were permissibly or contractually exercised persisted to the point where it had evolved into an *accepted* part of the culture and whether these practices had continued without *fundamentally violating the new system*."[68]

Second, *PASH* noted that "[o]ne of the most dramatic differences in the application of custom in Hawai'i is that passage of HRS § 1-1's predecessor fixed November 25, 1892 as the date Hawaiian usage must have been established in practice[,]"[69] relying on *Zimring I, supra,* as having "implicitly disapproved the 'time immemorial' standard"[70]—which *Oni v. Meek* suggested in dicta to the contrary, without offering a conclusive

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[66] *Id.* at 442 n.29, 903 P.2d at 1263 n.29.

[67] *Id.* at 441–42, 903 P.2d at 1262–63.

[68] *Id.* at 446 & n.37, 903 P.2d at 1267 & n.37 (quoting *Kalipi*, 66 Haw. at 11 n.5, 656 P.2d at 751 n.5).

[69] *Id.* at 447–48 & n.39, 903 P.2d at 1268–69 & n.39 (relying instead on State v. Zimring (*Zimring I*), 52 Haw. 472, 475, 479 P.2d 202, 204 (1970) ("the Hawaiian usage mentioned in HRS § 1-1 is usage which predated November 25, 1892")).

[70] *Id.* at 447 n.39, 903 P.2d at 1268 n.39.

opinion, "is entitled to great weight[.]"[71] Presumably, the *more demanding* time immemorial standard would have instead required practitioners to establish the origins of their claimed traditional and customary practices as far back in history such that "the memory of man runneth not to the contrary[.]"[72] Moreover, *PASH* footnote 39 observed that:

> Contrary to the apparent understanding of the *Oni* court: (1) "consistency" is properly measured against other customs, not the spirit of the present laws; (2) a particular custom is "certain" if it is objectively defined and applied; certainty is not subjectively determined; and (3) "reasonableness" concerns the manner in which an otherwise valid customary right is exercised—in other words, even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no "good legal reason" against it.[73]

The *PASH* court then added that "Nansay is not precluded from *raising the issue* of standing on remand" under HRS section 91–9(c).[74] This reference to HRS chapter 91, at least arguably, implies the *PASH* court's recognition that the burden of proof in contested case hearings under HRS section 91–10(5) must be borne by the applicants: "Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence."

A third difference in Hawai'i's Custom Doctrine is that the English common law prohibition on *profit a prendre*[75] is clearly inapposite.[76]

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[71] 2 Haw. 87, 90 (Haw. Kingdom 1858), *quoted in PASH*, 79 Hawai'i at 447, 903 P.2d at 1268.

[72] *See PASH*, 79 Hawai'i at 441 n.26, 903 P.2d at 1262 n.26 (quoting the first of seven elements under the doctrine of custom as listed in BLACKSTONE'S COMMENTARIES, *supra* note 37).

[73] *Id.* at 447 n.39, 903 P.2d at 1268 n.39.

[74] *Id.* (emphasis added).

[75] *See, e.g.*, *In re* West Chestnut Realty of Haverford, Inc., 173 B.R. 322, 324–25 (E.D. Pa. 1994) (defining *profit a prendre* as "a right to make use of the soil of another" including "the right of entry and the right to remove and take from the land the designated products or profit" as well as "the right to use such of the surface as is necessary and convenient for the exercise of the profit").

[76] *PASH*, 79 Hawai'i at 448, 903 P.2d at 1269. *Cf.* United Congregational and Evangelical Churches of Moku'aikaua v. Heirs of Kamamalu (*United Churches*), 59 Haw. 334, 343, 582 P.2d 208, 214 (1978) (Richardson, C.J.) ("The State, as holder of the title, is *free to use and develop the lots so long as the State does not interfere substantially* with religious and educational uses by the churches. As a matter of sound administrative policy, the State presumably will in any event *give full consideration to the historical and cultural values which have attached to the lots*") (emphasis added); *id.* (acknowledging "evidence showing religious and educational uses by the United Churches and its predecessors since

Fourth, and finally, *PASH* declined to decide whether rights under HRS section 1-1 may be invoked by "descendants of citizens . . . who *did not* inhabit the Hawaiian islands prior to 1778" and expressly reserved comment regarding "whether non-Hawaiian members of an 'ohana . . . may legitimately claim rights protected by article XII, section 7 of the state constitution and HRS § 1-1."[77] The court clarified that passing references to a lower court finding in *PDF v. Paty* that PDF's membership included persons of "fifty percent or more Hawaiian blood"[78] and citations to affidavits of persons with at least one-half native Hawaiian blood[79]—were not meant to imply the court's endorsement of a fifty percent blood quantum requirement for claims based upon traditional and customary rights.[80]

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the infancy of modern Hawaiian property law, under a good faith claim of right, leads us to the conviction that, under the special facts of this case, justice requires our recognition that the United Churches possess limited equitable rights in the lots"). *United Churches* drew an analogy to the law regarding presumed lost grants of easements, "hold[ing] that the United Churches possess equitable rights in the lots which entitle the churches to continue to use the lots for religious and educational purposes, including burial purposes, until such uses are abandoned." *Id.* at 344, 582 P.2d at 213; *id.* at 338, 582 P.2d 211 (concluding that, notwithstanding the state's fee simple title, the churches had "an equitable right akin to a prescriptive easement, entitling the churches to continue to use the lots for religious and educational purposes, without interference from the State, until such uses are abandoned"). *Id.* at 342 n.9, 582 P.2d at 214 n.9 (noting the trial court's determination that "any abandonment has not been voluntary but has been induced by the State's insistence on its ownership of the lots"). By comparison, traditional and customary rights trace back *prior* to the creation of private property rights in the mid-nineteenth century, suggesting a much more substantial foundation than equitable rights. *See supra* note 15 (citing *PASH*, 79 Hawai'i at 437 n.21, 903 P.2d at 1258 n.21); *see also* discussion *supra* Section II.C. (citing *PASH*, 79 Hawai'i at 441 n.26, 803 P.2d at 1262 n.26).

[77] *PASH*, 79 Hawai'i at 449 & n.41, 903 P.2d at 1270 & n.41. See also *infra* note 96 (discussing State v. Hanapi, 89 Hawai'i 177, 186 & n.8, 970 P.2d 485, 494 & n.8 (1998), which references the *disavowal* of any blood quantum requirement under the *PASH* Guidelines and *expressly declines* to reach the issues left open in *PASH* footnote 41). In *Pele Def. Fund v. Estate of Campbell*, No. 89-089, 2002 WL 34205861 (Haw. 3d Cir. Aug. 26, 2002), a trial court concluded that non-Hawaiians married to Hawaiians have the same right to claim constitutional protection for the exercise of traditional and customary practices. *Id.* (listing Conclusions of Law (COL) 33–36 and 64).

[78] 73 Haw. 578, 615 n.28, 837 P.2d 1247, 1269 n.28 (1992).

[79] *Id.* at 620 n.34, 837 P.2d at 1272 n.34.

[80] *PASH*, 79 Hawai'i at 448–49, 903 P.2d at 1269–70; *see also id.* at 449, 903 P.2d at 1270 (explaining that: (i) the term "native Hawaiian" in the Hawaiian Homes Commission Act is "not expressly applicable to other Hawaiian rights or entitlements"; (ii) the word "native" does not appear in HRS § 1-1; (iii) "[b]ecause a specific proposal to define the terms 'Hawaiian' and 'native Hawaiian' in the 1978 Constitutional Convention was not validly ratified, the relevant section was deleted from the 1985 version of HRS"; and (iv) "[c]ustomary and traditional rights in these islands flow from native Hawaiians' pre-existing

G. PASH *footnote 44*

PASH then proceeded to reconcile the discrepancies identified in Sections II.A. through II.F. above, by providing additional "badly needed judicial guidance"[81]—viz., clarifying that *Kalipi* "did not expressly hold that the exercise of customary gathering practices would be absurd or unjust when performed on land that is *less than fully developed*."[82] *PASH* further acknowledged the court's choice "not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed'"[83] (presumably due to the absence of a mature administrative record), then explained the court's decision to:

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sovereignty" such that "[t]he rights of their descendants do not derive from their race per se, and were not abolished by their inclusion within the territorial bounds of the United States") (citing Kahalekai v. Doi, 60 Haw. 324, 342, 590 P.2d 543, 555 (1979); Hawai'i Organic Act, § 83 (2009 & Supp. 2019); Act of April 30, 1900, c. 339, 31 Stat. 141, 157 (as amended).

[81] *See supra* text accompanying note 14.

[82] *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271 (emphasis added).

[83] *Id. See, e.g.*, STATE OF HAW. OFF. OF PLAN., *PASH* – KOHANAIKI STUDY GROUP: ON NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY PRACTICES FOLLOWING THE OPINION OF THE SUPREME COURT OF THE STATE OF HAWAI'I IN PUBLIC ACCESS SHORELINE HAWAII V. HAWAI'I COUNTY PLANNING COMMISSION, H.R. 19-197, Reg. Sess., at 9–10, 28 (1998). The report provides a list of factors—recognizing that "[s]ome of these factors may not be applicable in every case" but should, nevertheless, "be considered in determining whether a particular parcel should be considered fully developed" while combining "[u]ndeveloped and not yet (or less than) fully developed land . . . because both are subject to a higher level of scrutiny than fully developed land when analyzing proposed uses." *Id.* at 28 (section 2.2.2.). Factors listed under the fully developed category where it may be inconsistent to allow [or] enforce the practice of traditional Hawaiian gathering rights" include:

> [i] Parcel has been issued last discretionary permit to construct improvements (e.g.[,] zoning, shoreline management permits, etc.).
>
> [ii] Parcel does not require any discretionary permits to implement the desired use.
>
> [iii] The landowner's expectation of the need to exclude those who exercise traditional and customary rights is high.
>
> [iv] The owner's expectation, based in part on the history of the property and the absence of natural and cultural resources, is low that both access and traditional practices will be exercised on the property.
>
> [v] The expectation of those who exercise traditional and customary practices is low that they will have both access and the ability to practice.
>
> [vi] There is substantial investment in infrastructure on or improvements to the property, and appropriate access to natural and cultural resources is available.

> [R]efuse the temptation to place undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications. Such an approach would reflect an *unjustifiable lack of respect for gathering activities as an acceptable cultural usage* in pre-modern Hawai'i, . . . which can also be successfully incorporated in the context of our current culture.[84]

The reference above to an "unjustifiable lack of respect" recalls the *PASH* court's earlier criticism of "cultural insensitivity[.]"[85]

In this regard, several of the *PASH* court's statements can be interpreted as tacit rejection of the developer's argument: "[w]hen the owner develops land, the gathering rights disappear."[86] For example:

1) "the regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of 'property'"[87];
2) "the western concept of exclusivity is not universally applicable in Hawai'i"[88]; and

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> [vii] Agricultural District lands in cultivation or improved for pasturage, where appropriate access to natural and cultural resources is available.
>
> [viii] Agricultural lots that have improvements, structures, and infrastructure equal to urban and rural lots, where appropriate access to natural and cultural resources is available.
>
> [ix] State urban classified lands with buildings, development permits, infrastructure, improvements or cultivated crops or husbanded animals, where appropriate access to natural and cultural resources is available.
>
> [x] Property is zone or used for intensive residential, commercial, industrial or hotel use, and appropriate access to natural and cultural resources is provided.
>
> [xi] Lot size is small: under [ ] in the Urban District; under [ ] in State Conservation and Agricultural Districts.

Id. at 29 (bracketed material left blank in original).

[84] 79 Hawai'i at 450, 903 P.2d at 1271 (citation omitted).

[85] *See supra* text accompanying note 31 (quoting *PASH* footnote 15).

[86] *See* Melody Kapilialoha MacKenzie, *Ke Ala Pono – The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447, 457 & n.75 (2011) [hereinafter MacKenzie, *Ke Ala Pono*] (citing the Second Supplemental Brief (Opening Brief) for Petitioner-Appellee-Appellant Nansay Hawaii at 19, [*PASH*] (No. 15460) (Haw. Aug. 27, 1993)); Forman & Knight, *supra* note 34, at 18 & n.126. Ultimately, the HPC did not have an opportunity to implement the *PASH* Guidelines because no agency hearing was held on remand after the developer withdrew its permit application due to lost financing from the Japan-based investor. Forman & Knight, *supra* note 34, at 20 n.139.

[87] 79 Hawai'i at 442, 903 P.2d at 1263.

[88] *Id.* at 447, 903 P.2d at 1268.

3) "In the instant case, Nansay argues that the recognition of traditional Hawaiian rights beyond those established in *Kalipi* and *Pele* would fundamentally alter its property rights. However, Nansay's argument places undue reliance on western understandings of property law that are not universally applicable in Hawai'i."[89]

Regrettably, however, *PASH* remains the *only* Hawai'i Supreme Court opinion to rely on a statutory provision enacted nine years earlier in 1986 authorizing the judiciary (along with other branches of government) to give "consideration to the 'Aloha Spirit'" when exercising their powers on behalf of the people.[90]

By considering and applying the aloha spirit, the justices in *PASH* implicitly embraced restorative justice principles previously developed under the leadership of Chief Justice William S. Richardson (1966 to 1982).

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[89] *Id.* at 451, 903 P.2d at 1272.

[90] *Id.* at 450 n.44, 903 P.2d at 1271 n.44 (quoting HRS § 5-7.5(a) and (b), which authorize decisionmakers to "give consideration to the 'Aloha Spirit[,]'" meaning "the working philosophy of native Hawaiians" that reflects "the essence of relationships in which each person is important to every other person for collective existence"). *But see* Bettencourt v. Bettencourt, 80 Hawai'i 225, 228–30 & n.1, 909 P.2d 553, 556–58 & n.1 (1995) (noting an attorney's citation to the "Aloha Spirit" statute as his lone authority—despite arguably applicable precedent, and notwithstanding five extensions of time to file the brief—which "excoriates individual family court judges personally in a scathingly contemptuous diatribe" accompanied by "running sarcastic commentary" that compelled the Hawai'i Supreme Court to refer the record on appeal to the Office of Disciplinary Counsel for review and action).
First Circuit Court Judge Daniel Glen Heely also relied upon the Aloha Spirit statute in his subsequent (July 1996) oral and (October 1996) written rulings leading to Office of Hawaiian Affairs v. Housing and Community Dev. Corp. of Hawai'i (*HCDCH I*), 117 Hawai'i 174, 177 P.3d 884 (2008), *reversed*, Hawai'i v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). *See* Alan Matsuoka, *The Ceded Lands Ruling: Will it Break the Bank?*, HONOLULU STAR-BULLETIN, Jan. 13, 1997, http://archives.starbulletin.com/97/01/13/news/story1.html (reporting that Judge Heely's rulings "cited the federal government's apology for the illegal overthrow of the Hawaiian kingdom, and invoked a state law allowing him to 'contemplate and reside with the life force,' and consider the aloha spirit" before adding that "[t]he court cannot conceive of a more appropriate situation in which to attempt to apply the concepts set forth in the Aloha Spirit law . . . than ruling on issues that are directly related to the betterment of the native Hawaiian people").

III. PLACING *MAUNA KEA I & MAUNA KEA II* IN THE CONTEXT OF ONGOING NATIVE HAWAIIAN CLAIMS FOR RESTORATIVE JUSTICE

The Richardson Court recognized background principles of property law in Hawai'i that supported numerous restorative justice rulings:

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of the Hawai'i Supreme Court beginning after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases – and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[91]

The "primarily Western orientation and sensibility" mentioned by CJ Richardson reflects the incomplete and exclusionary "grand narratives"[92] that prevailed in Hawai'i during the Republic and Territorial periods.

By comparison, from 1982 to 1993 "the court under Chief Justice Herman T.F. Lum . . . issued relatively few opinions on Native Hawaiian issues"[93] with the notable exception of *PDF v. Paty*, "in which Associate

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[91] Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No'eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6–7 (2010) (quoting Chief Justice Richardson's acceptance speech at the 2007 American Bar Association Spirit of Excellence Awards Luncheon in Miami, Florida).

[92] *See, e.g.*, Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 21–22 & nn.51–52 (1994) [hereinafter Yamamoto, *Courts and the Cultural Performance*] (citing sources with differing perspectives on "cultural narratives" that raise silenced voices and challenge the notion of objectivity in decisions process, versus "grand narratives"—which use prevailing language and imagery to translate perceptions and experiences of others into dominant understandings of society); *id.* at 3 (discussing "society's treatment of outsiders" during "slavery, the internment, and the statue of liberty immigrant experience"—which "ignore[d] the physical and cultural domination of America's indigenous peoples[.]"). As explained *supra* notes * and 6, I have carved out for publication elsewhere my application of critical race theory to indigenous environmental justice issues that continue to plague practitioners of traditional and customary rights.

[93] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448 n.4 (citing Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992)

Justice Robert G. Klein, writing for a unanimous court less than six months after his appointment, established important principles on standing and sovereign immunity in addition to substantive law regarding traditional and customary rights and the State's trust duties relative to the public land trust."[94]

The Honorable Ronald T.Y. Moon served as Chief Justice from 1993 to 2010 (just one month shorter than the Richardson Court's tenure). The Moon Court, likewise, furthered efforts by Hawai'i's people to engage in "a reconciliation process rooted in [kānaka] maoli or Native Hawaiian values . . . by opening the courts to Native Hawaiian claims and by understanding and recognizing the true harm[—]the emotional and spiritual costs as well as the loss of land and sovereignty[—]to the Native Hawaiian community."[95] For example, the Moon Court: rejected efforts to erect

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[hereinafter MacKenzie, *The Lum Court*]). Professor MacKenzie's earlier assessment described a pattern of "fidelity to established precedent and an avoidance of 'hard' issues" in which the court "consistently declined the opportunity to expand the law and give recognition to the unique cultural and religious claims of Native Hawaiians." MacKenzie, *The Lum Court*, *supra* this note, at 393; *see, e.g.*, Dedman v. Bd. of Land & Nat. Res., 69 Haw. 255, 261–62, 740 P.2d 28, 33 (1987), *cert. denied*, 485 U.S. 1020 (1988) (holding that the constitutional Free Exercise clause was not violated absent proof that native Hawaiian practitioners held ceremonies to honor the deity Pele in a Wao Kele 'O Puna rainforest area proposed for geothermal development).

[94] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448 n.4. In 2000, after two decades of service to the judiciary and at the age of fifty-two, Justice Klein retired from the court and transitioned to private practice well before the constitutionally mandated retirement age of seventy. *See generally* Kahikina Noa Detweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 174 (2005) (discussing several of the most important Native Hawaiian Rights cases decided by Chief Justice William S. Richardson and Associate Justice Robert G. Klein).

Two years after Justice Klein's retirement from the bench, then Judge (and future BLNR Hearing Officer in *Mauna Kea II*) Riki May Amano issued her long-awaited decision on remand from the Hawai'i Supreme Court's 1992 order in Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 507 U.S. 918 (1993). *See* Pele Def. Fund v. Estate of Campbell, No. 89-089, 2002 WL 34205861 (Haw. 3d Cir. Aug. 26, 2002) (relying on HRS section 1-1, as reaffirmed in article XII, section 7 of the Hawai'i Constitution, to rule in favor of Native Hawaiian plaintiffs' exercising traditional and customary subsistence, cultural, and religious practices beyond the boundaries of the ahupua'a where they reside). The landowner elected not to appeal the decision. *See id.* Less than seven months later, the state Judicial Selection Commission voted not to retain Judge Amano for a second term. Christie Wilson, *Hilo judge loses bid to stay on for second term*, HONOLULU ADVERTISER, Mar. 19, 2003, http://the.honoluluadvertiser.com/article/2003/Mar/19/ln/ln32a.html.

[95] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 447–48. "'Kānaka Maoli' literally means 'true people' and is [another] term that Native Hawaiians have traditionally used to refer to themselves; in modern times, it is used to refer to all persons of Native Hawaiian ancestry."

jurisdictional and procedural barriers to claims that involve traditional and customary rights,[96] recognized the right of Hawaiian Home Lands trust beneficiaries to file breach of trust claims against the State,[97] and "fully

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NATIVE HAWAIIAN LAW TREATISE, *supra* note *, at xv. In addition to the thirteen cases discussed in Professor MacKenzie's article involving traditional and customary rights, Hawaiian Home Lands trust breaches, and public land trust or "ceded" land claims, she acknowledged in a footnote that the Moon Court also decided "important water rights and environmental cases that significantly impact the Native Hawaiian community." MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448 n.4; *but see id.* at 448 (conceding that "[i]t would be a mistake to conclude that the Moon Court always ruled in favor of Native Hawaiian interests" because: (1) "the court has rebuffed attempts to clarify the public trust land revenues due to the Native Hawaiian community[;]" and (2) "[i]n a criminal law context, the court also limited Native Hawaiian traditional and customary rights.").

For example, in *State v. Hanapi*, 89 Hawai'i 177, 970 P.2d 485 (1998), the court established three minimum requirements for successfully pleading the affirmative defense of privilege in a criminal case based on constitutionally-protective Native Hawaiian rights: (1) qualification as a Native Hawaiian under *PASH*, leaving open the question of whether non-Hawaiian descendants of Hawaiian Kingdom citizens, or other non-Hawaiian members of an 'ohana—presumably including duly trained members of hālau hula in addition to other cultural, subsistence and religious practices—may assert such rights; (2) an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary Native Hawaiian practice, including testimony of experts or kama'āina witnesses; and (3) exercise of the right on undeveloped or less than fully developed property—i.e., specifically excluding lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure. *Id.* at 186 & n.8, 970 P.2d at 494 n.8.

