

# Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources

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**H**ānau ka 'āina, hānau ke ali'i, hānau ke kanaka. Born was the land, born were the chiefs, born were the common people. Mary Kawena Pukui, *Ōlelo No'eau, Hawaiian Proverbs & Poetical Sayings* 56 (1983). So begins an ancient proverb that describes the inseparable spiritual—and genealogical—connection between Native Hawaiians and their land and environment. For Native Hawaiians, the land, or 'āina, is not a mere physical reality. Instead, it is an integral component of Native Hawaiian social, cultural, and spiritual life. Like many indigenous peoples, Native Hawaiians see an interdependent, reciprocal relationship between the gods, the land, and the people.

In stark contrast to the Western notion of privately held property, Hawaiians did not conceive of land as exclusive and alienable, but instead communal and shared. The land, like a cherished relative, cared for the Native Hawaiian people and, in return, the people cared for the land. The principle of *mālama 'āina* (to take care of the land) is therefore directly linked to conserving and protecting not only the land and its resources but also humankind and the spiritual world as well. See Lilikalā Kame'eleihiwa, *Native Land and Foreign Desires: Pehea Lā E Pono Ai?* (1992).

Western colonialism throughout the eighteenth and nineteenth centuries dramatically altered Hawaiians' relationship to the land. Hawaiian lands were divided, confiscated, sold away; Native Hawaiian cultural practices were barred and ways of life denigrated. In 1893, the independent and sovereign Hawaiian nation was illegally overthrown with direct U.S. military support. Large sugar plantations diverted water from Hawaiian communities. More Hawaiians were separated from the land, thereby severing cultural and spiritual connections. See Jonathan Kay Kamakawiwo'ole Osorio, *Dismembering Lāhui: A History of the Hawaiian Nation to 1887* (2002); Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (rev. ed. 1999).

Hawaiians in their homeland still bear the worst socioe-

conomic indicators of all of Hawai'i's people—the highest rates of illness, prison incarceration, and homelessness, and the lowest rates of higher education and family income.

But Native Hawaiians are again reclaiming their land. In partnership with conservation nonprofits and governmental bodies, Native Hawaiians are regaining control over the management of their land, environment, and cultural resources. Three recent land reclamations, described below, represent some of the first-ever returns of lands to Native Hawaiian ownership and control in over a century. The 25,856-acre Wao Kele o Puna rainforest on the Big Island of Hawai'i was successfully returned to Native Hawaiian hands after a more than twenty-year legal and political battle sparked by a private entity's attempts to clear the native forest to drill for geothermal energy. Waimea Valley, a lush and culturally rich tract of land on the north shore of O'ahu—originally managed by high-ranking Hawaiian priests, later sold to private interests for an adventure park and threatened with subdivision into luxury home lots—has returned to Native Hawaiian ownership. Finally, and perhaps most well known, is the return of Kaho'olawe island to the protection and stewardship of the Native Hawaiian people after the ravages of deforestation, massive erosion, and nearly fifty years of U.S. military live-fire bombing. In each case, Hawaiian organizations and individuals are participating in the protection of natural and cultural resources and ensuring that Native Hawaiian traditions and customs will be practiced on those lands far into the future.

Through these three examples, this essay explores the current "environmental justice" model and posits a new type of Native Hawaiian "restorative environmental justice" that takes into account the unique experiences of indigenous Hawaiians. The traditional environmental justice model typically focuses on the siting of hazardous facilities near communities of color and the poor. This traditional model often furthers environmental justice by providing communities of color and indigenous communities the tools they need to advocate effectively for the siting and health outcomes they seek. See Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 320 (2001).

While effective, the framework often fails to comprehend complex issues of indigenous peoples' spiritual, social, and cultural connections to the land and natural environ-

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ment. It also sometimes disregards the history of Western colonization and indigenous groups' ongoing attempts to achieve cultural and economic self-determination. For example, "while some might describe the siting of a waste disposal plan near an indigenous American community as environmental racism, that community might say that the wrong is not racial discrimination or unequal treatment; it is the denial of group sovereignty—the control over land and resources for the cultural and spiritual well-being of a people." Yamamoto & Lyman, at 312. For many indigenous peoples, environmental justice is thus largely about cultural and economic self-determination as well as about belief systems that connect their history, spirituality, and livelihood to the natural environment. See Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996).