[96] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448; *see also id.* at 455–59, 461–62 & 463-66. *See, e.g.*, Public Access Shoreline Hawaii v. Hawai'i County Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995) (*see infra* Part II); Ka Pa'akai O Ka 'Āina v. Land Use Comm'n (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000) (providing an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private [property] interests"); Kaleikini v. Thielen (*Kaleikini I*), 124 Hawai'i 1, 237 P.3d 1067 (2010) (allowing the court's first case involving 'iwi kūpuna, or Native Hawaiian ancestral remains, to proceed under the public interest exception to the mootness doctrine). Curiously, Professor MacKenzie neglected to discuss *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210 (1994), which held that agency hearings are required by law where issuance of a permit adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases—except as cited in *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 211, 891 P.2d 729, 298 (1995). MacKenzie, *Ke Ala Pono*, *supra* note 86, at 470 n.195.

[97] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448; *see also id.* at 469–82. *See, e.g.*, Bush v. Hawaiian Homes Comm'n (*Bush I*), 76 Hawai'i 128, 870 P.2d 1272 (1994) (declining to exercise appellate jurisdiction under HRS chapter 91 concerning the agency's approval of third party agreements benefiting non-Hawaiians in alleged violation of the Hawaiian Homes Commission Act (HHCA), because the beneficiaries lacked a property interest sufficient to establish a constitutional due process right to a hearing); Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawai'i 192, 891 P.2d 729 (1995) (upholding challenge involving the agency's refusal to hold contested case hearings on requests for

acknowledged the historical basis for Native Hawaiian claims when deciding controversial issues surrounding the public land trust or 'ceded' lands."[98]

For multiple reasons, it remains premature to attempt a holistic assessment of judicial decisions concerning Native Hawaiian issues under the Recktenwald Court since September 2010.[99] The State of Hawai'i Judicial Selection Commission retained our Chief Justice for a second ten-year term beginning in September 2020,[100] although he will reach the constitutionally mandated retirement age in early October 2025. The sheer number of cases concerning Native Hawaiian issues decided by the

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pastoral leases by Hawaiian Home Lands beneficiaries, who overcame a dizzying array of jurisprudential hurdles); Bush v. Watson (*Bush II*), 81 Hawai'i 474, 918 P.2d 1130 (1996) (invaliding third party agreements in action filed under 42 U.S.C. § 1983 and the HHCA, while laying the groundwork for future analyses of constitutional due process in administrative contested case hearing contexts through a unanimous opinion joined by the author of *Bush I*); Kepo'o v. Watson, 87 Hawai'i 91, 952 P.2d 379 (1998) (determining that beneficiaries had standing to challenge agency's failure to prepare an environmental impact statement for a proposed cogeneration power plant on Hawaiian Home Lands); Kalima v. State, 111 Hawai'i 84, 137 P.3d 990 (2006) (concluding that beneficiaries stablished their right to sue the State for breach of trust).

[98] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448; *see also id.* at 485–501. *See, e.g.*, Off. of Hawaiian Affs. v. State (*OHA I*), 96 Hawai'i 388, 31 P.3d 901 (2001); Off. of Hawaiian Affs. v. State (*OHA II*), 110 Hawai'i 338, 133 P.3d 767 (2003); Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. (*HCDCH I*), 117 Hawai'i 174, 177 P.3d 884 (2008), *rev'd sub nom.* Hawai'i v. Off. of Hawaiian Affs., 556 U.S. 163 (2009); Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. (*HCDCH II*), 121 Hawai'i 324, 219 P.3d 1111 (2009).

[99] One such reason is Associate Justice Richard Pollack's mandatory retirement from the bench on July 1, 2020. Chad Blair, *A New Direction for the Hawaii Supreme Court?*, HONOLULU CIVIL BEAT (June 30, 2020), https://www.civilbeat.org/2020/06/a-new-direction-for-the-hawaii-supreme-court/ (quoting Chief Justice Mark E. Recktenwald, Hawai'i State Supreme Court, Proclamation (July 1, 2020), https://www.courts.state.hi.us/wp-content/uploads/2020/07/07.01.20-Proclamation-Richard-Pollack.pdf: "[Justice Pollack] shaped the court's jurisprudence in areas including public trust resources and the environment, criminal procedure, evidence, and public access to governmental proceedings. He was always respectful in his decisions, even when others held different points of view."). On November 19, 2020, the Hawai'i State Senate confirmed Associate Justice Todd W. Eddins to replace Justice Pollack. Dan Nakaso, *Todd Eddins unanimously confirmed to Hawaii Supreme Court*, Honolulu STAR-ADVERTISER (Nov. 19, 2020), https://www.staradvertiser.com/2020/11/19/breaking-news/todd-eddins-unanimously-confirmed-to-hawaii-supreme-court/.

[100] Staff, *Recktenwald Retained as Hawaii Supreme Court Chief Justice*, W. HAW. TODAY (Apr. 11, 2021, 12:05 AM), https://www.westhawaiitoday.com/2020/09/23/hawaii-news/recktenwald-retained-as-hawaii-supreme-court-chief-justice/.

Recktenwald Court from 2010 through 2020,[101] however, hint at a strong desire for restorative justice that has "welled" up within the community over time:[102]

> In Kanaka 'Ōiwi[103] political discourse, aloha 'āina is at the center of the resistance against other rationalizations that threaten place . . . and articulates

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[101] *See, e.g.*, Kalima v. State, 148 Hawai'i 129, 468 P.3d 143 (2020); Lāna'ians for Sensible Growth v. Land Use Comm'n (*LSG IV*), 146 Hawai'i 496, 463 P.3d 1153 (2020); Ching v. Case, 145 Hawai'i 148, 449 P.3d 1146 (2019); Clarabal v. Dep't of Educ., 145 Hawai'i 69, 446 P.3d 986 (2019); *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 431 P.3d 752 (2018); Nelson v. Hawaiian Homes Comm'n (*Nelson II*), 141 Hawai'i 411, 412 P.3d 917 (2018); Flores v. Bd. of Land & Nat. Res., 143 Hawai'i 114, 424 P.3d 469 (2018); Kilakila 'O [Haleakalā] v. Bd. of Land and Nat. Res. (*Kilakila III*), 138 Hawai'i 383, 382 P.3d 195 (2016); Kilakila 'O [Haleakalā] v. Univ. of Haw. (*Kilakila II*), 138 Hawai'i 364, 382 P.3d 176 (2016); Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 363 P.3d 224 (2015); Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i, 133 Hawai'i 141, 324 P.3d 951 (2014); State v. Armitage, 132 Hawai'i 36, 319 P.3d 1044 (2014); Kilakila 'O [Haleakalā] v. Bd. of Land & Nat. Res. (*Kilakila I*), 131 Hawai'i 193, 317 P.3d 27 (2013); Blake v. Cnty. of Kaua'i Plan. Comm'n, 131 Hawai'i 123, 315 P.3d 749 (2013); *In re* 'Īao Groundwater Mmgt. Area (*Nā Wai 'Ehā*), 128 Hawai'i 228, 287 P.3d 129 (2012); Kaleikini v. Yoshioka (*Kaleikini II*), 128 Hawai'i 53, 283 P.3d 60 (2012); Nelson v. Hawaiian Homes Comm'n (*Nelson I*), 127 Hawai'i 185, 277 P.3d 279 (2012); Corboy v. Louie, 128 Hawai'i 89, 283 P.3d 695 (2011).

[102] *See, e.g.*, 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, 169–81 (2016) [hereinafter Sproat, *Climate Change Devastation*] (documenting the physical and cultural genocide facilitated by the arrival of westerners in Hawai'i, followed by the deployment of various tools of colonialism including the illegal overthrow in 1893 that resulted in persisting harms which affect the realms of native land, culture, social welfare, and self-determination—harms further exacerbated by the looming threat of climate change impacts on place-based practices); *see also id.* at 183–95 (discussing Hawai'i's commitment to restorative justice, but noting that "it remains unclear for state, county, and other decision-makers what this concept [of restorative justice] means in practice [because] . . . [t]here has been no delineation in the laws themselves or even in related court decisions"); *Aloha 'Āina: Native Hawaiian Land Restitution*, 133 HARV. L. REV. 2148, 2149 (2020) [hereinafter *Unjust Enrichment*] ("Mauna Kea is just one recent case in Hawaiian history that betrays a restitution claim. This Chapter argues that the lands of the Hawaiian Kingdom unjustly enriched the United States when the Kingdom was overthrown, and that the State of Hawai'i benefited from the same when it was admitted to the Union . . . [and] wealth accrued due to the possession of this land has continued to unjustly enrich these governments.").

[103] "Kanaka 'Ōiwi" (or the plural "Kānaka 'Ōiwi") literally means person(s) "of the ancestral bone[,]" which is where the "core of ancestral memory and knowledge" reside. 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 1 (2014).

> a political strategy of resistance that is anchored in spiritual and kinship relationship to place.
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> The Kanaka ʻŌiwi political community is diverse and heterogenous. Ongoing political campaigns to protect land and water rights, food security and our wahi pana (sacred places), like the earlier political campaigns from the 1970s onward, involve individuals who are able to work together to achieve political goals even as they follow different ideologies. These coordinated efforts are possible because aloha ʻāina is a unifying discourse that calls Kanaka ʻŌiwi and allies to kūʻē, participate in acts of resistance, and to kūkulu, build a shared and abiding relationship to place that is grounded in aloha.
>
> Aloha ʻāina discourse includes a number of place-based values . . . [or] discursive filaments that are continuously being woven into strong, flexible and resilient nets of discursive meaning that create the possibility for material transformation of settler relations to land. Two political tropes co-articulate in this net(work) of transformative social relations: the raised fists of kūʻē and the hands in the earth of kūkulu.
>
> Kūʻē encompasses acts of political resistance to dominant authority over land. . . . Refusing to let bulldozers onto the sacred Mauna a Wākea is an act of kūʻē.
>
> Kūkulu are acts that (re)build social structures outside of the dominant authority. Teaching the principles of kapu aloha to all those who come to Mauna a Wākea is an act of kūkulu.
>
> In order to re-establish our relationships to land and ancestors (grounded normativity), kūʻē (resistance) must be complemented by kūkulu (build). Kūkulu works on a long trajectory of social transformation. . . . Kūʻē at its most effective is event based with clearly articulated material goals such as preventing annexation, regaining control of Kahoʻolawe, or preventing the construction of yet another telescope on Mauna a Wākea.[104]

Before describing the *Mauna Kea I* and *Mauna Kea II* decisions in greater detail, it is important to acknowledge four salient points:

1) The long history of opposition to further telescope development at Mauna Kea voiced by Native Hawaiian communities (dating before 1978 amendments to the Hawaiʻi Constitution);[105]

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[104] Mary L. Baker, Hoʻoulu ʻĀina: Embodied Aloha ʻĀina Enacting Indigenous Futurities 55–57 (May 2018) (Ph.D. dissertation, University of Hawaiʻi at Mānoa) (ScholarSpace at University of Hawaiʻi at Mānoa), https://scholarspace.manoa.hawaii.edu/handle/10125/62695; *see also* Mana Maoli, *supra* note 14 (reimagining ISRAEL KAMAKAWIWOʻOLE, HAWAIʻI ʻ78 (Mountain Apple Co. 2010)).

[105] Kuʻupuamaeʻole Kiyuna, Ka Piko o ka ʻĀina: Additional Context for Understanding the Cultural Significance of Mauna Kea 1 (figshare) (citing Senator Kai Kahele, The Future of Mauna Kea at Ka Waiwai Collective (Apr. 11, 2018)) ("Within six years of the Mauna

2) The documented mismanagement of Mauna Kea (often to the detriment of traditional and customary rights);[106]
3) Despite the Hawai'i Supreme Court's eventual recognition of a "heightened duty of care owed to the Native Hawaiians"[107] it took the court *forty-seven years* after the University of Hawai'i secured its 1968 lease over the Mauna Kea Science Reserve from BLNR—and more than *twenty* years after *PASH*[108] (despite multiple prior opportunities[109])—to formally recognize Native

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Kea Science Reserve's genesis, universities and developers collectively erected six telescopes on Mauna Kea *despite opposition* from the community.") (emphasis added); *see also* Kanaeokana, *Fifty Years of Mismanaging Mauna Kea*, [Vimeo] (Dec. 12, 2017), https://vimeo.com/247038723.

[106] In its 1998 audit of the management at Mauna Kea, the State of Hawai'i Office of the Auditor found "the [U]niversity [of Hawai'i]'s management of the science reserve was inadequate to ensure that natural resources are protected . . . [and] that permit conditions, requirements, and regulations were not always enforced." STATE OF HAW., OFF. OF AUDITOR, FOLLOW-UP AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE REP. NO. 05-13, at iii–iv (2005) (citing STATE OF HAW., OFF. OF AUDITOR, AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE REP. NO. 98-6 (1998)), http://www.malamamaunakea.org/uploads/management/Audit_05-13.pdf. The 2005 audit similarly noted mismanagement in several key areas: (1) "[u]nder the general lease, the university is responsible for the protection of cultural and natural resources within its jurisdiction, but currently does not provide protection due to its lack of authority to establish or enforce administrative rules for the science reserve"; (2) "[t]he university also does not appear to systematically monitor its tenant observatories for compliance with [CDUP] requirements"; and (3) "[DLNR,] as landowner, has not provided a mechanism to ensure compliance with lease and permit requirements in protecting and preserving Mauna Kea's natural resources . . . [and] has not regularly monitored the university for compliance with [CDUP] requirements." *Id.* at i–ii. The 2005 audit further criticized "critical management issues, such as the lack of administrative rule-making and enforcement authority, unresolved public access control, weak permit monitoring, and indeterminate management plans," and advised that DLNR "still needs to intensify its efforts to protect Mauna Kea's natural and cultural resources." *Id.* at 13.

[107] *In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 430, 83 P.3d 664, 693 (2004) (citing Pub. Access Shoreline Hawaii v. Hawai'i County Plan. Comm'n (*PASH*), 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995); Pele Def. Fund v. Paty, 73 Haw. 578, 620–21, 837 P.2d 1247, 1272 (1992); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 7–8, 656 P.2d 745, 749 (1982); Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982)).

[108] *See supra* notes 22, 31 and accompanying text (discussing the *PASH* court's holding that an agency's restrictive interpretation of standing requirements "is not entitled to deference").

[109] Justice Acoba authored at least three concurring opinions addressing this point. Kilakila 'O [Haleakalā] v. Bd. of Land & Nat. Res. (*Kilakila I*), 131 Hawai'i 193, 206–14, 317 P.3d 27, 40–48 (2013) (Acoba, J., concurring, Pollack, J., joining) ("I would hold that jurisdiction . . . arises independently under article XI, section 7 of the Hawai'i Constitution[] in light of specific provisions therein protecting native Hawaiian rights.") (footnote omitted);

> Hawaiians' constitutional due process rights to be heard in administrative proceedings[110] that might affect their exercise of traditional and customary practices for subsistence, cultural or spiritual purposes, a proposition that the court belatedly recognized in 2015 through its *Mauna Kea I* decision;[111] and,

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Nā Wai 'Ehā, 128 Hawai'i 228, 271–72, 287 P.3d 129, 172–73 (2012) (Acoba, J., concurring) (observing that petitioners asserting adverse effects on their traditional and customary right to cultivate taro under article XII, section 7 "have a legitimate claim of entitlement under the Constitution and would be entitled to a due process hearing on their claim"); Kaleikini v. Thielen, 124 Hawai'i 1, 27, 30–31, 42–43, 237 P.3d 1067, 1093, 1096–97, 1108–09 (2010) (Acoba, J., concurring) ("I would hold that Petitioner's constitutional due process right as a Native Hawaiian practicing the native and customary traditions of protecting iwi mandated that a contested case hearing be held.").

Earlier, Justice Acoba authored two dissenting opinions along the same lines. Hui Kako'o Aina Ho'opulapula v. Bd. of Land & Nat. Res., 112 Hawai'i 28, 43, 143 P.3d 1230, 1245 (2006) (Acoba, J., concurring and dissenting, Del Rosario, J., joining) ("I would hold, rather, that Hui Kako'o was not provided an adequate opportunity to establish its standing as allowed under the Hawai'i Constitution, article XII section 7. . . ."); Kaniakapupu v. Land Use Comm'n, 111 Hawai'i 124, 142–43, 139 P.3d 712, 730–31 (2006) (Acoba, J., dissenting, Duffy, J., joining) (observing that the "rights, duties, and privileges" of a Hui formed to steward the historic ruins of Kamehameha III's royal summer cottage were determined for purposes of appellate jurisdiction under the Hawai'i Administrative Procedure Act, HRS section 91-14, when the agency denied their motion for an order to show cause why the property should not be reclassified back to conservation from urban as a result of the property owner's alleged failure to comply with conditions attached to the original reclassification order, then noting further that "it must be the substance of the agency proceeding, not its form, that controls").

[110] For purposes of establishing appellate jurisdiction under HRS section 91-14, a contested case hearing is required by statute in every case involving proposed uses of land within the conservation district for commercial purposes (excluding use of land for utility purposes). HAW. REV. STAT. §§ 91-1, -14 (2012 & Supp. 2019); *id.* § 183C-6(c) (2011 & Supp. 2019).

[111] The *Kilakila I* majority concluded that constitutional due process concerns need not be reached because DLNR administrative rules required that a contested case hearing be held. 131 Hawai'i at 202 n.5, 317 P.3d at 36 n.5 (disregarding arguments that a hearing was also required by due process considering the protections afforded under article XI, section 9 and article XII, section 7 of the Hawai'i Constitution with respect to environmental and Native Hawaiian issues). However, as Justice Acoba explained in his *Kilakila I* concurrence:

> This case illustrates precisely why this court has taken a *functional approach* to what can be considered a contested case hearing for purposes of judicial review, consistent with the policy of "favoring judicial review of administrative actions." *Alaka'i Na Keiki, Inc. v. Matayoshi*, 127 Hawai'i 263, 279, 277 P.3d 988, 1004 (2012). . . . The legislature did not define "contested case" with respect to the *agency's classification* of a particular proceeding as a "contested case", but instead defined the term with respect to the *result*. Thus, "*it must be the substance of the agency proceeding, not its*

4) when MKAH and other kia'i mauna were finally provided with a forum to assert their restorative justice claims, the hearings officer, BLNR *and* the court essentially turned deaf ears to their pleas (including a host of allegedly prejudicial legal process rulings).[112]

A. Putting the Cart Before the Horse in Mauna Kea I

In *Mauna Kea I*, the Hawai'i Supreme Court vacated and remanded BLNR's initial issuance of a conservation district use permit (CDUP) authorizing construction of a Thirty Meter Telescope (TMT) at Mauna Kea.[113] The unanimous *Mauna Kea I* court chastised BLNR for violating the Hawai'i Constitution's due process guarantee by "put[ting] the cart

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form, that controls." *Kaniakapupu v. Land Use Comm'n*, 111 Hawai'i 124, 143, 139 P.3d 712, 731 (2006) (Acoba J., dissenting, joined by Duffy, J.). In other words, "[t]he controlling principle is not the *label* accorded the motion or proceeding, but the *effect* of the agency's decision."

Id. at 214, 317 P.3d at 48 (Acoba, J., concurring, Pollack, J., joining) (alteration in original) (emphasis added); *accord PASH*, 79 Hawai'i at 432 n.11, 903 P.2d at 1253 n.11 (citing Town v. Land Use Comm'n, 55 Haw. 538, 548, 524 P.2d 84, 91 (1974)). *See supra* note 20 (discussing *Alaka'i Na Keiki* in greater detail).

[112] *See* Petitioners Exceptions/Responses to Hearing Officer Riki May Amano's Proposed Findings of Fact, Conclusions of Law, Case No. HA-CC 16-002 ¶¶ 29, 38, 40–81 (Aug. 21, 2017) [hereinafter MKAH Exceptions], https://dlnr.hawaii.gov/mk/files/2017/08/808-MKAH-Exceptions.pdf (referring to a multitude of Minute Orders "obviously made long after the fact and thus rendered moot" and arguing that the agency's failure to rule on the dispositive motions "in a timely manner means our due process rights again have been violated . . . with only 5 days to file Motions for Reconsideration [while] simultaneously holding us to [the] deadline for filing our collective FOF[,] COL, [and] D&O"); *id.* ¶ 30 (objecting to BLNR's decision not to upload a full set of transcripts to the online electronic Documents library, along with a letter from the Attorney General's Office precluding Librarians holding the transcripts from allowing petitioners to copy them); *id.* ¶ 35 (objecting to the requirement of hand signatures on filings and hard copies to be delivered on a different island than where the hearing took place and the petitioners resided). *See generally*, Yamamoto, *Courts and the Cultural Performance*, *supra* note 92, at 7, 9 (explaining how "volatile, deeply-rooted cultural and political indigenous land trust controversies" reflecting a "history of culture destruction and land dispossession" are sometimes "largely stripped [of] those issues . . . through the limiting language of legal process"—i.e., the rule of law).