The land and environmental controversies, discussed below, are partly about the imposition of disproportionate environmental burdens on Hawaiian communities—the bombing of Kaho'olawe, drilling in the Wao Kele o Puna forest, and commercial development in Waimea Valley—but they are also about something much more. For Hawaiians, restorative environmental justice is in large part about doing justice through reclamation and restoration of land and culture. A new environmental justice framework thus expands the focus beyond discrimination and ill health to integrate community history, political identity, and socioeconomic and cultural needs in defining environmental problems and fashioning remedies. See Yamamoto & Lyman, at 313.

These Hawaiian land reclamations are therefore types of restorative justice; not only are they attempts to preserve the fragile ecosystems of Hawai'i, they are efforts to restore to Native Hawaiians a measure of "sovereignty, economic self-sufficiency, and cultural restoration—an expansive, group-resonant type of environmental justice." Yamamoto & Lyman, at 355.

### *Wao Kele o Puna*

In Wao Kele o Puna, a 25,856-acre native rain forest draped on the flanks of Kīlauea Volcano, three important elements converge—the spiritual and religious importance of the area to Native Hawaiians as the home of the Hawaiian fire goddess Pele; the traditional use of Wao Kele o Puna by generations of indigenous Hawaiians for subsistence, cultural, and religious purposes; and the designation of these lands in the 1848 Māhele—a process that converted the Hawaiian communal land system into a Western private-property system—as Hawaiian government lands. Following the illegal overthrow of the Hawaiian government in 1893 by U.S. military-backed American businessmen, government lands, including Wao Kele o Puna, were "ceded" to the United States in the 1898 Joint Resolution annexing Hawai'i. When

Hawai'i became a state in 1959, the Admission Act provided that ceded lands, with some exceptions, were to be held by the new state as a public trust for five trust purposes, including "the betterment of conditions of native Hawaiians." See Section 5(f), Admission Act, Pub. L. No. 86-3, 73 Stat. 4.

Wao Kele o Puna is a descriptive term that means the rain belt of Puna—an area where clouds, attracted by the forests, accumulate. It is thought that Wao Kele o Puna may be an abbreviated form of Wao Oma'u o Kele o Puna, referring to Oma'u, one of Pele's aunts and a senior member of the Pele clan. See *Pele Defense Fund v. Estate of James Campbell*, Findings of Fact and Conclusions of Law, Civ. No. 89-089 (Haw. 3d Cir. 2002), at 5-6. In one part of Wao Kele, there were *mala'ai*, or dryland garden plots of land, used by Hawaiian families residing in the Kalapana district for subsistence and cultural activities. Early Hawaiians used Wao Kele's lands for planting *kukui*, ginger, *kalo*, *ti* leaf, and *awa*. There are at least two known large lava tube systems extending into Wao Kele. Both systems contain archaeological evidence of prehistoric and historic use of the tubes and surface lands for hunting, gathering, warfare, and burial purposes. *Id.*

Wao Kele is the last intact large native lowland rainforest in Hawai'i, providing essential habitat to more than 200 native plant and animal species, including threatened or endangered species. The forest also serves as a protected passageway for native birds traversing between the upland to the ocean. Wao Kele o Puna is also critical to water quality on Hawai'i island because it covers over 20 percent of the Pāhoā aquifer, the largest drinking water source on the island. See *Agreement Announced to Protect More Than 25,000 Acres of Rainforest on Hawaii Island*, OHA Press Release, September 12, 2005.

The legal controversy over Wao Kele o Puna began in the early 1980s when a large landowner, Campbell Estate, proposed to develop geothermal energy on a 25,000-acre parcel of forested conservation land known as Kahauale'a, located adjacent to Volcanoes National Park and upland from Wao Kele o Puna. The proposal resulted in community opposition and a series of contested case hearings, during which new lava flows overran the Kahauale'a area, making geothermal development untenable. The state, which supported geothermal development, proposed exchanging Campbell's Kahauale'a lands with the adjacent Wao Kele o Puna and part of the Puna Forest Reserve. See *Dedman v. Board of Land and Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988). This was an astonishing proposition—Wao Kele o Puna was designated a Natural Area Reserve, a designation under state law for pristine areas supporting unique natural resources to be preserved in perpetuity. See HAW. REV. STAT. § 195-1, *et. seq.*

Moreover, Native Hawaiians, and in particular those who honor or are genealogically connected to Pele and her 'ohana or extended family, believe that geothermal drilling desecrates Pele's body and takes her energy and lifeblood. In two additional contested case hearings, this time centered around designation of a portion of Wao Kele o Puna as a

geothermal resource subzone and Campbell's application for a conservation district use permit to allow actual drilling, individual Pele practitioners challenged the proposed drilling on First Amendment free exercise of religion grounds. On appeal, the Hawai'i Supreme Court, although acknowledging the sincerity of the religious claims at issue, determined that there was no burden on the exercise of religion. The court found controlling the absence of proof that religious ceremonies were held in the specific area proposed for development. See *Dedman*, 740 P.2d at 33.

The Pele Defense Fund, including Pele practitioners and Native Hawaiians living in *ahupua'a*—traditional land divisions running from the sea to the mountains—adjacent to Wao Kele o Puna, then brought suit in federal court challenging the land exchange between the state and Campbell Estate. The plaintiffs argued that the lands had been exchanged without any attempt to assess the impact on the trust purposes set forth in the Admission Act and that at least two of the trust purposes—the betterment of the conditions of Native Hawaiians and public use of the lands—were violated by the exchange. The plaintiffs also contended that because Section 5(f) of the Admission Act requires that the use of trust lands be consistent with the constitution and laws of the state, state laws protecting the lands must be read as part of the Section 5(f) trust. In this instance, state law had set aside the trust lands in a Natural Area Reserve, and Native Hawaiians used the lands for traditional access, gathering, and religious practices protected under the state Constitution. See HAW. CONST. art. XII, § 7. Ultimately, the case was dismissed on the grounds that it was barred by the state's immunity under the Eleventh Amendment. See *Ulaleo v. Paty*, 902 F. 2d 1395, 1399–1400 (9th Cir. 1990).

The Pele Defense Fund also challenged the land exchange in state court. In *Pele Defense Fund v. Paty*, the Hawai'i Supreme Court held that the Ninth Circuit's decision in *Ulaleo*, and the doctrine of *res judicata*, barred re-litigation of most claims regarding the land exchange. *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992).

The case, however, was an important victory for Native Hawaiians who used the Wao Kele o Puna area for hunting, gathering, and religious and cultural purposes. The Hawai'i Supreme Court recognized that customary and traditional rights, which were thought to be limited by residency within an *ahupua'a*, could be exercised for subsistence, cultural, and religious purposes on undeveloped lands beyond the boundaries of the *ahupua'a* of residence, where "such rights

have been customarily and traditionally exercised in this manner." *Id.* at 1272. On remand to the Third Circuit Court of Hawai'i, Pele Defense Fund members were able to validate their assertions that they exercised subsistence, cultural, and religious practices in Wao Kele o Puna—beyond the boundaries of the *ahupua'a* in which they actually resided—in accordance with ancient custom and tradition. The court permanently enjoined Campbell Estate from excluding Hawaiian subsistence or cultural practitioners, their *'ohana*, and those accompanying them from entering undeveloped portions of the land to perform customarily

and traditionally exercised subsistence and cultural practices. See *Pele Defense Fund v. Estate of James Campbell*, Final Judgment, Civ. No. 89-089 (Haw. 3d Cir. 2002), at 2.

Efforts to stop geothermal development in Wao Kele o Puna also took the form of civil disobedience and political protest. In March 1990, more than 1,000 protestors, led by the Pele Defense Fund and the Big Island Rainforest Action Network, marched to the locked gates leading to Campbell's geothermal site in Wao Kele o Puna; more than 100 people were arrested. See Theresa Dawson, *Hawaiian, State Agencies Race to Reclaim Wao Kele O Puna from Campbell Estate*, ENVIRONMENT HAWAII'I, Oct. 2005, at 5.