[113] 136 Hawai'i 376, 380, 399, 363 P.3d 224, 228, 247 (2015) (holding that BLNR violated constitutional due process by approving an application seeking authority to construct a Thirty Meter Telescope below the Mauna Kea summit, subject to a condition prohibiting commencement of construction until the agency resolved a subsequent contested case hearing in which practitioners of traditional and customary would be allowed to present evidence, testify, and cross-examine the applicant's witnesses and experts).

before the horse when it issued the permit before the request for a contested case hearing was resolved and the hearing was held."[114]

A majority of the court went a bit further,[115] holding that "[a]n agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision"[116] and stressing that "[t]he non-delegable nature of any agency's duty [under *Ka Pa'akai O Ka 'Āina v. Land Use Comm'n* (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000),] to protect and enforce constitutional rights only intensifies the important role that an agency plays."[117] The court explained that an agency's statutory duties must be performed in a manner that "not only avoid[s] infringing upon protected rights to the extent feasible," while also "[fulfilling] the State's affirmative constitutional obligations" including but not limited to "active and affirmative protection"[118] of Native Hawaiian traditional and customary rights under article XII, section 7,[119] as previously set forth by the court in: *Ka Pa'akai*,[120] *In re Water Use Permit Applications* (*Waiāhole I*),[121] and,

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[114] *Id.* at 381, 363 P.3d at 229. *See generally id.* at 380, 363 P.3d at 228 (quoting Sandy Beach Def. Fund v. City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989), for the proposition that due process includes the right to be heard at "a meaningful time and in a meaningful manner"); *id.* at 390–91, 363 P.3d at 238–39 ("Given the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, the risk of an erroneous deprivation absent the protections provided by a contested case hearing, and the lack of undue burden on the government . . . a contested case hearing was 'required by law' *regardless* of whether BLNR had voted to approve one on its own" and "BLNR's decision to vote on the permit *prior* to the contested case hearing denied Appellants a meaningful opportunity to be heard in both reality and appearance"); *id.* at 399, 363 P.3d at 247 ("In short, BLNR acted improperly when it issued the permit prior to holding a contested case hearing. No case or argument put forth by [the University] or BLNR persuades otherwise.").

[115] *Id.* at 413–15, 363 P.3d at 261–63 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV).

[116] *Id.* at 415, 363 P.3d at 263.

[117] *Id.* at 415 n.17, 363 P3d at 263 n.17.

[118] *Id.* at 414, 363 P.2d at 263 (quoting Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984)).

[119] *Id.* at 413 & nn.14–15, 363 P.3d at & 261 nn.14–15.

[120] 94 Hawai'i at 45, 7 P.3d at 1082, *cited with approval in Mauna Kea I*, 136 Hawai'i at 414, 363 P.3d at 262 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV).

[121] 94 Hawai'i 97, 143, 9 P.3d 409, 456 (2000), *cited with approval in Mauna Kea I*, 136 Hawai'i at 414, 363 P.3d at 262 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV).

Kauai Springs, Inc. v. Planning Commission of County of Kaua'i (*Kauai Springs*).[122]

B. Misapplying and Ignoring Applicable Law in Mauna Kea II

Following its second contested case hearing on remand from *Mauna Kea I*, BLNR issued the University a second CDUP authorizing construction of the TMT.[123] The agency's decision contradicted the *plain language* of applicable regulatory criteria, considering that "the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea, even without the TMT, have *already resulted* in substantial, significant and adverse impacts."[124] However, the *Mauna Kea II* majority concluded that BLNR did not clearly err in interpreting its regulatory criteria to allow consideration of measures designed to reduce or offset the impact of the proposed TMT project.[125]

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[122] 133 Hawai'i 141, 174–75, 324 P.3d 951, 984–85 (2014), *cited with approval in Mauna Kea I*, 136 Hawai'i at 414, 363 P.3d at 262 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV).

[123] *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 384, 431 P.3d 752, 757 (2018).

[124] *Id.* at 403, 431 P.3d at 776 (emphasis added). *Compare* HAW. REV. STAT. § 183C-1 (2011 & Supp. 2019) (finding that "lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply" and proclaiming "the intent of the legislature to conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare"), *with id.* § 205A-26 (2021) (authorizing "significant adverse environmental or ecological effect" where "minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests").

[125] *Mauna Kea II*, 143 Hawai'i at 404 n.31, 431 P.3d at 777 n.31 (citing BLNR FOF 522 which lists a "number of measures designed to reduce or offset the negative impact of the project" in addition to FOF 344 indicating TIO's commitment to restore an abandoned road, as well as CDUP Special Conditions 10 and 11 providing a legally binding commitment to permanently decommission three telescopes as soon as reasonably possible, without constructing any new observatories on those sides, along with two additional observatories by December 31, 2033); *id.* at 404–05, 431 P.3d at 777–78 (citing Kilakila 'O [Haleakalā] v. Bd. of Land & Nat. Res., 138 Hawai'i 383, 404–05, 382 P.3d 195, 216–27 (2016), and Morimoto v. Bd. of Land & Nat. Res., 107 Hawai'i 296, 303, 113 P.3d 172, 179 (2005), to support the conclusion that "[i]t was appropriate for the BLNR to consider these measures in its [Hawai'i Administrative Rules (HAR)] § 13-5-30(c)(4) analysis). *Cf. In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 441, 83 P.3d 664, 704 (2004) (rejecting the applicant's argument on appeal that the agency's permit issuance should be upheld because "the cumulative effect of reducing groundwater discharge . . . [would] not be the 'straw that broke the camel's back'" with respect to nearshore environmental impacts).

The *Mauna Kea II* court's reliance on *Kilakila 'O [Haleakalā] v. Board of Land & Natural Resources* (*Kilakila III*)[126] as justification for considering mitigation measures under Hawai'i Administrative Rules (HAR) § 13-5-30(c)(4) fails to consider the relative dearth of legal analysis involving traditional and customary rights in *Kilakila III*. Indeed, counsel for Kilakila 'O Haleakalā consciously avoided raising arguments rooted in public trust obligations or Native Hawaiian traditional and customary rights under article XII, section 7, based on his belief that the absence of any "balancing" language under BLNR's rules would be preferable to the potential alternative of a balancing test under the court's recently issued decision in *State v. Pratt*.[127]

The *Mauna Kea II* and *Kilakila III* courts' reliance on the earlier *Morimoto v. Board of Land & Natural Resources* decision to authorize consideration of mitigation measures likewise ignores the fact that the "quixotic"[128] *Morimoto* appellants "present[ed] no new arguments" under article XI, section 1.[129] In addition, *Morimoto* preceded (by more than eight years) the Hawai'i Supreme Court's recognition of a self-executing private right of action for environmental wrongs under article XI, section 9 of the Hawai'i Constitution.[130] Notwithstanding the *Mauna Kea II* majority's express rejection of the University's "*incorrect* position that 'cultural practices' are not 'natural resources'"[131]—again, contrary to applicable agency rules[132]—and despite BLNR's concomitant suggestion that cultural

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[126] 138 Hawai'i 383, 405, 382 P.3d 195, 217 (2016).

[127] Telephone Interview with David Kimo Frankel (Dec. 27, 2020) (referencing State v. Pratt, 127 Hawai'i 206, 277 P.3d 300 (2012)).

[128] *See* Denise E. Antolini, *The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation*, 33 U. HAW. L. REV. 581, 583, 629, 633 n.395 (2011).

[129] *Morimoto*, 107 Hawai'i at 308, 113 P.3d at 184 ("[A]s support, Morimoto only refers to (1) 'contradictions of the factual conclusions in the record, including the finding of no substantial impact upon the Palila' and (2) 'the court's failure to ensure that BLNR followed proper legal requirements, including rule-making.'"). In other words, the *Morimoto* appellants failed to present any arguments rooted in the constitutional provision. *See id.*

[130] *See* Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 412–13, 235 P.3d 1103, 1124–25 (2013).

[131] 143 Hawai'i at 403 n.30, 431 P.3d at 776 n.30 (emphasis added). *See also* Kilakila 'O [Haleakalā] v. Bd. of Land & Nat. Res. (*Kilakila I*), 131 Hawai'i 193, 212, 317 P.3d 27, 46 (2013) (Acoba, J., concurring, Pollack, J., joining) (noting the organizational goal of Kilakila 'O Haleakalā "to protect the natural resources, including cultural resources, of the area").

[132] *See, e.g.*, HAW. CODE R. § 13-5-2 (Westlaw 2020) (defining "natural resource" to mean "resources such as plants, aquatic life and wildlife, cultural, historic, recreational, geologic, and archeological sites, scenic areas, ecologically significant areas, watersheds, and minerals").

practices are not necessarily cultural *resources*,[133] the court concluded that the error, if any,[134] was "harmless" because the agency's analysis contained numerous references to its assessment of the TMT project's impact on cultural practices.[135]

Justice Richard W. Pollack's separate concurrence lamented the majority's failure to fully apply "fundamental" public trust principles to conservation land, given that "neither the text nor the history of article XI, section 1 provides for differing levels of protection for individual natural resources, such as water as compared to land" and argued that "this court should not establish artificial distinctions without a compelling basis for doing so."[136] Justice Pollack nevertheless concluded that the Hawai'i Supreme Court was obligated to accept BLNR's findings and conclusions

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[133] *Mauna Kea II*, 143 Hawai'i at 403 n.30, 431 P.3d at 776 n.30 (explaining that "BLNR suggested in COL 203 that cultural practices are not cultural resources protected by HAR § 13-5-30(c)(4)"); *see also id.* at 396 n.16, 431 P.3d at 769 n.16 (concluding that "BLNR appropriately took into account contemporary (as well as customary and traditional) Native Hawaiian cultural practices . . . in *other areas of Mauna Kea, including the summit region*" (emphasis added)). *Compare* BLNR Decision, *supra* note 5, at 222 (noting COL 204 which states "[t]he effect on cultural practices is *analyzed elsewhere*") (emphasis added), *with id.* at 223 (noting COL 211 which states "Petitioners' and Opposing Intervenors' argument is factually and legally incorrect"—viz., contending that proposed mitigation measures which *do not specifically address the environmental and cultural impacts of the project* cannot be considered in connection with HAR § 13-5-40(c)(4)) (emphasis added).

[134] *Mauna Kea II*, 143 Hawai'i at 403 n.30, 431 P.3d at 776 n.30 (observing that the court declined to define "cultural resources" in Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 47 n.27, 7 P.3d 1068, 1084 n.27 (2000), stating instead that "'cultural resources' is a broad category, of which *native Hawaiian rights is* only *one subset* . . . [and] we do not suggest that the statutory term, 'cultural resources' is synonymous with the constitutional term, customary and traditional native Hawaiian rights) (alteration in original) (emphasis added).

[135] *Id.* at 403 n.30, 431 P.3d at 776 n.30 (observing that "DLNR had included Native Hawaiian 'cultural practices' within its assessment of 'natural resources,' despite the University's *incorrect* position that 'cultural practices' are not 'natural resources'") (emphasis added); *id.* (citing COLs 198, 199, 205–10, 212, and 215, for the proposition that "BLNR's HAR § 13-5-30(c)(4) analysis contains numerous references to its assessment of the impact of the TMT Project on cultural practices") (alteration in original).

[136] *Id.* at 410, 431 P.3d at 783 (Pollack, J., concurring in part and concurring in the judgment) (declining to join Part V.C.1. of the majority opinion and, instead, calling for application of a "uniform standard" based on public trust principles governing water resources "that may easily be applied to other natural resources with only minor alterations"). In Part IV, Justice Pollack nevertheless concluded that the University "sufficiently carried its obligation to demonstrate that damage to public trust purposes will be offset by the implementation of reasonable mitigation measures." *Id.* at 420, 431 P.3d at 793 (Pollack, J., concurring in part and concurring in the judgment).

regarding the public trust on appeal because they "appear to be supported by substantial evidence and are thus not clearly erroneous."[137]

In his dissenting opinion, Justice Michael D. Wilson (former BLNR Chair, 1994 to 1999) coined the phrase "degradation principle" to describe the agency's conclusion, which he criticized for effectively determining that "cultural and natural resources protected by the Constitution of the State of Hawai'i and its enabling laws lose legal protection where degradation of the resource [as a result of both permitted and, at least initially, unpermitted development] is of sufficient severity as to constitute a substantial adverse impact"[138]—such that further development associated with constructing the TMT (a proposed land use that eclipses all other telescopes in magnitude[139]) can no longer create a tipping point where impacts become significant.[140]

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[137] *Id.* at 417, 431 P.3d at 790; *see also id.* at 416–20 & nn.9–13, 431 P.3d at 789–793 & nn.9–13 (applying the framework laid out in Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 324 P.3d 951 (2014)). However, Justice Pollack would have further held that BLNR "is obligated to utilize Special Condition Forty-Three in its Decision and Order, which permits the Chairperson to prescribe additional conditions on the conservation district use permit, to require the permittee to provide concrete information demonstrating the ability of the responsible parties to acquire the requisite construction and operation funding prior to beginning construction." *Id.* at 421, 431 P.3d at 794.

[138] *Id.* at 421–22, 431 P.3d at 794–95 (Wilson, J., dissenting). *See also id.* at 410–17, 431 P.3d at 783–90 (Pollack, J., concurring in part and concurring in the judgment, Wilson, J., joining as to Parts I–III) ("Public Lands Have Long Been Regarded as a Public Natural Resource Held in Trust by the State for the Benefit of the People"; "The Existing Public Trust Framework May Be Applied to Public Lands"; and "The Approaches Taken by the Hearing Examiner and the Board, are Inconsistent with the Law, and the Majority Offers Little Guidance to Correct These Missteps").

[139] *Id.* at 428, 431 P.3d at 807 (Wilson, J., dissenting). The *Mauna Kea II* majority's original slip opinion was, surprisingly, published ten days *before* publication of Justice Wilson's dissenting opinion. *See infra* note 142.

[140] *Mauna Kea II*, 143 Hawai'i at 422, 431 P.3d at 795 (Wilson, J., dissenting) (observing that the "degradation principle ignores the unequivocal mandate contained in [HAR] § 13-5-30(c)(4) prohibiting a [CDUP] for a land use that would cause a substantial adverse impact to existing natural [including cultural] resources"). In this regard, BLNR's determinations appear to have been heavily influenced by the "cumulative impacts on cultural, archaeological, and historic resources that are considered substantial, significant, and adverse" due to *existing* observatories—so much so that construction of the TMT would *not* adversely impact traditional and customary rights. BLNR Decision, *supra* note 5, at 21 (FOF 135); *id.* at 219–22 (COLs 176, 180, 183–87, 189–92, 196, 198–200, 202). *See also id.* at 89 (FOF 514: "TMT Observatory will not significantly add to or burden the balance of any existing impact from a level that is currently less than significant to a significant level within the Astronomy Precinct . . . [t]his means that the TMT Project itself will not cause substantial adverse impacts"); *id.* (FOF 515: Petitioners and Opposing Intervenors' acknowledge "that Mauna Kea has suffered previous 'unlawful' significant and adverse

Moreover, "the party that caused the substantial adverse impact [the State of Hawai'i, by authorizing previous construction within the Astronomy Precinct] is empowered by the degradation principle to increase the damage . . . contrary to accepted norms of the environmental rule of law" and, thus, "renders inconsequential the failure of the State to meet its constitutional duty to protect natural and cultural resources for future generations."[141]

C. Mauna Kea II *Reconsidered*

Returning more directly to the Symposium panel topic: *PASH* and its Progeny, this section examines the MKAH Appellants' partially successful motion for reconsideration[142] of the court's original October 30, 2018 slip opinion.[143] Four justices joined the order granting in part MKAH's motion by deciding "to delete footnote 15" and "to modify footnote 17[.]"[144] Former *Mauna Kea II* footnote 15 appeared in Section V.B.1.[145] of the

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impacts"). For example, "the existing level of the cumulative visual impact from past observatory construction projects at the summit ridge area has been considered to be substantial, significant, and adverse." *Id.* at 21–22 (FOF 136). *Compare id.* at 107 (FOF 623: noting an anthropology professor's testimony that "the CDUA underestimates the visual impact of the TMT Project on cultural practitioners" by failing to "adequately recognize the impacts to 'intangible' cultural resources"), *with id.* at 158 (FOF 860: "The TMT Project will add a visual element to the summit of Mauna Kea, but it will be one such element among many. The incremental increase in cumulative visual impact due to the TMT Project will be less than significant. Therefore, the TMT Project will not have a substantial adverse impact on the visual resources of Mauna Kea"). Moreover, "[d]evelopment of existing observatories . . . significantly modified the preexisting terrain" such that "the existing level of cumulative impact from preexisting observatories on geology, soils, and slope stability is considered to be substantial, significant, and adverse." *Id.* at 22 (FOF 137).

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

[142] [MKAH] Petitioners-Appellants' Motion for Reconsideration at 5 n.1, *Mauna Kea II* (Haw. filed Nov. 19, 2018) (Nos. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812) [hereinafter MKAH Reconsideration Motion] (challenging as error "and request[ing] for reconsideration the entire footnote 15 and 17" in addition to, unsuccessfully, requesting that the court take into consideration Justice Wilson's dissenting opinion issued on November 9, 2018, ten days after issuance of the majority's slip opinion).

[143] *See In re* Conservation District Use Application (CDUA) HA-3568, *Mauna Kea II* (Haw. Oct. 30, 2018) (No. SCOT-17-0000777) [hereinafter *Mauna Kea II*, slip op.].

[144] Order Granting in Part and Denying in Part Motion for Reconsideration at 1, *Mauna Kea II* (Haw. Nov. 29, 2018) (No. SCOT-17-0000777) [hereainfter Order Granting Partial Reconsideration] (signed by Recktenwald, C.J., McKenna, J., and Judge Castagnetti); *see also* Order Concurring in Part, and Dissenting in Part, to the Majority's Order Denying Motion for Reconsideration Filed by [MKAH Appellants] at 3, *Mauna Kea II* (Haw. Nov. 29, 2018) (SCOT-17-0000777) (Wilson, J.) ("I concur with the order to the extent that the order deletes footnote 15 and modifies footnote 17 of the Majority Opinion").

[145] *Mauna Kea II*, slip op. at 34 ("B. Native Hawaiian Rights Issues"; "1. Whether the

majority opinion immediately after the following sentence: "MKAH and Kihoi Appellants assert that the BLNR failed to meet these obligations[—viz., article XII, section 7, as explicated by *PASH* and *Ka Pa'akai*]."[146] Curiously, this alleged error was not expressly included in the court's "categorized and summarized" outline of questions preserved on appeal.[147]

Although removal of the footnote eliminated some of the court's more disturbing misapplications of *PASH* and its Progeny (including *Ka Pa'akai*, *Hanapi*, *Pratt* and *PDF v. Paty*),[148] this erasure did not cure the *Mauna Kea*

BLNR fulfilled its duties under Article XII, Section 7 and *Ka Pa'akai O Ka 'Āina v. Land Use Commission*"); *see also In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 388, 431 P.3d 752, 761 (2018) ("III. Points of Error on Appeal").

[146] *Id.* The court subsequently identified the "Kihoi Appellants" as Mehana Kihoi, Joseph Kuali'i Camara, Leina'ala Sleightholm, Kalikolehua Kanaele, Tiffnie Kakalia, Brannon Kamahana Kealoha, Cindy Freitas and William Freitas. *Id.* at 387 n.5, 431 P.3d at 760 n.5.

[147] *Mauna Kea II*, 143 Hawai'i at 388, 431 P.3d at 761; *but see id.* at 389 n.7, 431 P.3d at 762 n.7 ("[s]ome points of error are addressed in footnotes").

[148] *See, e.g.*, MKAH Reconsideration Motion, *supra* note 142, at 6–11 (citing HRS § 91-10(5) and *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui I*), 116 Hawai'i 481, 174 P.3d 320 (2007), in addition to distinguishing Pele Def. Fund v. Paty (*PDF v. Paty*), 73 Haw. 578, 837 P.2d 1247 (1992), as an action under 42 U.S.C. § 1983 rather than an administrative proceeding before an agency, clarifying that *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), "was a case involving standing" which did not address the burden of proof, and stressing that *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n* (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000), did more than establish a "procedural requirement" by specifically recognizing the State's affirmative obligation to protect and preserve traditional and customary rights under article XII, section 7—i.e., as a matter of substantive due process); [Proposed] Brief for Kua'āina Ulu 'Auamo et al. as Amici Curiae Supporting Plaintiff-Appellants' Motion for Reconsideration at 1–6, *Mauna Kea II* (Haw. Nov. 19, 2018) (Nos. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812) [hereinafter KUA/Machado/Ahuna *Unfiled* Amici Curiae Brief] (urging the court to exercise its authority under HRS section 5-7.5; suggesting that "the majority opinion erodes Chief Justice . . . Richardson's legacy regarding Native Hawaiian traditional and customary rights and the public trust doctrine" because footnote 15 "do[es] not accurately reflect the law and will needlessly complicate the protection of Native Hawaiian rights, or worse, invite agencies to diminish their affirmative constitutional obligations to protect these rights"; arguing that the court muddied the burden of proof issue by failing to correct and admonish BLNR's misstatements of the law in its COLs 82, 371–75, 379, 384, 386–88, 391–93, 396 and 399; quoting *PASH* footnote 15 and referencing the *PASH* Guidelines; distinguishing *PDF v. Paty*; as well as, citing HRS § 91-10(5) and *Kukui I*). *But see* Order Denying Motion for Leave to Appear and File a Brief as Amicus Curiae, *Mauna Kea II* (Haw. Nov. 29, 2018) (No. SCOT-17-0000777).