Ironically, even with government support, Campbell's geothermal partner, True Geothermal Developers, could not make good on the promise of geothermal and in 1994 the project was abandoned. *Id.* The land lay idle, and in 2001, Campbell Estate, which

by its own terms is set to dissolve in 2007, announced its intent to sell Wao Kele o Puna.

Pele Defense Fund representatives immediately met with the Hawai'i project manager of the Trust for Public Land (TPL), a national nonprofit land conservation organization, to explore how Wao Kele o Puna could be preserved. TPL, working with the State Department of Land and Natural Resources (DLNR) over a several-year period, was able to get \$3.4 million from the federal Forest Legacy Program, which protects forests by providing federal funds to buy conservation easements over, or title to, important lands for purchase of Wao Kele o Puna. Campbell Estate, however, was asking \$3.65 million; TPL and DLNR were \$250,000 short. *Id.* at 3. The Office of Hawaiian Affairs (OHA), established under the Hawai'i State Constitution to receive a portion of the revenues generated from ceded lands and to act to better the conditions of the Native Hawaiian people, stepped forward to provide the additional funding. See HAW. CONST. art. XII,

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§§ 5-6; HAW. REV. STAT. ch. 10.

OHA had provided partial funding for a previous TPL acquisition, but the agreement reached by OHA, TPL, and DLNR was groundbreaking—OHA would receive title to Wao Kele o Puna. TPL negotiated the deal for the property, purchased it from Campbell Estate, and then conveyed Wao Kele o Puna to OHA in July 2006.

Although state law allows OHA to hold title to lands, it has never had a land base and admittedly lacks land management experience. Thus, under an agreement reached by OHA and DLNR, they, along with the surrounding communities, will manage the forest in partnership until OHA is ready to take over the responsibility on its own. The concept is that DLNR will teach OHA about modern land-management practices, while OHA will educate DLNR about traditional Hawaiian ones.

The reclamation of Wao Kele o Puna is the first return of ceded lands to Native Hawaiian ownership since the 1893 overthrow of the Hawaiian kingdom and, for Native Hawaiians, holds promise as the beginning of a land base for a future Hawaiian nation. As OHA explained, it is “acquiring the area to protect the natural and cultural resources on the land, to guarantee that Native Hawaiians can continue to exercise traditional and customary activities on the land, and to ensure that OHA can pass it on to a sovereign governing entity.” See *Agreement Announced to Protect More Than 25,000 Acres of Rainforest on Hawaii Island*, OHA Press Release, September 12, 2005.

### *Waimea Valley*

Waimea Valley, a 1,875-acre tract of land on the north shore of O’ahu, is one of the last undeveloped watersheds on the island. The valley is an intact *ahupua’a*, a traditional Hawaiian mountain-to-sea land division that encompassed all of the resources needed by its residents and was managed to ensure sustainable use of resources.

Known as the “Valley of the Priests,” Waimea Valley has been a sacred place for Native Hawaiians for centuries. In about 1090, O’ahu ruling chief Kamapua’a recognized the spiritual importance of the valley and awarded its oversight to *kahuna nui* (high priests) of the Pa’ao line. The *kahuna nui* erected *heiau*, or temples, in and around the valley, including Pu’u O Mahuka, O’ahu’s largest *heiau*. The valley today also contains burial caves, agricultural terraces, ancient living sites, and countless cultural sites that have never been fully surveyed or inventoried. See Joseph

Kennedy, “*Valley of the Priests*”: *Highlights of Waimea Valley’s Extraordinary History*, KA WAI OLA, Mar. 2006, at 19; Derek Ferrar, “*A Cultural Resource of the Highest Possible Order*”: *Study Doubles Number of Known Archaeological Sites in Waimea*, KA WAI OLA, Mar. 2006, at 14.

In the 1800s, powerful Western influences swept nearly all Native Hawaiians from the valley and ended nearly 800 years of *kahuna nui* stewardship. In 1848, the Mōchele—a process advocated by Western business interests and legal advisors to King Kamehameha III—converted the Hawaiian communal land system into a Western private-property system and operated to strip Native Hawaiians of their lands. See Melody Kapilialoha MacKenzie, *Native Hawaiians and the Law: Struggling with the He’e*, 7 ASIAN-PAC. L. & POL’Y J. 7 (2006). After the last *kahuna nui*, Hewahewa, died, the newly formed Land Commission offered to give his last descendant outright ownership of about half of the valley on the condition that she abandon any claim to the rest. She was required to formally present a claim to the Land Commission by a certain time but failed to do so. She fell heavily into debt and had to mortgage and lease the land. The property was foreclosed after her death in 1886. See Kennedy, at 19.

Over the next twenty years, the valley changed ownership at public auction multiple times. It was bought in 1929 by a major pineapple and sugar cane company, which leased the land to cattle ranchers. After the attack on Pearl Harbor, the military built artillery positions and other installations around the valley.

The 1960s and 1970s ushered in a period of commercialism that further shadowed the valley’s environmental and spiritual history. The Waimea Falls Ranch and Stables catered to tourists by offering stagecoach rides

with actors who rode alongside playing “cowboys and Indians.” A restaurant and gift shop was built, guided tours were offered in trolleys, and visitors could watch cliff diving or hula shows. See Kennedy, at 19; see also *Waimea Falls Park, Inc. v. Brown*, 712 P.2d 1136 (1985) (describing Waimea Falls Park, Inc.’s ownership interest in the property).

A 150-acre arboretum and botanical garden was then established for native, threatened, and endangered plants from Hawai’i and around the world. In 1996, however, a New York theme park developer purchased the valley by assuming the \$12 million mortgage of Attractions Hawaii, the previous owner. The valley was transformed into an “adventure park,” with all-terrain vehicle and mountain bike trails. Struggling financially, the developer tried to sell the

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valley but was forced to place it under bankruptcy protection.

In 2002, the City and County of Honolulu filed suit to acquire the property through condemnation. As the trial to set a reasonable price for the valley neared in 2005, the city received an offer for settlement that would have divided ownership of the valley, with the developer retaining more than 1,500 acres in the back of the valley for the possible development of luxury residences. After intense community outcry, the City Council rejected the settlement.

On the heels of the Wao Kele o Puna acquisition, OHA and TPL, along with others, joined forces again to permanently protect the environmental and culturally important resources in the valley. After months of skillful negotiation and intense community organizing, it was announced in January 2006 that the valley would be saved. A unique alliance of the city, DLNR, OHA, the U.S. Army, and the Audubon Society purchased the valley from the developer for \$14 million, with legal title assumed by OHA for eventual transfer to a future Native Hawaiian governing entity. The Audubon Society will continue to operate the Waimea Valley Audubon Center, an ecological and cultural visitor center, on about 300 acres of the valley. The agreement will keep the valley zoned conservation, and a public easement will further prevent future development.

As owner of the valley and in partnership with the DLNR, OHA has pledged to ensure the protection and preservation of the valley's native and endangered species and cultural and historic resources. Derek Ferrar, *Waimea Valley Saved!*, KA WAI OLA, Feb. 2006, at 8. For OHA and Native Hawaiians, the valley is about much more than the preservation of its lush environment. As OHA Chairwoman Haunani Apoliona observed, it is also about the valley's robust cultural and genealogical connection to the Hawaiian people: "There is a long genealogy and history to Waimea, as there is a long genealogy and history to our Hawaiian people . . . OHA will ensure that Native Hawaiians will have a direct benefit and relationship with Waimea Valley. OHA will also ensure that the people of Oahu, the State of Hawai'i, the nation and the world grow in respect for, are renewed by, care for and support, learn from and celebrate this land of our ancestors, Waimea Valley." See Crystal Kua & Leila Fujimori, *Agreement Preserves Waimea for \$14.1 Million*, HON. STAR. BULL., Jan. 14, 2006, at A1.