II court's continuing failure to address otherwise binding court precedent in *Kukui I* and *Wai'ola*.[149]

The court also modified former *Mauna Kea II* footnote 17, which appears a little later in the same Section V.B.1. of the majority opinion—presumably due to carelessness during the editorial process.[150] In any event, the court once again eliminated its misstatements of the law under *PASH* and *Hanapi*, while attempting to adhere more closely to the *Ka Pa'akai* framework as correctly argued by the MKAH and Kihoi Appellants. *Mauna Kea II* nevertheless fails to demonstrate careful consideration of the *PASH* Guidelines, specifically with respect to the court's summary conclusion about the "reasonable[ness]"[151] element of Hawai'i's Custom Doctrine (if not also the "without interruption" element[152]).

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[149] Both TIO and the University opposed the KUA/Machado/Ahuna *Unfiled* Amici Curiae Brief, *supra* note 148. *See* Intervenor-Appellee [TIO]'s Response in Opposition to Motion for Leave to Appear and File a Brief as Amici Curiae, *Mauna Kea II* (Haw. Nov. 23, 2018) (Nos. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812) (arguing that the motion was untimely filed because the issues were extensively addressed, argued, and briefed over a year earlier; contending that the proposed brief would not add any new arguments not already raised, considered, and properly addressed); Appellee University of Hawai'i at Hilo's Opposition to Motion for Leave to Appear and File a Brief as Amici Curiae, *Mauna Kea II* (Haw. Nov. 23, 2018) (Nos. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812) (arguing that that motion was untimely, unwarranted, and would create dangerous precedent if granted; contending further that OHA trustees Machado and Ahuna are biased due to their lawsuit alleging mismanagement of Mauna Kea). Extending these arguments to their logical limits, the reasoning advanced by TIO and the University regarding timeliness implicitly supports the need for Native Hawaiian rights advocates to consider seeking intervention in contested case hearings more frequently in the future to guard against the court mischaracterizing and/or ignoring applicable precedent.

[150] *Compare Mauna Kea II*, 143 Hawai'i at 388, 431 P.3d at 761 (identifying Section III.B.2. as "Whether the BLNR erred in concluding that the Hawai'i Constitution does not protect contemporary native Hawaiian cultural practices" but omitting that section heading later in the opinion), *with id.* at 398, 431 P.3d at 771 ("2. Whether the TMT Project violates religious exercise rights of Native Hawaiians protected by federal statute"—previously listed in Part III as Section B.3.).

[151] *See supra* notes 4, 13, 36–38, 42–52, 67–73 and accompanying text (discussing the "reasonable[ness]" element of Hawai'i's Custom Doctrine under the *PASH* Guidelines).

[152] *See supra* notes 53–57 and accompanying text (explaining the distinction between uninterrupted rights versus exercise of such rights, and disavowing any "continuous exercise" or use requirement under the *PASH* Guidelines). *See also* Appellee University of Hawai'i at Hilo's Answering Brief to Petitioner-Appellants Mauna Kea Anaina Hou et al.'s Opening Brief at 26, *Mauna Kea II* (Haw. Apr. 9, 2021) (No. SCOT-17-0000777) (arguing that "Appellants *conflate the burden* of BLNR to conduct a *Ka Pa'akai* analysis with the burden of proof discussed in BLNR's COL 82" without even attempting to rebut the Appellants' reliance on *Kukui I*) (emphasis added).

1. Former Mauna Kea II *footnote 15.*

Recalling the detailed description of *PASH* footnote 15 above,[153] the numbering of former *Mauna Kea II* footnote 15 is a painfully ironic reminder of reoccurring cultural insensitivity:

> Appellants preliminarily assert that in COL 82, the BLNR *improperly shifted the burden of establishing Native Hawaiian cultural and traditional practices from itself to them*. In this regard, they appear to conflate the procedural requirements imposed by *Kā Pa'akai* [sic] on administrative agencies with the burden of proof imposed on Native Hawaiian practitioners, arguing that our cases place the burden of proof on practitioners only in criminal cases, and not in civil cases. The burden of proof is not at issue because *Kā Pa'akai* [sic] concerns procedural requirements placed on agencies in order to protect Native Hawaiian rights. In any event, Appellants' assertion that our cases do not recognize any burden on practitioners in civil cases is erroneous. . . . In *State v. Hanapi*, a criminal case, we stated:
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> > In order for a defendant to establish that his or her conduct is constitutionally protected as a native Hawaiian right, he or she must show, at minimum, the following three factors. First, he or she must qualify as a "native Hawaiian" within the guidelines set out in *PASH* . . . [as] "those persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778,' . . . regardless of their blood quantum." Second, once a defendant qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice. . . . Finally, a defendant claiming his or her conduct is constitutionally protected must also prove that the exercise of the right occurred on undeveloped or "less than fully developed property."
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> 89 Hawai'i 177, 185–86, 970 P.2d 485, 493–94 (1998) (citations and emphasis omitted). *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012), another criminal case, reaffirmed the *Hanapi* factors and added the additional requirement that any Native Hawaiian rights be balanced against the State's right to regulate Native Hawaiian traditional and customary practices. *Pratt*, 127 Hawai'i at 218, 277 P.3d at 312.
>
> In placing the burden of proof on the native practitioner, however, the *Hanapi* court had drawn all three factors from *PASH*, a land use case involving a contested case hearing over a special management area permit. *Hanapi*, 89 Hawai'i at 185–86, 970 P.2d at 493–94. Additionally, the *Pratt* court noted that *Paty* [sic] (a case involving the exchange of ceded lands) had been

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[153] *See supra* notes 31–34 and accompanying text.

> remanded for the Native Hawaiian practitioners "to prov[e] that the [Native Hawaiian] practice is traditional and customary," in addition to "show[ing] that it meets 'the other requirements of *Kalipi* [*v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982)],'" which were that the land the practitioners sought to enter was undeveloped or less than fully developed, and that no actual harm result from the cultural practices. *Pratt*, 127 Hawai'i at 215, 277 P.3d at 309 (citing *Pele Def. Fund v. Paty*, 73 Haw. 578, 621, 837 P.2d 1247, 1272 (1992)). Thus, the burden upon Native Hawaiian practitioners set forth in *Hanapi* and *Pratt* is not limited to the criminal context and is drawn from the civil context, with its origin in *PASH*, a land use case. We need not decide if *Kā Pa'akai* [sic] implicitly placed any evidentiary burden on the applicants because, as discussed infra, the BLNR's conclusion that no cultural or traditional practices existed at the TMT site is affirmatively supported by substantial evidence.[154]

The court's (now deleted) suggestion that the burden of proof is "not at issue" because the intervening practitioners only have procedural (rather than substantive) due process rights inexplicably ignored binding Hawai'i Supreme Court precedent.[155] In this context, the court's order granting reconsideration by deleting the references to *PASH*, *Hanapi*, *Pratt* and *Ka Pa'akai* (along with *PDF v. Paty*) further highlights the incongruity of BLNR Chair Suzanne Case's reaction to my February 5, 2021 symposium presentation, when she reiterated the agency's faulty reliance on these very decisions:

> My one comment in response—from my *direct* experience with the TMT BLNR decision—is that it, in fact, *very extensively* analyzed the project under *PASH* and *Hanapi* and *Pratt* and *Ka Pa'akai* tests *for* impacts to archaeological and historic and cultural resources and practices for over *seventy-five pages* of its 280 page decision, and didn't just *not find* evidence of impacts at the project site but found affirmatively, based on all of the evidence, that the traditional and customary cultural practices were elsewhere on Mauna Kea.[156]

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[154] *Mauna Kea II*, slip op. at 34–35 n.15 (emphasis added).

[155] *See infra* Part IV (discussing the court's prior holdings that shifting an applicant's contested case burden of proof to intervening Native Hawaiian practitioners constitutes an error of law).

[156] Law Review Spring 2021 Symposium – 25 Years of PASH: A symposium celebrating the landmark Hawai'i Supreme Court decision Public Access Shoreline Hawaii v. Hawai'i County Planning Commission, 79 Hawai'i 425 (1995), https://vimeo.com/519658393/7233498d4b (Panel 1, PASH and its Progeny, at 0:53:29 to 0:54:09) (noting speaker's emphases).

2. *Former* Mauna Kea II *footnote 17.*

Although one of the alleged points of error on appeal identified in Section III.B.2. does not actually appear as a section heading in the court's Discussion of Points of Error on Appeal (Part V), former *Mauna Kea II* footnote 17 addressed the issue of "contemporary" versus "traditional" cultural practices as follows:

> The Kihoi Appellants allege in Point of Error B(2) that the BLNR erred by stating that Article XII, Section 7 does not protect contemporary Native Hawaiian cultural practices. In *Hanapi*, we stated, "To establish the existence of a traditional or customary native Hawaiian practice, we hold that there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice." 89 Hawai'i at 187, 970 P.2d at 495 (footnote omitted; emphases added). Also, *PASH* defined a "customary" native Hawaiian usage as one that "must have been established in practice" as of "November 25, 1892. . . ." *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268. Thus, Native Hawaiian cultural practices are protected by Article XII, Section 7 if there is an adequate foundation connecting the practice to a firmly rooted traditional or customary Native Hawaiian practice that was established as of November 25, 1892. The BLNR properly analyzed the cultural practices at issue under this standard.[157]

Before devoting approximately five pages of their motion for reconsideration to urging proper application of the *Ka Pa'akai* framework by the *Mauna Kea II* court,[158] the MKAH Appellants notably argued that:

> Footnote 17 deals with the misplaced and unfounded concept of "contemporary" practices. If the navigators of the Hokule'a, for example, gained learning from a non-Hawaiian, Mau Piailug, from Satawal, would the Court characterize the navigational practices of the Polynesian Voyaging Society to not be a native Hawaiian traditional and customary practice? If younger generation Native Hawaiians learn ['Ōlelo] Hawai'i in immersion schools or at the University and revitalize the language after it became nearly extinct [sic] with the impacts of American colonialism during earlier generations, does that mean the speaking of the Hawaiian language is no longer part of native Hawaiian culture or should not be practiced?[159]

After once again deleting erroneous references to *PASH* and *Hanapi* previously contained in the court's slip opinion, the now revised *Mauna Kea II* footnote 16[160] clarified that the *reasonable* exercise of

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[157] *Mauna Kea II*, slip op. at 36 n.17.

[158] *See* MKAH Reconsideration Motion, *supra* note 142, at 7–11 & 14.

[159] *Id.* at 5 n.2.

[160] Following the deletion of former *Mauna Kea II* footnote 15, former *Mauna Kea II*

"contemporary (as well as customary and traditional) Native Hawaiian cultural practices" within the project site and its immediate vicinity, along with "possible native Hawaiian rights or cultural resources outside the area at issue[,]"[161] must indeed be evaluated under the *Ka Pa'akai* framework. Yet again, however, the court appears to have given short shift to the *PASH* Guidelines concerning "reasonable[ness]" as an element of Hawai'i's Custom Doctrine.[162]

In addition, the *Mauna Kea II* court's curious use of the phrase "immediate vicinity" in its revised *Mauna Kea II* footnote 16 is belied by the court's subsequent holding that *Ka Pa'akai*[163] required BLNR to

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footnote 17 now appears in the published decision as *Mauna Kea II* footnote 16—immediately after a sentence that reads: "In addition to testimonial evidence, in reaching its findings, the BLNR had available numerous recent research studies, plans, and impact assessments documenting cultural resources on Mauna Kea, including Native Hawaiian traditional and customary practices." *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea* II), 143 Hawai'i 379, 396, 431 P.3d 752, 769 (2018). The footnote now reads:

> The Kihoi Appellants allege in Point of Error B(2) that the BLNR erred by stating that Article XII, Section 7 does not protect contemporary Native Hawaiian cultural practices. The record reflects, however, that the BLNR appropriately took into account *contemporary* (as well as customary and traditional) Native Hawaiian cultural practices, finding and concluding that none were taking place *within the TMT Project site or its immediate vicinity*, aside from the recent construction of ahu to protest the TMT Project itself, which was not found to be a *reasonable* exercise of cultural rights. Further, although the BLNR defined the "relevant area" in its *Ka Pa'akai* analysis as the TMT Observatory site and Access Way, the Board's findings also identified and considered the effect of the project upon cultural practices in the vicinity of the "relevant area" *and in other areas of Mauna Kea, including the summit region*, as [*Ka Pa'akai O Ka 'Āina v. Land Use Comm'n* (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000)] requires. *See* 94 Hawai'i at 49, 7 P.3d at 1086 (faulting the agency for failing to address "possible native Hawaiian rights or cultural resources *outside* [the area at issue]") (emphasis added, brackets in original).

Id. at 396 n.16, 431 P.3d at 769 n.16 (emphases added).

[161] *Id.* at 396 n.16, 431 P.3d at 769 n.16.

[162] *See supra* notes 4, 13, 36–38, 42–52, 67–73, 151, 161, and accompanying text (discussing the "reasonable[ness]" element of Hawai'i's Custom Doctrine under the *PASH* Guidelines).

[163] Interestingly, Justice Pollack's dissenting opinion in *Kilakila 'O [Haleakalā] v. Board of Land and Natural Resources* (*Kilakila III*), 138 Hawai'i 383, 382 P.3d 195 (2016), contains that court's *sole* reference to *Ka Pa'akai*—merely citing the requirement that agencies "'make specific findings and conclusions' regarding certain factors '[i]n order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible[.]'" *Kilakila III*, 138 Hawai'i at 416 n.3, 382 P.3d at 228 n.3 (Pollack, J., dissenting, Wilson, J., joining as to Parts IA and II); *cf. supra* note 127 (noting the professed

identify and consider "the effect of the project upon cultural practices in the vicinity of the 'relevant area' *and in other areas of Mauna Kea, including the summit region.*"[164] The *Mauna Kea II* court used the "[*s*]*ee*" signal (signifying that the authority supports but does not directly state the proposition), noting that *Ka Pa'akai* faulted the State Land Use Commission (LUC) "for failing to address 'possible native Hawaiian rights or cultural resources *outside* [the area at issue]"—inserting the bracketed phrase in place of the *Ka Pa'akai* court's reference to the developer's "235 acre RMP [or, Resource Management Plan],"[165] which is located within a nearly 1,010 acre parcel that the developer sought to reclassify from conservation to urban land use.[166] In addition to mauka-makai trails

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effort by Kilakila's counsel to focus on a plain reading of BLNR's applicable regulatory provisions).

[164] 143 Hawai'i at 396 n.16, 431 P.3d at 769 n.16 (citing *Ka Pa'akai*, 94 Hawai'i at 49, 7 P.3d at 1086) (emphasis added). Under the circumstances, a more culturally-attuned assessment with respect to the "reasonableness" of constructing an ahu on the Access Way might have considered (on remand, or otherwise) whether arguably analogous actions were undertaken in response to past actions taken by ali'i, the Kingdom of Hawaii, or others in positions of authority, which traditional and customary practitioners considered to be hewa (wrong, improper, erroneous), particularly where threats of harm to sacred areas or resources were concerned—e.g., sandalwood or whales. Such weighty issues surely deserved more than mere conclusory analysis under the *Ka Pa'akai* framework. *Contra* BLNR Decision, *supra* note 5, at COL 383 ("Two 'ahu were built on the TMT access road in 2015. *See* FOF #791, *supra*. These are not shrines. They were built as a protest against the TMT project. *Id.* The building of rock piles in the right-of-way of another person is *obviously not an accepted native Hawaiian tradition and custom.* Nor does it conform to the [*Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995),] requirement [sic] that practices be reasonable. 79 Hawai'i at 447, 903 P.2d at 1268.") (emphasis added). *See supra* notes 13, 36–38, 42–52, 67–73, 151, 161–62, and accompanying text (discussing the "reasonable[ness]" element of Hawai'i's Custom Doctrine under the *PASH* Guidelines); *see also supra* text accompanying notes 54–57 (discussing a similarly crabbed interpretation of the *PASH* Guidelines, albeit in a different context, but also delivered by one of the Deputy Attorney Generals who represented BLNR in both *Mauna Kea Anaina Hou v. Board of Land and Natural Resources* (*Mauna Kea I*), 136 Hawai'i 376, 363 P.3d 224 (2015), and *Mauna Kea II*).

[165] *Ka Pa'akai*, 94 Hawai'i at 49, 7 P.3d at 1086 (emphasis added); *see also id.* at 36–37, 7 P.3d at 1073–74 (observing that the 235-acre RMP included a resource management area of about 198 acres, plus an approximately 37-acre archaeological preserve intended to remain within the conservation district). One acre (or 43,650 square feet) is a little less than 91% the size of an American football field excluding the end zones (48,000 square feet).

[166] *Id.* at 34 & 35, 7 P.3d at 1071 & 1072. The 1,010-acre parcel lies within an even larger parcel that covers approximately 2,181 acres. *In re* Kaupulehu Developments, Findings of Fact, Conclusions of Law, and Decision and Order, Docket No. A93-701, at 8, para. 36 (Land Use Comm'n June 17, 1996), https://files.hawaii.gov/luc/cohawaii/a93701kaupulehu_dev06171996.pdf (last visited Mar.

providing access to salt-gathering areas, other areas where hālau hula (dance schools) gather Pele's Tears,[167] and the religious significance of the 1800–1801 lava flow, Ka Pa'akai O Ka 'Āina member Aunty Hannah Kihalani Springer also testified that she and her family utilize the lateral coastline trails as did "people from Mahai'ula, from Makalawena, [and] from Kukio . . . down the coastline from their home ahupua'a"[168]—many miles away from both the embedded 235-acre RMP and the larger 1,010-acre parcel in *Ka Pa'akai*.[169] Accordingly, the *Ka Pa'akai* court observed that the agency's failure to "articulate whether the area lying outside the RMP *lacked* cultural resources or that the resources present *lacked significance* warranting protection or management" were "omissions . . . of particular significance because these activities fall *outside* the 'protection' of [Kaupulehu Develoment's] conceptual RMP area."[170] In other words, the failure to protect practices taking place *outside* the specific project site (i.e., "elsewhere on Mauna Kea" as stated by BLNR's Chair[171]) can be considered a violation of the *Ka Pa'akai* framework.

Considering the context provided by a close examination of *Ka Pa'akai*, the *Mauna Kea II* court's reliance on BLNR's finding that "since 2000, cultural and/or spiritual practices have been occurring while astronomy facilities have existed, and that those activities would not be *prevented* [sic: applying a higher standard than set forth in HAR sections 13-5-40(c)(4) to (6)] by the TMT Observatory located 600 feet below the summit ridge"[172] is

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10, 2021). Thus, potential impacts on traditional and customary practices outside the 235-acre RMP beyond the salt beds, including access rights, also needed to be taken into consideration pursuant to *Ka Pa'akai*. By comparison, the Astronomy Precinct of the Mauna Kea Science Reserve covers only 525 acres—of which astronomy development is restricted to a defined portion that covers a mere 150-acres. 143 Hawai'i at 405–06, 431 P.3d at 778–79.

[167] Pele's Tears are "tiny teardrop-shaped globule[s] of black volcanic glass similar to obsidian" that are formed after molten masses of lava are launched through the air. Hobart M. King, *Pele's Hair and Pele's Tears*, https://geology.com/volcanoes/peles-hair/ (last visited Mar. 10, 2021).

[168] 94 Hawai'i at 49 & n.30, 7 P.3d at 1086 & n.30.

[169] Email from Hannah Kihalani Springer to David M. Forman (Dec. 12, 2019) ("It is approximately 9 miles from the Pu'uwa'awa'a / Ka'ūpūlehu boundary [where the salt beds are located in Kalaemanō] to the Mahai'ula / Kaulana boundary"—i.e., at the opposite end of the coast covered by Ms. Springer's testimony in *Ka Pa'akai*).

[170] *Ka Pa'akai*, 94 Hawai'i at 49, 7 P.3d at 1086 (initial emphases in original, latter emphasis added).

[171] *See supra* note 156 (quoting BLNR Chair Case's February 5, 2021 comment).

[172] *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 397, 431 P.3d 752, 770 (2018) (emphasis added). Presumably, the "600 feet" reference represents elevation as distinguished from distance. *See id.* at 406, 431 P.3d at 779 (observing that "BLNR noted that the proposed location of the TMT project is a half mile

befuddling—particularly when viewed in light of the testimony provided by intervening practitioners including Kealoha Pisciotta, Uncle Kū Ching, and Mehana Kihoi, among numerous others.[173]

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from the summit area"—i.e., 2,640 feet). Regardless, the "vicinity" of cultural practices at issue in *Mauna Kea II* to the TMT Project site appears significantly closer than: (a) the distance between the shoreline areas where cultural practices were threatened by proposed uses of the respective wells in *Wai'ola* (approximately 2.51 miles as the crow flies, or a little more than 13,000 feet) and *Kukui I* (approximately three miles, or around 16,000 feet as the crow flies), *see, e.g.*, Delwyn S. Oki, Geohydrology and Numerical Simulation of the Ground-Water Flow System of Molokai, Hawaii, Rep. No. 97-4176, at 16, Fig. 8 (U.S. Geological Survey, 1997); Email from Glenn Teves to David M. Forman (Dec. 25, 2020); or (b) the distance between the Kalaemanō salt beds and both the 235-acre RMP and the larger 1,010-acre parcel at issue in *Ka Pa'akai*. *See supra* note 169 (approximately nine miles).