### *Kaho'olawe*

The island of Kaho'olawe is the smallest of the eight main islands in the Hawaiian archipelago. Centuries ago, ancient Hawaiians dedicated the island to Kanaloa, the god of the ocean, ocean currents, and navigation. Kaho'olawe was viewed as the physical embodiment of Kanaloa, and the god's *mana*, or spiritual power, was held within the island's soil. Also known as Kukulū Ka'iwi O Ka

'Āina, or "the bone of the land standing upright," and Kohemālamalama O Kanaloa, "the shining womb of Kanaloa," the island has been a center of religious, cultural, historical, and political importance to Native Hawaiians. See Noa Emmett Aluli & Daviana Pōmaika'i McGregor, *Mai Ke Kai Mai Ke Ola, From the Ocean Comes Life: Hawaiian Customs, Uses, and Practices on Kaho'olawe Relating to the Surrounding Ocean*, 26 HAWAIIAN JOURNAL OF HISTORY 235 (1992); *Kaho'olawe Island: Restoring a Cultural Treasure*, Final Report of the Kaho'olawe Island Conveyance Commission to the Congress of the United States, at 17 (Mar. 31, 1993). Carbon dating of archeological sites shows that the island was inhabited by 1000 A.D.

For hundreds of years the island was fruitful and supported Native Hawaiian communities that were skilled in astronomy, navigation, fishing, and adz making. The island's western tip was one point in the navigational triangle used to navigate between Hawai'i and the South Pacific.

*Kaho'olawe Aloha No: A Legislative Study of the Island of Kaho'olawe*, at 35 (1978). Ancient Hawaiians from all of the islands also traveled to Kaho'olawe to deposit their troubles in special portions of the island in acts of spiritual cleansing.

During the 1800s, Western colonialism dramatically reduced the island's population. Although no sale of any part of the island was made, in 1858 a lease of the entire island was granted for sheep ranching, marking the beginning of years of ranching operations. Throughout the ranching period, the uncontrolled grazing of cattle, sheep, and goats contributed to the massive erosion and environmental degradation of the island. Peter MacDonald, *Fixed in Time: A Brief History of Kahoolawe*, 6 *Hawaiian Journal of History*, at 73 (1972); Carol Silva, Environment Impact Study Corp., *Kaho'olawe Cultural Study Part 1: Historical Documentation*, for the Dept. of the Navy, at 76 (1983).

In 1898, Kaho'olawe, which was Hawaiian government land, was "ceded" to the United States upon annexation of Hawai'i. See Stephen Kinzer, *Overthrow: America's Century of Regime Change from Hawaii to Iraq* (2006) (describing overthrow of Hawaiian nation).

Through a lease with the Kaho'olawe Ranch Company, the U.S. military began its use of Kaho'olawe as a practice target for aerial bombs in the 1920s. During World War II, the U.S. government took control of the island, banned all civilian access, and closed traditionally used fishing areas. In a 1953 executive order, President Eisenhower set the island aside for massive target practice by navy bombers. The navy conducted ship-to-shore bombardment of the island and submarine commanders tested torpedoes by firing them at Kaho'olawe's shoreline cliffs. The bombing of Kaho'olawe (including surface-to-air missiles and underwater and surface high-explosive detonations) continued unabated for nearly half a century, causing massive damage to hundreds of cultural sites and fragile environmental resources.

When Hawai'i became a state in 1959, the Admissions Act stated that lands set aside pursuant to any act of Congress, executive order, or proclamation of the presi-

dent were to remain the property of the United States if needed for continued use. See Admissions Act, Pub. L. No. 86-3, 73 Stat. 4. Thus, military control of the island was guaranteed for the unascertainable future.

By the 1970s, Native Hawaiians and nearby island residents could no longer accept the reverberations of bombs, the restricted fishing around the island, and the desecration of sacred lands. In 1971, Maui Mayor Elmer Cravalho and the nonprofit environmental organization Life of the Land brought suit against the Department of Defense under the newly enacted National Environmental Policy Act of 1969 (NEPA). In *Cravalho v. Laird*, Civ. No. 71-3391 (1972), the plaintiffs requested a halt to live-fire training and contended that NEPA required the navy to prepare an environmental impact statement (EIS) to document the effects of military use of the island. The navy responded that it planned to keep the island indefinitely, and if it were denied use of Kaho'olawe, it would be forced to cut back use of Pearl Harbor, thus depriving the state of a major source of income. The court did not order a halt to the bombing, but the navy was ordered to produce an EIS and the case was dismissed.