In any event, the *Mauna Kea II* court's reference to BLNR's use of the term "prevented" contrary to HAR sections 13-5-30(c)(4), (5), and (6) deserves further scrutiny. *Compare* BLNR Decision, *supra* note 5, at FOF 838 ("Since the year 2000 and up to the present, the reliable probative evidence shows that those cultural and/or spiritual practices can continue to be conducted with the existing astronomy facilities and those activities will not be *prevented* by the TMT Observatory which will be located 600 ft. below the summit ridge.") (emphasis added), *with id.* at FOF 757 ("Evidence was presented that certain Petitioners and Opposing Intervenors have been conducting cultural practices on Mauna Kea since at least 2000. These practices have occurred within the presence of the thirteen observatories at the summit area and were not *prevented or curtailed* by these astronomical facilities.") (emphasis added); and *id.* at FOF 825 ("Petitioner Ching testified that he participates in cultural practices . . . [including] performance of traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. . . . Since 2002, Ching has participated in a group (Huaka'i I Na 'Aina Mauna) that hikes ancient trails that traverse certain areas on Mauna Kea" but "none of the ancient trails go to the summit of Mauna Kea" and "Ching did not establish that any of his cultural practices at the Mauna Kea Summit area that [sic] are connected to a firmly rooted traditional or customary native Hawaiian practice dating back to 1892. Ching also did not establish that he performs any historical or traditional native Hawaiian practice at the TMT Project site. No evidence was presented that his practices would be *substantially impacted or prevented* by the TMT Project.") (emphasis added). *See also id.* at COL 110 (summarizing the second *Ka Pa'akai* requirement as requiring an examination whether traditional and customary Native Hawaiian rights "will be affected or impaired by the proposed action" as opposed to whether such practices will be prevented); *id.* at COL 366 (same).

[173] *See, e.g.*, MKAH Reconsideration Motion, *supra* note 142, at 12–15 (providing numerous record citations for testimony about traditional and customary practices "connected to the entire mountain, including the northern plateau"—i.e., the location of the TMT Project site—for example: gathering medicinal items from the Northern side of Mauna Kea that are different from any other place on earth due to unique wind and rain patterns; recitation of traditional chants honoring iwi kupuna at the site; erection of ahu at the site; and, uncontradicted testimony that constructing the TMT in the proposed location would obstruct view planes for solstice and equinox observations, as well as star tracking, from areas in addition to the summit that include areas where practitioners were forced to move

Although the *Mauna Kea II* majority does not actually cite *Kilakila III* in connection with its use of the phrase "immediate vicinity" (nor did BLNR[174]), the court's decision concerning the proposed telescope at Haleakalā on the island of Maui did note the intervening practitioners' arguments "that the ICA erred in affirming BLNR's interpretation of 'locality and surrounding areas' in HAR § 13-5-30(c)(5) as the *immediate vicinity* of the proposed ATST [Advanced Technology Solar Telescope] site" and stressing, further, the absence of any evidence that the proposed project would be compatible with the Haleakalā National Park.[175] Nevertheless, the *Kilakila III* court expressly noted a Federal Environmental Impact Statement (FEIS) determination with respect to cultural and visual resources, which concluded that construction of the proposed telescope "would result in major, adverse, short- and long-term, direct impacts on the traditional cultural resources" within the "Region of Influence" defined to include "the HO site [i.e., Haleakalā High Altitude Observatory] *and surrounding areas including* [*Haleakalā*] *National Park.*"[176]

Regarding the applicable regulatory criteria for permit issuance under HAR section 13-5-30(c)(5), the *Kilakila III* court noted BLNR's focus on the HO site where "[a]stronomical and observatory facilities have existed . . . since 1951" along with the agency's determination that the "ATST Project includes the construction of astronomical facilities which are compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel."[177] Ultimately, the Hawai'i Supreme Court deferred to BLNR's interpretation—while, at least nominally, applying the "clearly erroneous" standard of review—explaining that Governor William Quinn specifically set aside the HO site

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their practices as a result of the construction of two earlier telescopes).

[174] *See* BLNR Decision, *supra* note 5, at FOF 974 (using the terms "immediate vicinity" repeatedly); *id.* at COL 239–40 & 380–81 (same). Interestingly, the phrase "immediate vicinity" does not appear in the Hearing Officer's proposed decision. *In re* Conservation Dist. Use Application (CDUA) HA-3568, Case No. BLNR-CC-16-002, Proposed Findings of Fact, Conclusions of Law and Decision and Order (Haw. Bd. of Land & Nat. Res. July 26, 2017), https://dlnr.hawaii.gov/mk/files/2017/07/783-Hearing-Officers-Proposal.pdf (last visited Mar. 10, 2021).

[175] *Cf.* Kilakila 'O [Haleakalā] v. Board of Land & Natural Resources (*Kilakila III*), 138 Hawai'i 383, 406, 382 P.3d 195, 218 (2016) (emphasis added).

[176] *Cf. id.* at 388 & n.8, 382 P.3d at 200 & n.8 (emphasis added).

[177] *Id.* at 406, 382 P.3d at 218 (inferring that "BLNR necessarily interpreted 'locality and surrounding areas' as the areas within the HO site" because the agency did not mention areas outside the HO site).

for observatory purposes via executive order in 1961.[178] Thus, *Kilakila III* relied on actions initiated by the executive branch in 1951, eight years prior to statehood, and twenty-seven years before the 1978 constitutional convention.[179] Those initial executive actions during Hawai'i's territorial period were later formalized under the 1961 executive order issued by Governor Quinn—the last of twelve persons *appointed* as Governor of the Territory; although he also became the first person elected Governor for the State of Hawai'i, Governor Quinn soon was voted out of office in 1962 (with the election of Governor John A. Burns and Lieutenant Governor William S. Richardson), just one year after issuing the executive order concerning observatories at Haleakalā.[180]

In any event, *Mauna Kea II* also fails to explain or otherwise distinguish seemingly relevant testimony cited by the *Ka Pa'akai* court: "[w]hat is critical to the performance or the practice is that the body, and thus the spirit, becomes imbued with the character of the land . . . other than . . . our workaday world, we are allowed to experience and be imbued with the characteristics of the land, the quiet, *as well as what we see* . . . all of which is setting the tone" for the exercise of traditional and customary practices.[181]

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[178] *Id.* (citing Kaleikini v. Yoshioka (*Kaleikini II*), 128 Hawai'i 53, 67, 283 P.3d 60, 74 (2012), and *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Hawai'i 401, 425, 83 P.3d 664, 688 (2004), regarding deference to agency interpretations except where plainly erroneous or inconsistent with the legislative purpose); *id.* at 407, 382 P.3d at 219 (dismissing the intervening practitioners' contrary reliance on a quote in the BLNR order approving the permit, which allegedly recognized that Haleakalā National Park was part of the "surrounding area").

[179] *See, e.g.*, *IfA Maui History*, UNIV. OF HAW. INST. FOR ASTRONOMY, http://about.ifa.hawaii.edu/facility/history-of-ifa-maui/ (discussing identification of Halaeakalā as the most practical site for astronomy experiments "due to the relatively easy access" in 1951). Further critical-contextual analysis of this executive order will be pursued in a subsequent publication. *See supra* notes * and 6.

[180] *Cf.* Robinson v. Ariyoshi, 65 Haw. 641, 667 n.25, 658 P.2d 287, 306 n.25 (1982) ("[D]uring the territorial period ['when the resources of our land were subject to an authority which did not directly represent Hawaii's people'] . . . the judiciary was not a product of local sovereignty. . . . [U]pon our assumption of statehood our own government assumed the whole of that responsibility [to frame the law], absent any explicit federal interest") (citing Erie v. Tompkins, 304 U.S. 64, 79 (1938), for the proposition that "the voice adopted by the State as its own . . . should utter the last word" concerning applicable common law). Once again, however, the application of critical race theory to indigenous environmental justice issues is beyond the scope of this article.

[181] 94 Hawai'i 31, 49 n.32, 7 P.3d 1068, 1086 n.32 (2000) (emphasis added). *See also* MAUNA KEA CIA STUDY, *supra* note 1, at 43 (quoting cultural impact assessment prepared in connection with the University's Mauna Kea Science Reserve Master Plan, which identifies Native Hawaiian cultural practices including "experiential activities focused on 'becoming one' with natural setting; that is, behaviors relating to spiritual communication and

The late Shirley Naomi Kanani Garcia made a prescient observation about the likelihood of fully realizing the promise associated with even the "minimal prerequisites" required by *Ka Pa'akai*:[182]

> [I]n the end, the analytical [*Ka Pa'akai*] framework may fail to live up to the court's expectations. To protect the traditional and customary practices of Native Hawaiians, the State must protect the cultural and natural resources upon which these practices depend. Native Hawaiian identity is located in the *'āina*, the land. . . .
>
> *For agencies to fulfill their constitutional mandate, judicial guidance is needed.* Cultural sensitivity and understanding, however, cannot be judicially mandated through the application of a three-pronged test, no matter how well intentionally crafted to "accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other." To better ensure Native Hawaiian traditional and customary rights are adequately protected, what is needed is meaningful, consistent, and permanent representation of Native Hawaiian cultural practitioners in decision-making that affects how land use and development proceeds in the state.[183]

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interaction that reaffirm and reinforce familial and kinship relationships with the natural environment"); Otaguro, *supra* note 52, at 35 (quoting practitioner Mahealani Pai: "You do your practice, you *pule*, you pray, and you have this huge building right in front of you and these tourists looking at you, observing you. Plus, there are a lot of sites over there that we're afraid they're going to destroy. They only call for a 40-foot buffer. All the infrastructure they have to put in—utility, conduits—they have to dig, make puka [a hole]. With a huge construction like that, we feel they're going to plug up the puka for the 'ōpae 'ula"; presumably, Pai's latter "puka" reference invoked the anchialine nature of the ponds, which include subterranean connections to the ocean and are influenced by the tides); *id.* at 62 (quoting CJ Richardson: "Fee simple rights have always been limited by Native Hawaiian rights. You go back all the way to the Mahele if you want to. The Hawaiian rights have always been there. What we think of as fee simple ownership never cut off any Native rights or customs").

[182] 94 Hawai'i at 50, 7 P.3d at 1087.

[183] Shirley Garcia, *Ka Pa'akai o Ka 'Āina v. Land Use Commission: Fulfilling the State's Duty to Protect the Traditional and Customary Rights of Native Hawaiians?*, at 30, http://www.hawaii.edu/elp/publications/moolelo/ELP-PS-Spring2004.pdf (published as part of the Environmental Law Program's Spring 2004 paper series, He Mau Mo'olelo Kānāwai o ka 'Āina "Stories of the Law of the Land") (emphasis added, footnote omitted). Before joining the Law School as a full time faculty member, I had the pleasure of litigating cases with Shirley as a fellow Enforcement Attorney at the Hawai'i Civil Rights Commission from 2004 to 2010 (although she took leave beginning in 2005 to serve as Interim Director of the Law School's Ulu Lehua Program when Professor Chris Iijima was diagnosed with a rare blood disease, and continued in that role after Iijima passed away at the end of the year, through 2007 when the Law School hired Professor Linda Krieger as the program's new Director).

Proposed legislation to require the appointment of a Native Hawaiian cultural practitioner to BLNR was ultimately amended, however, to instead authorize appointment of a "cultural expert" regardless of ethnicity.[184]

Rather than providing the "badly needed judicial guidance" and "enforcement by the court of these rights" as specifically called for by delegates to the 1978 constitutional convention,[185] the court's recent decisions in several agency appeals suggest a willingness to abdicate the court's constitutional duties to the detriment of public trust (including natural and cultural) resources. Whether through application of standards of review that evoke parallels to the criticism that "there is a rule of statutory construction for every outcome[,]"[186] or by ignoring the court's own

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[184] *See also* Candace Fujikane, *Mapping Abundance on Mauna a Wākea as a Practice of Ea*, 11 HŪLILI: MULTIDISCIPLINARY RESEARCH ON HAWAIIAN WELL-BEING 23, 28 (Sept. 2019) ("[B]earing witness to the unjust processes of the settler state that amended the legislative language of HB1618 CD1 from requiring the BLNR to have a seat for a member with expertise in native Hawaiian traditional and customary practices in order 'to better administer the public lands and resources with respect to native Hawaiian issues and concerns' to a seat for a 'cultural expert' who does not represent Hawaiian concerns.[] The governor subsequently appointed an Asian settler to this seat on the BLNR, a board member who voted to approve the permit for the TMT on three separate occasions"); Ashley Nagaoka, *3 arrested for disorderly conduct while protesting BLNR member*, HAW. NEWS NOW, Oct. 27, 2017, https://www.hawaiinewsnow.com/story/36705694/3-arrested-at-state-meeting-amid-protests-of-board-member/ ("Sam ['Ohu] Gon . . . recently voted to approve the [TMT] construction permit and serves as the board's official cultural adviser" as a "well-respected practitioner of Hawaiian culture" but "because he's not Native Hawaiian, the protesters say he should not be making decisions that affect their people"); Associated Press, *Supreme Court Justice Reports Improper Emails Regarding TMT*, HONOLULU CIV. BEAT, Aug. 10, 2018, https://www.civilbeat.org/2018/08/supreme-court-justice-reports-improper-emails-regarding-tmt/ ("When asked if he could provide copies of the emails, Gon said the state Attorney General's office advised him to destroy them. A spokeswoman for the office said Gon was not advised to destroy the emails. On Friday, Gon denied initially saying he was told to destroy the emails and declined further comment").

[185] STAND. COMM. REP. NO. 57, *supra* note 14, at 640 (quoted *in Ka Pa'akai*, 94 Hawai'i at 50, 7 P.3d at 1087, and Pele Def. Fund v. Paty (*PDF v. Paty*), 73 Haw. 578, 619–20, 837 P.2d 1247, 1271 (1992)); *see also* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 5, 656 P.2d 745, 748 (1982) (quoting page 637 of the same source). *Cf.* Mana Maoli, *supra* note 14 (reimagining ISRAEL KAMAKAWIWO'OLE, HAWAI'I '78 (Mountain Apple Co. 2010)).

[186] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 279–80 (1990), *quoted in* Richardson v. City and Cty. of Honolulu, 76 Hawai'i 46, 54 n.14, 868 P.2d 1193, 1201 n.14 (1994) (describing the "often illusory and self-serving" nature of the canons, which are "[c]autionary rather than directive, often pulling in opposite directions like their counterparts, the maxims of ordinary life . . . , the canons are the collective folk wisdom of statutory interpretation and they no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday living to be solved"); *but see id.* at 75 n.18, 868 P.2d at 1222 n.18 (Klein, J., dissenting, Moon,

precedent invalidating agency proceedings that erroneously shifted the applicants' contested case hearing burdens of proof to intervening practitioners, or via selective application of [rebuttable] presumptions, the court has essentially deferred to agency actions that turn a blind eye to "volatile, deeply-rooted cultural and political indigenous land trust controversies" reflecting a "history of culture destruction and land dispossession"[187]—despite the express language of the Hawai'i Constitution, and at the expense of those who wish to continue exercising traditional and customary practices.

In this regard, recent scholarship concerning the obligation of Free, Prior Informed Consent under the United Nations Declaration on the Rights of Indigenous Peoples is informative[188]—as are formally binding international

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C.J., joining) ("[T]he fact that the legislature's reasons for acting are 'ultimately unknowable' is not a sound basis for disregarding legislative actions and applicable rules of construction. In fact, it is precisely because the legislature's reasons are ultimately unknowable that rules of construction have developed."). *See also* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) ("[T]here are two opposing canons on almost every point.").

[187] *See, e.g.*, Fujikane, *supra* note 184, at 26 (describing "the mapping of ancestral knowledges of the abundance that is Mauna a Wākea as part of an education in 'ea' a word meaning life, breath, sovereignty, and a rising—the rising of the people to protect the 'āina, the land that feeds physically, intellectually, and spiritually"); *see also id.* at 42-43 (discussing the term "EAducation" coined by one of the Kia'i Mauna leaders, Kaho'okahi Kanuha, who explains that "EAducation is what will return breath and life to our lāhui [nation], it will give us the ability to have sovereignty, rule and independence over all the decisions we make and over the future of our lāhui").

[188] *See* Julian Aguon & Julie Hunter, *Second Wave Due Diligence: The Case for Incorporating Free, Prior, and Informed Consent into the Deep Sea Mining Regulatory Regime*, 38 STAN. ENV'T. L.J. 3 (2018) [hereinafter Aguon & Hunter, *Second Wave*]; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP]. *See also Unjust Enrichment*, *supra* note 102, at 2159–60 & n.135 (citing [U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples 1] (2011), https://2009-2017.state.gov/documents/organization/154782.pdf, for the "moral and political force" of UNDRIP, and Julian Aguon, *Native Hawaiians and International Law*, *in* NATIVE HAWAIIAN LAW TREATISE, *supra* note *, at 399–401, for the proposition that UNDRIP could eventually be invoked as a source of customary international law"); Hilding R. Neilson & Samantha Lawler, *Canadian Astronomy on Mauna Kea: On Respecting Indigenous Rights* (Oct. 14, 2019), https://arxiv.org/pdf/1910.03665.pdf (presenting recommendations based on UNDRIP for the Canadian astronomical community to better support Indigenous rights on Mauna Kea and Hawai'i while providing clear guidelines for the astronomical community to participate in activities conducted on Indigenous land—including, but not limited to, "a process that requires clear Native Hawaiian consent for future projects" and that "Canadian engagement on Maunakea must be consistent with the spirit of the Calls to Actions of the Truth and Reconciliation Commission and [UNDRIP]"). Note that the State Department

instruments including the Convention on the Elimination of Racial Discrimination, along with the International Covenant on Civil and Political Rights, if not also the Convention on Biological Diversity (which the United States has signed but not ratified).[189] For example, the United States has been required to provide "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent[.]"[190] Moreover, "the scope of indigenous peoples' rights to make autonomous decisions regarding development projects [has been expanded] beyond the limits of their traditional lands" to include "the total environments" of areas used by indigenous peoples[191] and "have the right to maintain and strengthen their distinctive spiritual relationship with their . . . waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[192]

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announcement concerning UNDRIP refers to the traditional Native Hawaiian skill of wayfinding across the world's largest ocean as "one of the greatest feats of human kind."

[189] *See* Letter from Noureddine Amir, Chair, Comm. on the Elimination of Racial Discrimination, Off. of the United Nations High Commissioner for Human Rights, to Mark J. Cassayre, Permanent Rep. of the U.S. to the United Nations Off., Geneva (May 10, 2019) https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_ALE_USA_8932_E.pdf (noting receipt of information about impending construction of the TMT at Mauna Kea under the committee's early warning and urgent action procedure, and expressing concern about allegations involving "the lack of adequate consultation and the failure to seek free, prior and informed consent" which "could constitute a breach of the State party duty to recognize and protect the rights of indigenous people to own, develop, control and use their communal lands, territories and resources"; citing the Committee's General Recommendation No. 23 on the rights of indigenous peoples (1997), along with recommendations on the rights of indigenous peoples made in paragraph 24 of its concluding observations of September 2014 (CERD/C/USA/CO/7-9); encouraging the United States to seek assistance from the United Nations Expert Mechanism on the Rights of Indigenous Peoples mandated by the Human Rights Council (resolution 33/25, paragraph 2); and, requesting a formal response under article 9(1) of the Convention and article 65 of its Rules of Procedure).

[190] Aguon & Hunter, *Second Wave*, *supra* note 188, at 30 n.115 (citing Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 131 (2003)).

[191] *Id.* at 33 & n.124 (citing BIRGITTE FEIRING, INT'L LAND COAL., INDIGENOUS PEOPLES' RIGHTS TO LANDS, TERRITORIES, AND RESOURCES, 17 (2018), http://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf).

[192] *Id.* at 33 & n.125 (citing UNDRIP, art. 25; arguing further that Pacific peoples' resources and/or territories extend throughout large swaths of the Pacific Ocean where islanders practiced expert navigation and sustainable resource practices).

IV. THE RELEVANT RULE OF LAW IN HAWAI'I: IT IS AN ERROR OF LAW TO SHIFT THE APPLICANT'S BURDENS (AND THE AGENCY'S DUTIES) IN A CONTESTED CASE HEARING ONTO INTERVENING NATIVE HAWAIIAN PRACTITIONERS

> "Expedients are for the hour, but principles are for the ages. Just because the rains descend, and the winds blow, we cannot afford to build on shifting sands."
>
> —Henry Ward Beecher[193]

The Hawai'i Supreme Court has twice held (in *Wai'ola* and *Kukui I*) that a state agency committed legal error by shifting the burden of proving harm in administrative contested case hearings to intervening practitioners who asserted traditional and customary Native Hawaiian rights, instead of requiring the permit applicant to affirmatively demonstrate that its proposed use would not abridge or deny those constitutionally-protected practices.[194] In both cases, the court stressed that agencies are "duty bound" to hold applicants to their burden of proof during contested-case hearings.[195]

The absence of discussion regarding these holdings in the *Mauna Kea II* majority,[196] concurring[197] (except for an indirect reference[198]), and

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[193] American Presbyterian Minister (1813–1887), prolific author and speaker, abolitionist—and brother of Harriet Beecher Stowe (author of *Uncle Tom's Cabin*)—as well as a supporter of continued Chinese immigration, women's suffrage, and U.S. presidential candidate Grover Cleveland (who recognized the illegal overthrow of the Hawaiian Kingdom).

[194] *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui I*), 116 Hawai'i 481, 507–09, 174 P.3d 320, 346–48 (2007); *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Hawai'i 401, 441–42, 83 P.3d 664, 704–05 (2004).

[195] *Kukui I*, 116 Hawai'i at 490, 509, 174 P.3d at 329, 348 (citing *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000), and *Wai'ola*, 103 Hawai'i at 336, 342, 441–42, 83 P.3d at 689, 695, 704–05); *see also Waiāhole I*, 94 Hawai'i at 136–38, 9 P.3d at 448–50.

[196] Although perhaps coincidentally, *In re Conservation Dist. Use Application (CDUA) HA-3658* (*Mauna Kea II*), 143 Hawai'i 379, 431 P.3d 752 (2018)—authored by Justice McKenna, with Chief Justice Recktenwald and Justice Nakayama joining, and Justice Pollack concurring in part and concurring in the judgment—appears immediately before Justice Pollack's unanimous opinion in *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui II*), 143 Hawai'i 434, 431 P.3d 807 (2018). In *Kukui II*, those four justices were joined by Judge Collete Y. Garibaldi (in place of Justice Wilson, recused). It seems implausible that any member of the *Mauna Kea II* majority would have failed to refresh their recollection about the *Kukui I* holding during their deliberations over *Kukui II*.

[197] Justice Pollack's *Mauna Kea II* concurring opinion cites *Wai'ola* three times, but not regarding the impropriety of burden-shifting in a contested case hearing from applicants to intervening practitioners. *See Mauna Kea II*, 143 Hawai'i at 411, 431 P.3d at 784 (Pollack,

dissenting[199] opinions—in addition to the underlying BLNR Decision at issue in *Mauna Kea II*—is glaring, to say the least.[200] This omission is

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J., concurring) (citing *Wai'ola*, 103 Hawai'i at 429, 83 P.3d at 692, for its interpretation of Hawai'i Constitution article XI, section 1 public trust obligations regarding the use of water); *id.* at 418 n.10, 431 P.3d at 791 n.10 (citing the holding in *Wai'ola*, 103 Hawai'i at 409, 83 P.3d at 672, that the Commission failed to discharge its public trust duty to protect traditional and customary rights as guaranteed by article XII, section 7 of the Hawai'i Constitution—in the context of concluding substantial evidence supported the agency's determination that implementation of reasonable mitigation measures to address harm to public trust purposes, including traditional and cultural practices); *id.* at 418 n.11, 431 P.3d at 791 n.11 (citing *Wai'ola*, 103 Hawai'i at 429–31, 83 P.3d at 692–94, for the framework that sets forth evidentiary principles to guide agency determinations).

[198] Justice Pollack instead relies on *Kauai Springs, Inc. v. Planning Commission of County of Kaua'i* (*Kauai Springs*), 133 Hawai'i 141, 324 P.3d 951 (2014), for the proposition that "*applicants have the burden* to justify the proposed use of conservation lands in light of trust purposes" including demonstration of (1) "actual needs and the propriety of using state conservation lands to satisfy those needs" and (2) "the absence of a practicable alternative location for the proposed project" as well as (3) "[i]f there is a *reasonable allegation of harm* to public trust purposes, then the applicant must implement reasonable measures to mitigate such cumulative impact from existing and proposed projects using conservation land." *Mauna Kea II*, 143 Hawai'i at 419 n.12, 431 P.3d at 792 n.12 (Pollack, J., concurring in part and concurring in the judgment) (emphases added); *see also id.* at 414, 431 P.3d at 787 (citing *Kauai Springs*, 133 Hawai'i at 174, 324 P.3d at 984). Although the cited portion of *Kauai Springs* does rely on *Kukui I*, 116 Hawai'i at 490, 499, 174 P.3d at 329, 338, the relevant burden of proof discussion takes place much later in *Kukui I*. *See id.* at 507–09, 174 P.3d at 466–68.

[199] Justice Wilson's dissenting opinion, likewise, does not discuss *Kukui I* and only cites *Wai'ola* regarding the principle of intergenerational equity under article XI, section 1 of the Hawai'i Constitution. *See generally*, *Mauna Kea II*, 143 Hawai'i at 421–34, 431 P.3d at 794–807 (Wilson, J., dissenting); *id.* at 428 n.11, 431 P.3d at 801 n.11 (citing *Wai'ola*, 103 Hawai'i at 429–31, 83 P.3d at 692–94). As mentioned *supra* note 196, Justice Wilson was recused from *Kukui II*.

[200] Justice McKenna previously joined the *Wai'ola* opinion as a then-Circuit Court judge assigned to sit in place of recused Associate Justice James E. Duffy (now retired). *Wai'ola*, 103 Hawai'i at 406, 83 P.3d at 669. Also joining the *Wai'ola* opinion authored by Associate Justice Steven H. Levinson were Chief Justice Ronald T. Y. Moon (now-retired) and Justice Nakayama. *Id.* A separate concurring opinion filed by Justice Acoba (now-retired) stated simply that he "concur[red] in the result." *Id.* at 451, 83 P.3d at 714. In addition, Justice McKenna joined Justice Pollack's *Mauna Kea Anaina Hou v. Board of Land & Natural Resources* (*Mauna Kea I*) "concurring opinion"—along with Justice Wilson, therefore representing a majority of the court—as to Part IV entitled "Constitutional Responsibilities of an Agency" and holding that "[a]n agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision." 136 Hawai'i 376, 415, 363 P.3d 224, 263 (2015).
Justice Nakayama previously authored the Hawai'i Supreme Court's landmark *Waiāhole I* decision (joined by Moon, C.J., Klein and Levinson, JJ.), which provided a framework for the *Wai'ola* and *Kukui I* opinions with only the late Justice Mario R. Ramil dissenting.

particularly disconcerting in light of the court's prior acknowledgment of Pisciotta's argument on behalf of MKAH, that its members' due process rights would be violated by "shifting the burden of proof, and thereby forcing us to have to change BLNR's mind, rather than BLNR listening with an open mind to hear all evidence."[201]

At least two,[202] if not all four of the justices who deliberated over both *Mauna Kea I* and *Mauna Kea II* (not counting Circuit Court Judge Jeannette Castagnetti, who sat by designation in *Mauna Kea II* following the recusal of Justice Paula A. Nakayama), were also specifically aware of the *Kukui I* opinion in the context of ongoing efforts to obtain the privilege of permission to construct an additional telescope near the summit of Mauna Kea:

> The court clarified, in [Kukui I], that in cases where Native Hawaiian rights figure in an agency's public trust balancing, the burden is not on parties of Native Hawaiian ancestry to prove that the proposed use would harm traditional and customary Native Hawaiian rights; rather, the permit applicants and the agency are the parties obligated to justify the proposed use and the approval thereof in light of the trust purpose of protecting Native Hawaiian rights.[203]

A comparison of the agency actions previously vacated by the Moon Court in *Wai'ola* and *Kukui I*, reveals eight striking similarities with the underlying facts in *Mauna Kea II*—raising serious questions about the differing outcomes in these cases. Both the Commission on Water Resource Management (CWRM) in *Wai'ola* and *Kukui I*, as well as BLNR in *Mauna Kea II*:

Waiāhole I, 94 Hawai'i at 190–98, 9 P.3d at 502–10 (Ramil, J., dissenting). In addition to joining the *Wai'ola* opinion, Justice Nakayama would later author the court's unanimous *Kukui I* opinion. 116 Hawai'i at 484, 174 P.3d at 324 (Nakayama, J., Moon, C.J., Levinson and Acoba, JJ., and Circuit Judge Karl K. Sakamoto in place of Duffy, J., recused, joining). However, Justice Nakayama was recused from *Mauna Kea II*, with Circuit Judge Castagnetti assigned to take her place. 143 Hawai'i at 383, 431 P.3d at 756.

[201] *Mauna Kea I*, 136 Hawai'i at 386, 363 P.3d at 234 (quoting the University's response as "we didn't shift—the burden of proof did not shift. The University agreed and has continued to agree to accept the burden of proof of the eight criteria for the issuance of a CDUP"). However, the unanimous part of *Mauna Kea I* does not otherwise address the burden of proof and the University apparently changed course following remand and joined arguments by Intervenor TIO that the burden should shift to the intervening practitioners under *Hanapi* and *Pratt*.

[202] *Mauna Kea I*, 136 Hawai'i at 399–418, 363 P.3d at 247–63 (Pollack, J., concurring, Wilson, J., joining).

[203] *Id.* at 406 n.8, 363 P.3d at 254 n.8 (emphasis added) (citing *Kukui I*, 116 Hawai'i at 507–09, 174 P.3d at 346–48).

1) acknowledged that applicants bear the *burden of proof and persuasion* with respect to applicable statutory/regulatory criteria;[204]
2) recognized the existence of traditional and customary Native Hawaiian practices *outside* the project site,[205] but "no evidence" [206] of such practices *within* the project site;
3) shifted the contested case hearing burden from the applicant to intervening Native Hawaiian practitioners—implicitly by CWRM,[207] and explicitly by BLNR as follows:

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[204] *Compare Kukui I*, 116 Hawai'i at 498, 174 P.3d at 337, *and Wai'ola*, 103 Hawai'i at 415–19, 83 P.3d at 678–82, *with In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 408, 431 P.3d 752, 781 (2018) (quoting HAR § 13-1-35(k)). *See also Mauna Kea I*, 136 Hawai'i at 386, 363 P.3d at 234 (quoting the University's prior argument that "the burden of proof did not shift. The University agreed and has continued to agree to accept the burden of proof of the eight criteria for the issuance of a CDUP.").

[205] *Compare Kukui I*, 116 Hawai'i at 508–09, 174 P.3d at 347–48, *and Wai'ola*, 103 Hawai'i at 412–13, 413 n.15, 419 & n.22, 83 P.3d at 675–76, 676 n.15, 682 & n.22, *with Mauna Kea II*, 143 Hawai'i at 395–96, 396 & nn.15–16, 431 P.3d at 768–69, 769 & nn.15–16. *See also supra* Section III.C.2. (discussing the *Mauna Kea II* court's curious use of the term "immediate vicinity" when applying its analysis under Ka Pa'akai O Ka 'Āina v. Land Use Commission (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 1086 (2000)). Note, further, that the *Mauna Kea II* court effectively diminished protections for traditional and customary rights by deferentially incorporating BLNR's categorization of issues in a manner that obscures the overlapping nature of these serious questions raised by practitioners. *See id.*

[206] *Compare Kukui I*, 116 Hawai'i at 509, 174 P.3d at 348, *and Wai'ola*, 103 Hawai'i at 442, 83 P.3d at 705, *with Mauna Kea II*, 143 Hawai'i at 396, 431 P.3d at 769. The *absence* of physical signs of activity by traditional and customary practitioners within the "relevant area" of a proposed use and its surroundings (*see supra* text accompanying note 8, noting the "high degree of sacredness" suggested by the presence of a ring of shrines surrounding the summit area)—i.e., what would appear to be one of the *least* intrusive forms of cultural, spiritual and/or religious practices when a regulatory authority attempts to balance competing interests under article XII, section 7 of the Hawai'i Constitution—is a curious basis for justifying the extinguishment of "possible native Hawaiian rights or cultural resources" in the relevant area under a true *Ka Pa'akai O Ka 'Āina v. Land Use Commission* (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000), analysis. *See id.* at 47 n.28, 49, 7 P.3d at 1084 n.28, 1086 (adding emphasis to a Standing Committee Report for H.B. No. 2895, 20th Leg., Reg. Sess. (Haw. 2000), concerning Native Hawaiian cultural impact statements—"Your Committee believes that this measure will result in '*a more thorough consideration of an action's potential adverse impact on Hawaiian culture and tradition, ensuring the culture's protection and preservation*'"—before noting that the bill's "requirements and purposes provide strong support for the" *Ka Pa'akai* framework (quoting H. Stand. Comm. Rep. No. 3298, 20th Leg., Reg. Sess. (Haw. 2000))).

[207] *Kukui I*, 116 Hawai'i at 507–09, 509 n.20, 174 P.3d at 346–48, 346 n.20 ("[T]he Commission's conclusion that 'no evidence was presented' to suggest that the rights of native Hawaiians would be adversely affected erroneously shifted the burden of proof to

> Petitioners and Opposing Intervenors are required to carry the burden of proof on issues asserted by them. In particular, to the extent that Petitioners and Opposing Intervenors are claiming to assert native Hawaiian rights based on customary and traditional practices, the burden is on them to establish that the claimed right is constitutionally protected as a customary and traditional native Hawaiian practice. The standards for establishing constitutional protection of practices that are claimed to be customary and traditional are set forth in *State v. Hanapi*, 89 Hawai'i 177, 186, 970 P.2d 485, 494 (1998)[,] and *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012), and are discussed in detail below.[208]

Although BLNR acknowledged the obvious distinction between criminal prosecutions and the agency's obligations in a contested case hearing under the *Ka Pa'akai* framework, the agency contended that the criminal burden of proof "should apply" without citing any support and without addressing applicable constitutional mandates, statutory and regulatory provisions, or binding precedent (e.g., *Wai'ola* and *Kukui I*):

> *Hanapi* was a criminal prosecution. In a CDUA, under *Ka Pa'akai* . . . , the BLNR, prior to granting a permit, must establish what protected traditional and customary rights might be affected by the project, even if there is no opposition to the permit and no one comes forward to claim any rights. In the context of the present application, where exhaustive efforts were made to investigate and determine the extent of traditional and customary practices even before the application was filed, and a contested case hearing has been held, *Hanapi*'s burden of proof *should apply* to any new claims of traditional and customary rights asserted by a party or other individual that were not previously identified by the applicant. In other words, it is the claimant's burden to present evidence sufficient to establish the existence of the right; *it is not the applicant's burden to negate the claimed right.*[209]

[appellants]."); *Wai'ola*, 103 Hawai'i at 442, 83 P.3d at 705 ("[The Commission] erroneously placed the burden on the Intervenors to establish that the proposed use would abridge or deny their traditional and customary gathering rights.").

[208] BLNR Decision, *supra* note 5, at 205 (COL 82); *see also id.* at 248 (COL 396: citing the need to balance interests applying a "totality of the circumstances" test under *Pratt*, 127 Hawai'i 206, 216–17, 277 P.3d 300, 310–11 (2012)). *But see supra* Section III.C. (discussing the *Mauna Kea II* court's reconsideration of its original opinion by deleting references to *Pele Def. Fund v. Paty* (*PDF v. Paty*), 73 Haw. 578, 837 P.2d 1247 (1992), *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), *Ka Pa'akai, State v. Hanapi*, 89 Hawai'i 177, 970 P.2d 485 (1998), and *State v. Pratt* 127 Hawai'i 206, 277 P.3d 300 (2012), in the context of alleged errors involving the applicable burden of proof).

[209] BLNR Decision, *supra* note 5, at 209 (COL 103A); *see also id.* at 245 (COL 371–75) (citing various elements laid out in *Hanapi*). The alphanumeric identifier "103A" reflects BLNR's insertion of this particular COL following receipt of written exceptions filed by the Petitioners and Opposing Intervenors. *See, e.g.*, MKAH Exceptions, *supra* note 112, at ¶¶

4) weighed conflicting testimony in the applicant's favor;[210]
5) concluded that the intervening Native Hawaiian practitioners failed to meet their burden;[211]

13, 216–17, 221, 474, 490 (objecting to the erroneous shifting of burdens from the applicant and agency to the intervening practitioners). Proceeding pro se after the Hearings Officer refused to grant a stay (thus forcing MKAH's counsel to withdraw due to scheduling conflicts), MKAH's written exceptions erroneously characterized portions of Justice Pollack's *Mauna Kea I* concurrence as having received three votes—however, Justice McKenna only joined Part IV of Justice Pollack's *Mauna Kea I* opinion (thus constituting a majority of the court, *see supra* notes 115–22). *Compare Mauna Kea I*, 136 Hawai'i at 413–15, 363 P.2d at 261–63 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV), *with* MKAH Exceptions, *supra* note 112, at ¶¶ 217, 490 (quoting *Mauna Kea I*, 136 Hawai'i at 406 n.8, 363 P.3d at 254 n.8, which in turn cites with approval *Kukui I*, 16 Hawai'i at 507–09, 174 P.3d at 346–48); *see supra* Section III.C.1. (discussing the deletion of former *Mauna Kea II* footnote 15).

The *Mauna Kea II* court's initial error was corrected after MKAH counsel Richard Naiwieha Wurdeman resumed his legal representation of the unincorporated organization on appeal. Petitioner-Appellants' Opening Brief on Appeal at 29, *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (Feb. 26, 2018) (No. SCOT-17-0000777) (citing *Kukui I* for the proposition that BLNR "improperly plac[ed] the burden on these Petitioner-Appellant native Hawaiian cultural practitioners the extent to which these rights are affected or impaired and the feasible action to protect these rights were not properly considered as required under *Ka Pa'akai*"). Meanwhile, the Answering Briefs filed by BLNR and the University failed to rebut MKAH's citation to *Kukui I*, *see* Appellees State of Haw. Bd. of Land & Nat. Res. Answering Brief, *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (Apr. 9, 2018) (No. SCOT-17-0000777); Appellee Univ. of Haw. at Hilo's Answering Brief, *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (Apr. 9, 2018) (No. SCOT-17-0000777), and TIO's Answering Brief merely offered an unpersuasive non sequitur suggesting that MKAH's reliance on *Kukui I* was "misplaced" because that case involved a public trust analysis in the context of a water use permit application. Intervenor-Appellee TMT Int'l Observatory, LLC's Answering Brief at 31, *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (Apr. 9, 2018) (No. SCOT-17-0000777); *see also id.* at 29 n.20 (adding emphasis to the phrase "*When* an individual of Native Hawaiian descent *asserts*" from the *Mauna Kea I* concurring opinion and, thus, misconstruing this apparent reference to an intervenor's burden of *production* rather than a burden of *proof*).

[210] Although the BLNR's findings and conclusions in this regard are more extensive by comparison, the agency's ultimate conclusions about the intervening practitioners' supposed failure to present scientific data, research, or empirical evidence about perceived harms are functionally indistinguishable from the CWRM conclusions vacated by *Wai'ola* and *Kukui I*. *Compare Kukui I*, 116 Hawai'i at 507–09, 509 n.20, 174 P.3d at 346–48, 348 n.20, *and Wai'ola*,103 Hawai'i at 412–13, 440 n.35, 83 P.3d at 675–76, 703 n.35, *with* BLNR Decision, *supra* note 5, 161–62 (FOFs 871, 873–75), 220–21 (COLs 191–92), 247 (COLs 385–86).

[211] *See also supra* notes 204–10 and accompanying text. *Compare Kukui I*, 116 Hawai'i at 507–09, 509 n.20, 174 P.3d at 346–48, 348 n.20, and *Wai'ola*, 103 Hawai'i at 419, 442, 83 P.3d at 682, 705, *with* BLNR Decision, *supra* note 5, at 246 (COLs 379-81), 247 (COL 387).

6) determined that the applicants' proposed uses would not adversely impact Native Hawaiian traditional and customary rights;[212]
7) nevertheless, addressed potential harm to traditional and customary Native Hawaiian rights by imposing conditions upon issuance of the requested permits;[213] and
8) ultimately, issued the permits because the agencies determined that the applicants satisfied the applicable statutory/regulatory criteria.[214]

The striking similarities summarized above make it exceedingly difficult to reconcile, on the one hand, *Mauna Kea II*'s failure to address the point of error involving burden-shifting by the agency[215] and, on the other hand, the court's binding precedent in *Wai'ola* and *Kukui I* that vacated another agency's erroneous determination about questions involving mixed questions of fact and law then remanded the matter for further agency

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[212] *Compare Kukui I*, 116 Hawai'i at 508–09, 506 n.20, 174 P.3d at 347–38, 347 n.20, *and Wai'ola*, 103 Hawai'i at 394–95, 419, 83 P.3d at 682, 705–06, *with* BLNR Decision, *supra* note 5, at 60 (FOF 326), 70 (FOFs 369–70), 76 (FOF 418), 109 (FOF 633), 161–62 (FOFs 872–79), 163 (FOFs 881–82, 885–86), 166 (FOFs 900–01). For conflicting accounts regarding water, see Pisciotta Oral Testimony, *supra* note 7, at 37, and Pisciotta Written Testimony, *supra* note 7, at 10. Additionally, relevant BLNR findings and conclusions include: BLNR Decision, *supra* note 5, at 80 (FOF 456), 87 (FOFs 502–05), 88 (FOFs 511–12), 91 (FOF 529), 105 (FOF 610), 126 (FOF 731), 154–55 (FOFs 834–39), 158–61 (FOFs 861–70), 162 (FOF 880), 163 (FOF 888), 165 (FOFs 898–99), 166 (FOF 903), 171 (FOF 937), 218–19 (COLs 172–74), 222-23 (COLs 205, 207, 210), 229 (COL 255), 238 (COL 326).