During the 1970s, a group of young Native Hawaiians founded the Protect Kaho'olawe 'Ohana (family), an organization dedicated to stopping the bombing and reclaiming Kaho'olawe for the Native Hawaiian people. An integral part of a growing political and cultural resurgence among Native Hawaiians, the group began a campaign to raise awareness about the destruction of their sacred land. In January of 1976, nine people landed on the island in an act of peaceful civil disobedience. Although the Coast Guard quickly escorted the protestors off the island and cited several for trespass, the 'Ohana continued its landings on the island. In conjunction with their continued landings, the 'Ohana filed a federal lawsuit against the Department of Defense, *Aluli v. Brown*, 437 F. Supp. 602, 604 (1977), to enjoin the navy from further bombing.

In early 1977, 'Ohana leaders George Helm and Kimo Mitchell returned to the island to search for two others who had remained on the island. In trying to paddle-surf back to Maui seven miles away, Helm and Mitchell were lost at sea. Their death marked a critical point in the 'Ohana's struggle to halt the bombings and reclaim Kaho'olawe.

While the *Aluli* appeal was pending in May of 1979, the 'Ohana and the navy began settlement negotiations. In October 1980, the parties entered into a Consent Decree. In it, the navy did not promise to cease live-fire training, but it did agree to use inert ordnance "to the maximum extent possible," prevent ordnance from landing in the surrounding waters and document and remove any that did, and clear ordnance from approximately 10,000 acres designated by the 'Ohana. The cleared areas were to be reserved for "religious, cultural, scientific, and educational purposes." See *Aluli v. Brown* Consent Decree and Order, Civ. No. 76-0380 (1980), at 4-5. The navy

also promised to take measures to protect historic sites, which specifically included adz quarries and burial sites. *Aluli v. Brown* Consent Decree, at 9-11. Finally, the navy agreed to give the 'Ohana limited access to the island to implement its environmental and cultural restoration plan.

In March of 1981, the entire island was listed on the National Register for Historical Places and designated the Kaho'olawe Archaeological District. In 1990, nearly fifty years after the bombing began, President Bush halted the bombing of Kaho'olawe. The United States transferred title to Kaho'olawe to the state in May of 1994 and established a joint venture among the federal and state governments and the 'Ohana to oversee restoration of the island. The navy was given ten years and allocated \$400 million to remove unexploded ordnance and to complete environmental restoration of the island.

The transfer and eventual control of the island was placed under the responsibility of the Kaho'olawe Island Reserve Commission (KIRC), part of DLNR. KIRC, now headed by Native Hawaiian Sol Kaho'ohalahala, has authority over all actions occurring on the island, including proper treatment of any burial sites discovered there and entering into stewardship agreements with Hawaiian organizations. KIRC works in partnership with the 'Ohana, which is the official steward of the island.

Four exclusive and perpetual purposes and uses of the island were made part of Hawai'i State law: the preservation and practice of customary and traditional Native Hawaiian rights for cultural, spiritual, and subsistence purposes; the preservation of the island's archaeological, historical, and environmental resources; rehabilitation, revegetation, habitat restoration, and preservation; and education. See H.R.S. Chapter 6K. Chapter 6K also guarantees that when a sovereign Native Hawaiian entity is established and recognized by the United States, the state will transfer management and control of Kaho'olawe to that entity.

The navy declared the island's cleanup complete in April of 2004. Even with the removal of 10 million pounds of metal, the cleanup fell far short of the promised 100 percent surface clearance and 30 percent subsurface clearance. About 70 percent of the island had been surface cleared, and about 9 percent was cleared to a subsurface level of four feet. Places on the island will likely never be cleared of ordnance. See Sterling Kini Wong, *Kaho'olawe Now*, KA WAI OLA, May 2006, at 10; Timothy Hurley, *Contractor Concludes Kaho'olawe Cleanup*, HON. ADV., Apr. 9, 2004, at B-1.

Despite the incomplete navy cleanup, KIRC and the 'Ohana carried on their restoration plans, including planting over 100,000 native species on the island. The current focus of restoration is to prevent further erosion and to build up soil and ground cover to enable reforestation. Once ground cover shrubs and grasses are restored, trees will be planted to further hold in soil and moisture, and

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## Environmental Justice


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eventually to help bring rain back to the island. See Wong, at 10.