[213] *Compare Kukui I*, 116 Hawai'i at 495–96, 174 P.3d at 334–35, *and Wai'ola*, 103 Hawai'i at 419–20, 433–34 & n.30, 440–41 & n.34, 444, 83 P.3d at 682–83, 696–97 & n.30, 703–04 & n.34, 707, *with* BLNR Decision, *supra* note 5, at 129 (FOF 747), 223–25 (COLs 208, 212–22). *See also Mauna Kea II*, 143 Hawai'i at 397 & nn.17–18, 431 P.3d at 770 & nn.17–18.

[214] *Compare Kukui I*, 116 Hawai'i at 498, 174 P.3d at 337, *and Wai'ola*, 103 Hawai'i at 407 n.1, 415–19, 83 P.3d at 670 n.1, 678–82, *with* BLNR Decision, *supra* note 5, at 77–189 (FOFs 429–1040), 213–37 (COLs 121–321). *See also Mauna Kea II*, 143 Hawai'i at 401 n.25, 431 P.3d at 774 n.25 (declining to address the underlying constitutional questions); *id.* at 404–07, 431 P.3d at 776–79 (determining that appellants' allegations were without merit). Unlike the intervening practitioners in *Wai'ola* and *Kukui I*, Mauna Kea practitioners' ongoing efforts to pursue restorative justice were (at least temporarily) silenced through the limiting language of legal process. *See* Yamamoto, *Courts and the Cultural Performance*, *supra* note 92, at 6–7, 9, 21–22 & nn.51–52.

[215] The KUA/Machado/Ahuna *Unfiled* Amici Curiae Brief suggests that former *Mauna Kea II* footnote 15 constituted "dicta that serve[d] no necessary purpose for the majority's rulings[,]" adding that the court could "avoid the problems of footnote 15 [regarding the burden of proof] by simply deleting it," and "[a]t minimum, deleting this footnote would avoid exacerbating misconceptions by BLNR and other agencies." *Id.*, *supra* note 148, at 2, 3, 6.

proceedings. Importantly, *Wai'ola* emphasized the court's holding in *Waiāhole I* "that the Code 'does not supplant the protections of the public trust doctrine,' . . . [and] recognized that '[e]ven with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible 'outer limits,' and justify its existence.'"[216] Accordingly, the *Wai'ola* court relied on Hawai'i Constitution article XII, section 7 and *PASH*, in addition to summarizing (without specifically citing to) the *Ka Pa'akai* framework.[217]

Thus, constitutional protections for traditional and customary rights are *not* dependent upon the State Water Code—consistent with the mandate that "provisions of this constitution shall be *self-executing* to the fullest extent that their respective natures permit."[218] "[W]hile overlap may occur,

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[216] *Wai'ola*, 103 Hawai'i at 429, 83 P.3d at 692 (quoting *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 133, 9 P.3d 409, 445 (2000)). The *Wai'ola* court's analysis applied even where the proposed use involved *public benefits*—viz., domestic water needs, including consumption and other uses. *Compare Wai'ola*, 103 Hawai'i at 429, 83 P.3d at 692 (discussing public rights in trust resources that are "superior" to private interests, which imposes a "higher level of scrutiny" requiring applicants and agencies to bear the burden of justifying of the latter), *with* BLNR Decision, *supra* note 5, at 241 (COL 346) (concluding that "UH Hilo's public trust uses are 'superior to' the private interests discussed in [*Waiāhole I*]" and citing *Wai'ola*, but *failing to address* the intervening practitioner's public trust uses—instead, apparently treating traditional and customary practices as individual, *private* interests). *See also* Suzanne Case, *Implementing* PASH *and its Progeny Within DLNR*, 43 U. HAW. L. REV. (forthcoming 2021) (arguing that *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), "applies to individual gathering rights" notwithstanding the facts that (i) *PASH* was also an unincorporated association, albeit with fewer members than MKAH who were Native Hawaiian practitioners but, and more importantly, (ii) traditional and customary rights are a public trust purpose).

[217] *Wai'ola*, 103 Hawai'i at 419, 83 P.3d at 682; *see also Kukui I*, 116 Hawai'i at 507–09, 174 P.3d at 346–48 (citing article XII, section 7, *PASH* and Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 5, 656 P.2d 745, 748 (1982)—*in addition to* the State Water Code, *Waiāhole I* (upholding "the exercise of traditional and customary rights as a public trust purpose"), and *Wai'iola*—to support its holding that the Commission "failed to adhere to the proper burden of proof standard to maintain the protection of native Hawaiians' traditional and customary gathering rights in discharging its public trust obligation").

[218] HAW. CONST. art. XVI, § 16 (emphasis added). In determining whether a particular provision is self-executing, its language must be closely reviewed "to determine whether it indicates that the adoption of implementing legislation is *necessary*." Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 412, 235 P.3d 1103, 1124 (2013) (emphasis added). On the one hand, a reference to laws or legislation may refer to an existing body of statutory laws (as in HAW. CONST. article XI, section 9: "laws relating to environmental quality, including pollution and conservation, protection and enhancement of natural resources"), or it may simply refer to *supplemental, rather than implementing*, legislation (as in HAW. CONST. article XII, section 7: "subject to the right of the state to regulate such

the State's constitutional public trust obligations exist *independent of any statutory* [or regulatory] *mandate* and must be fulfilled regardless of whether they coincide with any other legal duty."[219]

Flores v. Board of Land & Natural Resources[220] is another beguiling decision juxtaposed against the court's admonishment of BLNR in *Mauna Kea I* for violating constitutional due process by putting "the cart before the horse" when the agency acted on a permit application before considering questions raised by intervening practitioners. Given that allegations of error relating to constitutional due process were still pending before the Hawai'i Supreme Court in *Mauna Kea II*, it appears that the *Flores* court itself prejudged the question whether Mr. Flores was indeed afforded a "full and fair opportunity to express his views and concerns" in the BLNR proceeding on remand from *Mauna Kea I*. In any event, the *Flores* decision appears to raise more questions than it does answers, particularly since the opinion's author was recused from deliberations concerning *Mauna Kea II*, the very proceeding relied upon for the proposition that Flores received an opportunity to be heard at a meaningful time and in a meaningful manner.[221]

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rights"). *Cf. Ala Loop*, 123 Hawai'i at 412–13, 235 P.3d at 1124-25 (emphasis added). On the other hand, provisions that require implementing legislation are *not* self-executing (as in HAW. CONST. article XI, section 3: "[t]he legislature shall provide standards and criteria to accomplish the foregoing"—viz., requirement that "[t]he State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands"). *See also* Save Sunset Beach Coal. v. City & Cnty. of Honolulu, 102 Hawai'i 465, 474–76, 78 P.3d 1, 10–12 (2003) (holding that the constitutional provision's subsequent prohibition on reclassification or rezoning of land unless "approved by a two-thirds vote of the body responsible for the reclassification" under article XI, section 3, was legally inoperative in the absence of relevant standards and criteria duly adopted by the legislature).

[219] Ching v. Case, 145 Hawai'i 148, 178, 449 P.3d 1146, 1176 (2019) (citing Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014)) (emphasis added).

[220] 143 Hawai'i 114, 424 P.3d 469 (2018) (rejecting BLNR's and University's argument that HRS chapter 91 does not cover the agency's consent to a sublease where a Native Hawaiian practitioner properly requests a contested case hearing pursuant to the agency's rules then concluding, nevertheless, that a contested case hearing was not required by statute, regulation, or constitutional due process—thus, reversing the environmental court's ruling to the contrary); *id.* at 128, 424 P.3d at 483 (concluding that "Flores has already participated in the separate contested case hearing on the CDUP, and was thereby afforded a *full and fair opportunity to express his views and concerns* as to the effect . . . on his interest in engaging in traditional and cultural practices on Mauna Kea. To require BLNR to hold another contested case hearing in such circumstances would require BLNR to shoulder duplicative administrative burdens and comply with additional procedural requirements that would offer no further protective value") (emphasis added).

[221] *But see id.* at 127 & n.7, 424 P.3d at 482 & n.7 ("Flores does not clarify the extent to

V. CONCLUSION

In *Mauna Kea II*, the State of Hawai'i Board of Land and Natural Resources (BLNR) dismissed uncontradicted kama'āina testimony on the grounds that it lacked credibility—based on the purported absence of supporting data (and notwithstanding the applicant's failure to provide any of its own data or other proof to the contrary)—even though the applicant's own cultural assessments themselves *documented* substantial, adverse impacts to traditional and customary Native Hawaiian rights.[222] In addition to MKAH President Kealoha Pisciotta,[223] many other Native Hawaiian practitioners testified about alleged harms to their traditional and customary rights during the second BLNR contested case hearing on remand from *Mauna Kea I* including Clarence Kūkauakahi Ching[224] (who would later

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which, if BLNR held a contested case hearing . . . he would put forth evidence and arguments materially different from that which he already proffered at the CDUP contested case hearing" and "the potential impact of the Sublease on Flores's asserted interests would appear to overlap entirely with the potential impacts of the CDUP").

[222] Cultural Impact Assessment (CIA) author Brian J. "Kawika" Cruz of Cultural Surveys Hawai'i, Inc. (CSH) testified that after he refused an allegedly unprecedented request from Parsons Brinckerhoff employee Jim Hayes to remove a recommendation based on research and interviews with affected practitioners that "no further development" take place at Mauna Kea, that recommendation and nine additional recommendations relating to proposed mitigation measures and alternative actions were removed from the CIA submitted to the agency by the applicant in apparent violation of HAR § 11-200-17. Although the recommendations were subsequently reinserted into the final EIS, they were not included in the CIA provided within the draft EIS published for review and comment by decisionmakers and other interested persons. *TMT Hearing: Cultural Impact Assessment 'Falsified,'* BIG ISLAND NOW (Mar. 3, 2017), https://bigislandnow.com/2017/03/03/tmt-hearing-cultural-impact-assessment-falsified/; *see also Near Close of TMT Contested Case, Witness Says EIS Process Was Flawed*, ENV'T HAW. (Apr. 2017), https://www.environment-hawaii.org/?p=9592 (reporting on cross-examination efforts by University counsel Tim Lui-Kwan); Pi'ikea Keawekane-Stafford, *Brian Cruz - Expert Witness for Mauna Kea*, YOUTUBE (Aug. 2, 2019), https://www.youtube.com/watch?v=D5g0sdiRTws (crediting Na Leo TV and Occupy Hawaii, filmed Feb. 29, 2017; providing an apparently edited version that omits cross-examination of the witness).

[223] *See supra* note 7 (providing links to Pisciotta's written and oral testimony). Pisciotta credited a workshop conducted by former ELP Director M. Casey Jarman (now Leigh) as "instrumental" in the MKAH President's ability to navigate BLNR contested case hearings, particularly after the practitioners' counsel had to withdraw due to scheduling conflicts. Telephone Interview with Kealoha Pisciotta (Jan. 8, 2021); *see also* M. CASEY JARMAN, MAKING YOUR VOICE COUNT: A CITIZEN GUIDE TO CONTESTED CASE HEARINGS 3 (2002) (identifying me as one of seven "actors" contributing to the video project).

[224] Ex. B. 19a, Written Direct Testimony for Clarence Kukauakahi Ching, Oct. 9, 2016, at 11–12, https://dlnr.hawaii.gov/mk/files/2016/10/B.19a-Ching-WDT.pdf [hereinafter Uncle Kū Testimony] (describing the practitioner's active and continuous involvement in

prevail against BLNR in the civil action *Ching v. Case*,[225] which concerned another location near the mauna, or mountain), Mehana Kihoi,[226] and a host of others including but not limited to: Paul K. Neves, William Freitas, E. Kalani Flores, Pua Case, Hāwane Rios, Laulani Teale, and Hank Fergerstrom.[227]

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natural and cultural resources protection of Mauna Kea since the 1980s, including traditional and customary practices consisting of cultural as well as religious or spiritual rituals and ceremonies "from sea level to the summits of Mauna Kea, Mauna Loa, Hualalai and Kilauea and back. . . ."); *see also id.* at 12–13 (noting his prior participation in disputes concerning proposed observatory facilities on Mauna Kea in 2002 and 2004; listing "use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adze making and other crafts, depositing of the 'piko' or umbilical cord in and around Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve" including non-Equinox and non-Solstice times).

[225] 145 Hawai'i 148, 449 P.3d 1146 (2019) (holding that BLNR breached its public trust duty to reasonably monitor or inspect trust land leased to the United States military—viz., the Pōhakuloa Training Area, located in Ka'ohe, Hāmākua and Pu'uanahulu, North Kona, Hawai'i Island, in the "saddle" between Mauna Kea and Mauna Loa—in order to preserve the asset and allow trust beneficiaries to prevent irreparable harm before it occurs). Pisciotta testified in the proceeding below as a cultural monitor for the battle area complex, noting "a range of debris left over from military exercises, including munitions and UXO [unexploded ordinance], stationary targets, junk cars, an old tank, crudely built rock shelters, and other miscellaneous military rubbish" and further testifying "that some of her reports recommended that the debris be cleaned up, but not all of the UXO that she observed was removed." *Id.* at 160, 449 P.3d at 1158.

[226] *See* Aff. of Mehana Kihoi, Exhibit S-1, Aug. 9, 2016, https://dlnr.hawaii.gov/mk/files/2016/10/C-Freitas-Exhibits-S-1-to-S-6.pdf (stamped as received Oct. 10, 2016, Office of Conservation and Coastal Lands, Department of Land and Natural Resources, State of Hawai'i); *id.*, ¶¶ 16–17 ("Having a direct ancestral connection to Mauna Kea, I am an active steward of this land to ensure there is no more further desecration of this land because it is tied to my spiritual and cultural identity, health and well-being as a Native Hawaiian"; "I have built ahu and intend to build more ahu on Mauna Kea to pay tribute to my ancestors and our creators Papa and Wākea"); *see also* Fujikane, *supra* note 184, at 41 (quoting Kihoi with regard to proposed mitigation efforts: "Would there be any outreach provided to our Native Hawaiian children who have been emotionally, physically, mentally, and spiritually traumatized by this project? More specifically, my child who was present for the arrest on the mountain, who saw me being handcuffed while I was in pule [prayer ceremony] on the summit of Mauna Kea. . . . What does your project have in place to address her concerns, her pain, and her suffering? I am speaking on behalf of my daughter who is here with me today who does not have a voice. I am her voice.").

[227] MKAH Reconsideration Motion, *supra* note 142, at 12–14 (citing voluminous evidence of traditional and customary practices and beliefs from the administrative record that contradicts BLNR's conclusion affirmed by *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 431 P.3d 752 (2018), including: gathering of medicinal items on the Northern side of the mauna under the direction of recognized cultural expert Papa Henry Auwae; identifying the Northern Plateau area—

Numerous individuals with subject matter expertise in a variety of disciplines also provided testimony in support of the intervening practitioners, including but not limited to: Kū Hinahinakūikahakai Kahakalau, Ph.D.; Kehaunani Abad, Ph.D.; Noelani Ka'ōpua-Goodyear, Ph.D.; Peter Mills, Ph.D.; Candace Lei Fujikane, Ph.D.; Jonathan Kay Kamakawiwo'ole Osorio, Ph.D.; Maile Tauali'i, Ph.D.; Manulani Aluli Meyer, Ph.D.; Joseph Keawe'aimoku Kaholokula, Ph.D.; Kawika Liu, M.D., J.D., Narissa P. Spies; David Kimo Frankel, Esq.; and, Mililani B. Trask, Esq. After determining that the collective kama'āina and other supportive testimony did not *credibly* establish that TMT construction would harm traditional and customary practices, BLNR decided (for the second time) to issue a conservation district use permit to the University of Hawai'i authorizing TMT construction; this time, a majority of Hawai'i Supreme Court justices decided to uphold the agency's action on appeal—relying on the "clearly erroneous" and "substantial evidence" (or "sufficiency") standards of review, while ignoring substantive constitutional issues raised on appeal.[228]

"There you go again."[229] "As sometimes happens in the law, the misapplication of a standard is perpetuated by its repetition."[230] For

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location of the proposed TMT project site—as uniquely critical to traditional and customary gathering practices because "[t]he wind and rain patterns of the Northern Plateau of Mauna Kea are different from any other place on earth which means the medicines of that area are different from all others"; chanting and honoring iwi kūpuna at the proposed TMT site; erection of ahu at the site; multiple view plane impacts, including ancient practices involving sun and star tracking).

[228] *Mauna Kea II*, 143 Hawai'i at 383–409, 431 P.3d at 756–82 (McKenna, J., Recktenwald, C.J., and Nakayama, J., joining); *see also id.* at 384, 431 P.3d at 757 (observing that Justice Pollack joined the majority opinion except as to Part V.C.1). The portion of the majority opinion Justice Pollack refused to join is entitled: "Whether the TMT Project violates Article XI, Section 1 of the Hawai'i Constitution and public trust principles." *Id.* at 400, 431 P.3d at 773; *see also id.* at 402, 431 P.3d at 775 (emphasizing BLNR's determination that "there was *no actual evidence of use* of the TMT Observatory site and Access Way by Native Hawaiian practitioners" and "in general, astronomy and Native Hawaiian uses on Mauna Kea have co-existed for many years and the TMT Project *will not curtail or restrict* Native Hawaiian uses") (emphasis added).

[229] Then candidate Ronald Reagan won over voters during his one and only debate in 1980 against President Jimmy Carter, when he deployed (for the first time) what would later become his signature one-line rejoinder to critics. *See, e.g.*, Courtney Weaver, *There You Go Again: Lessons from Previous US Debates*, FIN. TIMES (Sep. 25, 2016), https://www.ft.com/content/15e746b6-81ce-11e6-8e50-8ec15fb462f4.

[230] Paul's Elec. Serv., Inc. v. Befitel, 104 Hawai'i 412, 422, 91 P.3d 494, 504 (2004) (Acoba, J., concurring) ("The grounds set forth in HRS § 91-14(g) establish the authority of the appellate courts to remand, reverse, or modify an agency decision 'if the substantial rights of the petitioners may have been prejudiced'" and "there is little gain in according

example, despite the decision in *Paul's Electrical Service, Inc. v. Befitel*, that "[a]gency determinations, even if made within the agency's sphere of expertise are *not* presumptively valid,"[231] the Hawai'i Supreme Court has since repeatedly invoked such a presumption.[232] In this context, it is worth noting Justice Acoba's prescient warning that: "the retention of 'high burden,' and 'heavy burden' . . . will cloud the issue" because these "imprecise" terms "beg the question as to what the burden relates to . . . and may reasonably but mistakenly be perceived as establishing something more than the requirement that the action of the agency be 'arbitrary, capricious or characterized by . . . unwarranted discretion' to warrant judicial action."[233]

'deference' to agency decisions . . . in terms other than those expressly defined and stated in HRS § 91-14(g).") (citations omitted); *id.* at 422, 91 P.3d at 504 (explaining that "the 'unjust and unreasonable' language, has heretofore, crept into various non-rate-making cases as an independent standard of appellate review").

[231] *Id.* at 419, 91 P.3d at 501 (Duffy, J., Moon, C.J., Levinson & Nakayama, JJ., joining) (quoting Michael J. Yoshii, *Appellate Standards of Review in Hawaii*, 7 U. HAW. L. REV. 273, 292–93 (1985)) (emphases added); *cf. id.* at 421–22, 91 P.3d at 503–04 (Acoba, J., concurring) ("I do not find any viability in qualifying review of agency decisions 'by the principle that the agency's decision carries a presumption of validity[, *id.* at 417, 91 P.3d at 499,]' and that appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences'").

[232] Lāna'ians for Sensible Growth v. Land Use Comm'n (*LSG IV*), 146 Hawai'i 496, 504, 463 P.3d 1153, 1161 (2020); Morita v. Gorak, 145 Hawai'i 385, 391, 453 P.3d 205, 211 (2019); *In* re Hawai'i Elec. Light Co., 145 Hawai'i 1, 23, 445 P.3d 673, 695 (2019); Kilakila 'O [Haleakalā] v. Board of Land & Natural Resources (*Kilakila III*), 138 Hawai'i 383, 401, 382 P.3d 195,213; Sierra Club v. Castle & Cooke Homes Hawai'i Inc., 2016 WL 2940851, *8 (Haw. Apr. 6, 2016); Sierra Club v. D.R. Horton-Schuler Homes LLC, 136 Hawai'i 505, 516, 364 P.3d 213, 224 (2015); *In re* 'Īao Groundwater Mgmt. Area (*Nā Wai 'Ehā*), 128 Hawai'i 228, 238, 287 P.3d 129, 139 (2012); Paul v. Dep't of Transp., 115 Hawai'i 416, 425, 168 P.3d 546, 555 (2007); *see also* Kolio v. Haw. Pub. Hous. Auth., 135 Hawai'i 267, 271, 349 P.3d 375, 378 (2015) (acknowledging that determinations within an "agency's sphere of expertise, are not presumptively valid; however, an agency's discretionary determinations are entitled to deference, and an appellant has a high burden to surmount that deference") (citation omitted); *In re* Waikoloa Sanitary Sewer Co., 109 Hawai'i 263, 271, 125 P.3d 484, 492 (2005) (same). *But see* Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 164–65, 324 P.3d 951, 974–75 (2014) (citing "a presumption of validity . . . within the agency's expertise" but then clarifying that "[a]s with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state").

[233] *Compare Paul's Elec.*, 104 Hawai'i at 423, 91 P.3d at 505 (Acoba, J., concurring) (citing HRS § 91-14(g)(6)), *with id.* at 417–20, 91 P.3d at 499–502 (addressing "Deference to administrative agencies" as a standard of review under Section II.A.2. of the court's opinion).

Even setting aside for the sake of argument the court's obligation to analyze constitutional public trust mandates,[234] the relevant statutory authority governing conservation district lands specifically requires compliance with HRS chapter 91 absent any conflict with HRS chapter 183C[235]—and, neither *Kilakila III*, nor *Mauna Kea II*, identified any such conflicts. Nevertheless, immediately prior to the Hawai'i Supreme Court's grant of certiorari in *Kilakila III*,[236] the ICA issued an unpublished memorandum decision[237] that presages *Mauna Kea II* with respect to view plane impacts. Among other things, the ICA rejected as "inapposite" the practitioners' reliance on *State v. Diamond Motors, Inc.*,[238] for the proposition that protecting an industrial district from further encroachment—viz., adding a structure that would "substantially impair the view"—remains important notwithstanding the presence of numerous structures already existing at a site.[239]

In addition, the ICA repeatedly cited *In re Application of Hawaiian Elec. Co. (In re HECO)*,[240] to support its conclusion that BLNR must be afforded the discretion to *discredit* Native Hawaiian practitioners' testimony about impacts associated with construction of a telescope on view planes at

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[234] *See supra* notes 216–19 and accompanying text.

[235] HAW. REV. STAT. § 183C-9 (2011 & Supp. 2019) ("Chapter 91 shall apply to every contested case arising under this chapter except where chapter 91 conflicts with this chapter, in which case this chapter shall apply."). *See, e.g.*, *id.* § 183C-6(b) (2011 & Supp. 2019) ("If within one hundred eighty days after acceptance of a completed application for a permit, the department shall fail to give notice, hold a hearing, and render a decision, the owner may automatically put the owner's land to the use or uses requested in the owner's application.").

[236] *But see supra* notes 127, 163 (discussing conscious efforts by Kilakila's counsel to avoid constitutional issues on appeal).

[237] Kilakila 'O Haleakalā v. Bd. of Land and Nat. Res. (*Kilakila III* (ICA)), 134 Hawai'i 132, 337 P.3d 53 (Table), 2014 WL 5326757 (Haw. Ct. App. Oct. 17, 2014).

[238] 50 Haw. 33, 429 P.2d 825 (1967).

[239] *Id.* at 36, 429 P.2d at 828, *cited in Kilakila III* (ICA), 2014 WL 5326757, at *18 (dismissing, further, dicta in *Diamond Motors* that accepted "beauty as a proper community objective, attainable through the use of the police power"); *but see Kilakila III* (ICA), 2014 WL 5326757, at *17 n.19 (noting the National Science Federation's Record of Decision, which "agrees that the construction and operation of *the* [*Solar Telescope*] *will have major adverse short-term and long-term impacts to visual resources and view planes within key areas of the Park that will thus result in major adverse impacts to the visitor experience within the Park*"—while implicitly adopting the master narrative by ignoring the corresponding impact on traditional and cultural practices associated with view planes); *Kilakila III*, 138 Hawai'i at 388 & n.8, 382 P.3d at 200 & n.8 (quoting the FEIS regarding "major, adverse, short- and long-term, direct impacts on the traditional cultural resources within" the project site and surrounding areas, including Haleakalā National Park).

[240] 81 Hawai'i 459, 918 P.2d 561 (1996).

Haleakalā.[241] The ICA specifically noted BLNR's conclusion that Kilakila "failed to show that its directors or members engaged in traditional and customary activities, i.e., activities protected under Hawai'i law, according to *Pratt*[,]"[242] but the court's accompanying footnote clarified the agency's ultimate decision to "accept[]" the practitioners testimony consistent with information contained in cultural assessments for the proposed project.[243]

The Hawai'i Supreme Court *failed to acknowledge* in *Kilakila III* that BLNR's COL 29(a) "accepted" the alleged traditional and customary practices set forth in the cultural assessments, notwithstanding the agency's earlier conclusion about Kilakila's purported failure to satisfy the burden of proof under *Pratt*;[244] nor does *Kilakila III* address the ICA's misstatement of law regarding agency deference under *In re HECO*.[245] Of course, the

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[241] *Compare Kilakila III* (ICA), 2014 WL 5326757, at *10, *14, *15, *16, *17, *19 (citing *In re HECO*, 81 Hawai'i at 465, 918 P.2d at 567), *with supra* note 210 and accompanying text (citing *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui I*), 116 Hawai'i 481, 174 P.3d 320 (2007), and *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Hawai'i 401, 83 P.3d 664 (2004)).

[242] *Compare Kilakila III* (ICA), 2014 WL 5326757, at *16, *with supra* Section III.C.1. (discussing the *Mauna Kea II* court's decision to delete its former footnote 15), *and supra* notes 206–09, 211–12 and accompanying text (citing *Kukui I* and *Wai'ola*).

[243] *Kilakila III* (ICA), 2014 WL 5326757, at *16 n.18 (quoting the contradictory determinations embedded in COL 29(a) as follows):

Although Kilakila has not shown that its directors or members engage in activities that are traditional and customary, according to *Pratt*, the Cultural Resources Assessment and the Supp. Cultural Assessment conducted in connection with the [Solar Telescope] have established that traditional cultural practice, such as religious prayer and ceremonies, the burying of piko [(umbilical cord)], and connection with akua (gods) and ancestors, have occurred and continue to occur in the summit area. The practices engaged in by the directors and members of Kilakila are consistent with the cultural practices set forth in the cultural assessments and will be *accepted* as such.

See also id. at *16 n.16 (quoting FOFs 3, 156, 165).

[244] *See supra* notes 241–43 and accompanying text.

[245] *See supra* notes 227–41 and accompanying text. As support for its characterization of the relevant standard of review, *In re HECO* cites *Application of Hawaii Elec. Light Co.* (*In re HELCO*), 60 Haw. 625, 594 P.2d 612 (1979), a decision that *does not even mention* "credibility of witnesses or conflicts in testimony[.]" *Compare In re HECO*, 81 Hawai'i at 465, 918 P.2d at 567, *with In re HELCO*, 60 Haw. at 629, 594 P.2d at 617 (describing the clearly erroneous test, instead, as "whether the appellate court is left with a firm and definite conviction that a mistake has been made"). Contrary to the court's unsupported statement in *In re HECO*, *In re HELCO* actually applied a standard that "gives an appellate court *greater leeway* in exercising its functions" and despite "evidence to support an agency finding, *if the court is left with a firm and definite conviction that a mistake has been made, the court will, under the clearly erroneous rule, reject the tribunal's findings*." 60 Haw. at 629, 594 P.2d at 617 (internal quotation marks and citations omitted) (emphasis added); *accord* Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 314, 97 P.3d 372, 390 (2004). Before the *In re HECO* court improperly relied on decisions from outside Hawai'i that restate a purported

separation of powers principles underlying agency deference *do not* justify abdication of the judiciary's fundamental role as final arbiter of constitutional questions. Rather, where questions of constitutional law are involved, courts must exercise their *independent judgment* under the right or wrong standard "without being required to give *any weight* to the trial court's answer to it."[246] To hold otherwise would arguably create a state constitutional crisis approaching the magnitude of *Marbury v. Madison*.[247]

The foregoing analysis highlights the public lament by Native Hawaiian practitioner Kahele Dukelow who, along with other Native Hawaiians, offered a consistent message in opposition to continued desecration of Haleakalā as a sacred place: "The courts, and the whole legal process, we always lose. It's not set up for us to win. It's set up for a process so they can say we consulted, there's the mitigation, we move on. And we're saying,

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"presumption of validity" for agency decisions within their sphere of expertise and the supposed "heavy burden" of showing invalidity under the "unjust and unreasonable" standards of review—which the Hawai'i Supreme Court later rejected in *Paul's Electrical Service, Inc. v. Befitel*, 104 Hawai'i 412, 91 P.3d 494 (2004), *see supra* note 231—*In re HELCO* characterized agency deference as a constitutional *separation of powers* issue recognizing both the function of agencies (to discharge their "delegated duties") *and* the function of courts (to "review[] agency determinations"). 60 Haw. at 630, 594 P.2d at 617.

[246] Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 221, 140 P.3d 985, 1001 (2006) (emphasis added), *cited with approval in* Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 165, 324 P.3d 951, 975 (2014). *Accord* Ching v. Case, 145 Hawai'i 148, 178, 449 P.3d 1146, 1176 (2019) ("[W]hile overlap may occur, the State's constitutional public trust obligations exist *independent of any statutory* [or regulatory] *mandate* and must be fulfilled regardless of whether they coincide with any other legal duty") (emphasis added); Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 415, 363 P.3d 224, 263 (2015) (Pollack, J., concurring) ("An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision."); *Kukui I*, 116 Hawai'i 481, 491, 174 P.3d 320, 330 (2007) (citing *In re* Water Use Permit Applications (*Waiāhole II*), 105 Hawai'i 1, 15–16, 93 P.3d 643, 657–58 (2004), for the proposition that "this court must take a 'close look' at the Water Commission's action to determine if it complies with the Water Code and the public trust doctrine"); *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000) ("[T]he ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state."), *cited in Kelly*, 111 Hawai'i at 217, 140 P.3d at 997; *Kauai Springs*, 133 Hawai'i at 172, 324 P.3d at 982 (quoting *Waiāhole I*, 94 Hawai'i at 132, 9 P.3d at 444, for the proposition that "'mere compliance by agencies with their legislative authority' may not be sufficient to determine if competing uses are properly balanced in the context of uses protected by the public trust and its foundational principals [sic]"); *id.* (quoting *Kukui I*, 116 Hawai'i at 496, 174 P.3d at 335, for the proposition that an agency "cannot fairly balance competing interests . . . if it renders its decision prior to evaluating the availability of alternative[s]").

[247] 5 U.S. (1 Cranch) 137 (1803).

nope."[248] Likewise, the *Mauna Kea II* court's departure from *Wai'ola* and *Kukui I* (see Part IV *supra*) exacerbated the deleterious effect of the majority and concurring opinions' decisions, respectively, not to address or apply the available framework for determining whether BLNR's action complied with its public trust obligations.[249] The court later repeated its mistakes in *LSG IV*,[250] by inexplicably ignoring the Land Use Commission's allegedly erroneous shifting of the project proponent's burden onto intervening practitioners.[251]

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[248] Noe Tanigawa, *Haleakalā: A History of Telescopes*, HAW. PUB. RADIO, (July 7, 2015), https://www.hawaiipublicradio.org/post/haleakal-history-telescopes#stream/0. *See also supra* notes 102–04 (discussing the cultural imperatives of kū'ē and kūkulu, which lie at the root of Nā Kia'i Mauna's commitment to oppose ongoing injustices through non-violent resistance).

[249] *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 401 n.25, 431 P.3d 752, 774 n.25 (declining to address the issue); *id.* at 416–20, 431 P.3d at 789–93 (applying a more deferential standard of review). *Contra* David L. Callies & Calvert G. Chipchase, *Water Regulation, Land Use and the Environment*, 30 U. HAW. L. REV. 49, 95 (2007) (arguing that *Kukui I*'s reliance on *Waiāhole I* continues "to overstate both the place of the public trust doctrine . . . and the preeminence of native Hawaiian rights in water allocation matters" and ignores the constitutional right to regulate native Hawaiian rights, instead of placing "commercially economic uses of water in a superior position over native Hawaiian and conservation rights and uses"); *see also id.* at 49 (characterizing Hawai'i's public trust doctrine as an "*elitist, communitarian regime* that bears no relationship to either *traditional* notions of water rights or constitutionally protected rights in property") (emphasis added). The framing by Professor Callies and his co-author call to mind Professor Yamamoto's observations about the power of narratives. Yamamoto, *Courts and the Cultural Performance*, *supra* note 92, at 6–7, 21–22 & nn.51–52 (discussing "prevailing" narratives); *see also Waiāhole I*, 94 Hawai'i at 138, 9 P.3d at 450 (stating that public trust principles must recognize "public rights in trust resources separate from, and superior to, the *prevailing* private interests in the resources") (emphasis added); *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Hawai'i 401, 429, 83 P.3d 664, 692 (2004); *id.* at 442, 83 P.3d at 705.

[250] 146 Hawai'i 496, 463 P.3d 1153 (Pollack, J., McKenna, J., joining, and Wilson, J., joining except as to Parts III(E) and IV) (2-2-1 plurality opinion) (affirming, for inconsistent reasons, an LUC decision vacating the agency's earlier cease and desist order issued in 1996—the year following issuance of the *PASH* decision).

[251] Opening Brief for Petitioner at 12, Lāna'ians for Sensible Growth v. Land Use Comm'n, 146 Hawai'i 496, 463 P.3d 1163 (2020) (SCOT-0000526), 2017 WL 11604591, at *12 [hereinafter LSG Opening Brief] (listing Question Presented A.1.d.ii.: "Did the LUC shift the burden of proof and clearly err by concluding there was no evidence of possible harm from the leakage of potable water from upper level wells into Wells 1 and 9?"); *id.* at 14–31, 24 n.35 (citing *Wai'ola* and *Kukui I*—in addition to other applicable cases—concerning the applicable standards of review and standards of proof, including the applicant's burden of proof in administrative contested case hearings and the obligation to analyze reasonable alternatives to the proposed use); Reply to Answering Brief of Petitioner at 6, Lāna'ians for Sensible Growth v. Land Use Comm'n, 146 Haw. 496, 463 P.3d 1163 (2020) (SCOT-17-0000526), 2018 WL 11299039, at *6 [hereinafter LSG Reply Brief]

Thus, the cultural insensitivity[252] attributable to the respective applicants, agencies, and courts in *Kilakila III*, *Mauna Kea II*, *LSG IV* (and most recently, the applicant and agency[253] in *PPKAA*) provide painful reminders that true restorative justice under the constitutional amendments adopted in 1978 remains elusive. Although beyond the scope of this article, further inquiry under the framework articulated by Professor Yamamoto appears necessary:

> Critical-contextual analysis interrogates, what is really at stake, who benefits and who is harmed (in the short and long-term), who wields the behind-the-scenes power, which social values are supported and which are subverted,

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(citing LSG Opening Brief, at 24 n.35, 26–30, along with HAW. CODE R. § 15-15-59(a) [sic: presumably invoking HAW. CODE R. § 15-15-77(a) (Westlaw 2020), which currently provides that "[t]he commission shall not approve an amendment of a land use district boundary unless the commission finds upon the clear preponderance of the evidence that the proposed boundary amendment is reasonable, not violative of section 205-2, HRS, and consistent with the policies and criteria established pursuant to sections 205-16, 205-17, and 205A-2, HRS"]); *see also id.* at *1 ("Even if Condition 10 allows use of high[-]level aquifer ([]HLA) water, THE RESORT would still have to prove non[-]potable water exists in the HLA, *leaving it up to the LUC to determine whether THE RESORT carried its burden of proof.*") (emphasis added); *id.* at *2 (citing HAW. REV. STAT. § 91-14(g)(1) concerning violation of constitutional provisions as a basis for reversing agency action); *id.* at *3–4 (arguing that typical agency deference does not apply where a public trust resource is at stake, which negates the "presumption of validity" otherwise afforded to agency action as well as the "heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences"); *id.* at *4 (asserting that the burden of proving with certainty that the water sources used to irrigate the resort's golf course contained non-potable water "remains with THE RESORT [as applicant] to demonstrate, which it has failed to do"—as opposed to the mere *possibility* inferred by the court in *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296, 310, 97 P.3d 372, 386 (2004)). *Compare id.* at 314 n.45, 97 P.3d at 390 n.45 (rejecting the applicant's argument that the burden of proving compliance with the 1991 Order was *not* its burden to bear under the preponderance of evidence standard properly applied by the LUC).

[252] *See supra* notes 31–34 and accompanying text (discussing *PASH* footnote 15); *see also supra* notes 84–92 (discussing the "unjustifiable lack of respect" acknowledged by the *PASH* court, in partial reliance on the Aloha Spirit statute, as well as the Richardson Court's affirmative efforts to avoid the "primarily Western orientation and sensibilities" reflected in judicial decisions during the Territorial and Republic periods).

[253] The allegedly "consistent" behavior by the Maui County Planning Commission, *see supra* note 26 and accompanying text, in contravention of clear guidance from *PASH*, *see supra* notes 31–34 and accompanying text, deserves a stinging rebuke from the Hawai'i Supreme Court, regardless of how the court decides the question whether HRS section 201H-38 allows for exemptions from HRS section 205A-26(2)(C) currently pending review on certiorari from the ICA in *Preserve Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n* (*PPKAA*), No. CAAP-15-0000478, 2020 WL 5512512 (Haw. Ct. App. Sep. 14, 2020), *cert. granted*, 2021 WL 195053 (Haw. Jan. 20, 2021).

> how political [or economic] concerns frame the legal questions, and how societal institutions and differing segments of the populace will be affected by the court's decision[s].[254]

To correct course and return to the path carved out by CJ Richardson and carried on by his former law clerks Melody MacKenzie, Robert Klein, and Simeon Acoba, this article urges the Hawai'i Supreme Court to demonstrate increased fidelity to the (sometimes case-dispositive) standards of review under the Hawai'i Administrative Procedure Act, as codified in HRS section 91-14(g), rather than jurisprudential standards applicable within other jurisdictions[255] or based upon standards of review rooted in otherwise inapplicable statutory schemes.[256]

Instead of applying agency deference principles at odds with the Hawai'i Constitution, the court should recognize that "the ultimate authority to interpret and defend [state constitutional guarantees] in Hawai'i rests with the courts of this state."[257] Such an approach would be consistent with

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[254] Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765, 781 (2017) (quoting Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 291–92 (2005); *see also* Yamamoto, *Courts and the Cultural Performance*, *supra* note 92. Further critical-contextual analysis of these decisions will be pursued in a subsequent publication. *See supra* notes * and 6.

[255] *See supra* note 245 (discussing Application of Hawaii Elec. Light Co. (*In re HELCO*), 60 Haw. 625, 594 P.2d 612 (1979), which cites decisions from outside Hawai'i as support for its reliance on agency deference principles).

[256] *See supra* notes 230-31, 233, and accompanying text (discussing Paul's Elec. Serv., Inc. v. Befitel, 104 Hawai'i 412, 91 P.3d 494 (2004))

[257] Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 165, 324 P.3d 951, 975 (2014) (quoting *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000)); *id.* at 172, 324 P.3d at 982 (quoting *Waiāhole I*, 94 Hawai'i at 132, 9 P.3d at 444, for the proposition that "'mere compliance by agencies with their legislative authority' may not be sufficient to determine if competing uses are properly balanced in the context of uses protected by the public trust and its foundational principles"). *See also Ching v. Case*, 145 Hawai'i 148, 178, 449 P.3d 1146, 1176 (2019) ("[W]hile overlap may occur, the State's constitutional public trust obligations exist *independent of any statutory* [or regulatory] *mandate* and must be fulfilled regardless of whether they coincide with any other legal duty."); Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 415, 363 P.3d 224, 263 (2015) ("An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision"); *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui I*), 116 Hawai'i 481, 491, 174 P.3d 320, 330 (citing *In re* Water Use Permit Applications (*Waiāhole II*), 105 Hawai'i 1, 15–16, 93 P.3d 643, 657–58 (2004), for the proposition that "this court must take a 'close look' at the Water Commission's action to determine if it complies with the Water Code and the public trust doctrine"); Kelly v. 1250

seemingly neglected portions of HRS section 1-1 that precede the phrase "established by Hawaiian usage[,]" specifying that "[t]he common law . . . as ascertained by . . . American decisions" does not apply where in conflict with the "the laws of the State, or fixed by Hawaiian judicial precedent."[258] In addition, governmental decisionmakers in the legislative, executive, and judicial branches should seriously consider their authority to "contemplate and reside with the life force and give consideration to the 'Aloha Spirit'" under HRS section 5-7.5(b).[259] Doing so could help avoid the reoccurring cultural insensitivity and unjustifiable lack of respect associated with ignoring familial and kinship relationships between Kānaka Maoli and natural elements—whether involving ethnographic landscapes like Mauna Kea, or other culturally significant locations in these Hawaiian islands.[260]

Oceanside Partners, 111 Hawai'i 205, 221, 140 P.3d 985, 1011 (2006) ("[t]he court's interpretations of . . . set forth in *Ka Pa'akai* [*O Ka 'Āina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000),] implicate questions of constitutional law, which this court answers 'by exercising [its] own independent judgment based on the facts of the case"); *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455 ("[T]he ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state.").

[258] HAW. REV. STAT. § 1-1 (2009 & Supp. 2019), quoted *supra* note 15.

[259] *See supra* notes 90, 148 and accompanying text.

[260] *See supra* notes 4–8, 34, 58, 84–92, 102–06, 167–73, 181, 187, 223–27 and accompanying text; *see also* Mana Maoli, *supra* note 14 (reimagining ISRAEL KAMAKAWIWO'OLE, HAWAI'I '78 (Mountain Apple Co. 2010)).