The 'Ohana has focused on restoring many important cultural sites, such as the Hale O Papa *heiau*. Between February and October each year, volunteers access the island through the 'Ohana to help in restoration efforts. In November through January, cultural practitioners access the island for the annual *Makahiki*, a traditional Hawaiian celebration of the harvest and time of personal, spiritual, and cultural renewal.

Hawaiians have long recognized Kaho'olawe as a *wahi pana* (a legendary place) and *pu'uhonua* (a place of refuge), and today it is being protected and restored as a result of Native Hawaiian efforts. Native Hawaiians are participating directly in the preservation and protection of Kaho'olawe's archaeological, historical, and environmental resources and are engaged in rehabilitation and rehabilitation of the island. As KIRC director Sol Kaho'ohalahala recognized, "Aloha 'Āina [(love for the land)] and the navy's bombing target range on the island

of Kaho'olawe were in direct conflict. The movement to stop the bombing of Kaho'olawe was significant and symbolic of the struggle that we faced as a people disenfranchised in their own island home." Sol Kaho'ohalahala, *Reflections of the Past Thirty Years*, KOHEMĀLAMALAMA, Winter 2006.

As these three environmental controversies and successes illustrate, Native Hawaiians are doing justice by reclaiming and restoring Hawaiian land and culture. Although these land reclamations are attempts to preserve Hawai'i's natural environment, they are also hard-fought efforts to restore to Native Hawaiians a measure of self-determination, cultural restoration, and economic self-sufficiency. This expansive view of restorative "environmental justice" goes beyond rectifying the discriminatory siting of toxic facilities. The framework embraces the complexity of the Native Hawaiian experience by integrating cultural values, history, socioeconomic power, and group needs and goals in defining environmental problems and fashioning meaningful remedies. 

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of its land for carbon sequestration purposes with other tribes expected to commit additional lands in the future. Prospectively, NTEC expects to build upon its carbon sequestration activities to further address the adverse impacts faced by tribes as a result of global warming.

### *The Future of Tribal Air Quality Management*

While much has been accomplished by tribes and through the efforts of NTEC, a number of challenges lie ahead, particularly during a time of dwindling federal resources. Tribes must be prepared to focus on filling data gaps through development of comprehensive emissions inventories that include all relevant air pollutants and a national tribal monitoring strategy that ensures tribes have the requisite resources to monitor the myriad of pollutants that threaten their health and welfare. Other challenges include increasing their capacity to better address indoor air quality concerns, a growing concern among native and nonnative populations alike; air toxics and associated mitigation measures; new source review, particularly as EPA moves to finalize a rule that will provide tribes with the ability to regulate minor sources; Class I redesignations of tribal lands (which has been recently stalled for the Forest County Potawatomi Tribe); and global warming that affects tribes nationwide, not just those in northern climates.

With dwindling federal resources, tribes may best be

served by partnering with both tribal and nontribal groups. As noted for WRAP, tribes involved with this effort have been the beneficiaries of some tools that they would have unlikely acquired otherwise. Information sharing and protection is one challenge that must be addressed. Some tribes expect that their data will be protected from within and beyond a partnership. According to some tribal leaders and representatives, when a tribe's data have been made publicly available in the past, it has been sometimes used to the detriment of the tribe. Tribes, however, may no longer have a choice to withhold sensitive data if such data are gathered through the use of federal dollars. More federal agencies are expecting to receive such data, which may necessitate tribes to find alternative funding sources in order to keep their data private. Regardless, the data are needed to better serve the tribes and their air quality needs.

Since obtaining the opportunity for delegated regulatory authority to manage CAA programs in 1990, tribes have accomplished a lot in a short time. While many tribes are still conducting preliminary air quality activities, many more are taking on full or partial CAA programs. NTEC has complemented the efforts of tribes by managing and facilitating tribal participation in national and regional efforts while looking for other opportunities to enhance tribal air quality. As tribes move forward, a number of challenges lie ahead, but NTEC expects to provide its ongoing support in meeting such challenges with the intent of protecting and preserving tribal air quality. 