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PARTICIPATION IN PARADISE?: INDIGENOUS PARTICIPATION AND ENVIRONMENTAL DECISIONMAKING IN HAWAIʻI

Lindsay Peterson
Florida State University

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I. INTRODUCTION

Beyond the American-sponsored façade of Edenic beaches, lavish tropical resorts, and an enviably carefree lifestyle, Native Hawaiians bear a dark history. The Hawaiian monarchy was illegally overthrown by the American military in 1893, plunging the Native Hawaiian people into an ongoing struggle to retain autonomy in a land increasingly subject to American control.[1] Western dominance has made it difficult, and sometimes impossible, for Native Hawaiians to participate in the decisionmaking processes that determine the policies that impact them. Native Hawaiians' inability to participate in environmental management decision making has led to poor environmental justice[2] outcomes including disproportionate health impacts, loss of control over water quality and access, threats to traditional and customary rights, and diminished access to sacred sites.[3]

In response to the weakening of Native Hawaiian voices in decisionmaking forums and the associated negative effects, an ongoing sovereignty movement has called for Hawaiian independence since Hawai'i's annexation to the United States in 1959.[4] Some Native Hawaiians, however, believe decolonization is unlikely and have instead called for the United States government to recognize the tribal sovereignty of the Native Hawaiian people[5]—a benefit held by 574 Indian tribes in the contiguous United States and Alaska.[6] Despite the promulgation of a rule by the Department of the Interior setting forth a procedure by which Native Hawaiians might achieve tribal sovereignty[7] and a decades-long push for tribal sovereignty by several

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[1] *See* Davianna Pomaika'i McGregor, *Recognizing Native Hawaiian Rights: A Quest for Sovereignty*, *in* ASIAN AMERICAN STUDIES NOW: A CRITICAL READER 99, 106 (Jean Yu-Wen Shen Wu & Thomas Chen eds., Rutgers University Press 2010).

[2] *See Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice. ("'Environmental justice' means the just treatment and meaningful involvement of all people regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment[.]").

[3] *See e.g.*, Ku'uwehi Hiraishi, *UH Report: Hawaiian Culture is Just What the Doctor Ordered*, HAW. PUB. RADIO (Dec. 16, 2020), https://www.hawaiipublicradio.org/local-news/2020-12-16/uh-report-hawaiian-culture-is-just-what-the-doctor-ordered; *see* Carmichael v. Bd. of Land & Nat. Res., 506 P.3d 211 (2022); Ming Tanigawa-Lau, *The State's Kuleana: Deconstructing the Permitting Process for the Thirty-Meter Telescope and Finding Restoration through Systemic Validation of Native Hawaiian Rights*, 68 UCLA L. REV. 1390, 1393 (2022).

[4] *See* Claire Wang, *Covid spike reignites sovereignty debate among Native Hawaiians,* NBC NEWS (Aug. 30, 2021), https://www.nbcnews.com/news/asian-america/covid-spike-reignites-sovereignty-debate-native-hawaiians-rcna1761; Peter Apo, *Hawaiians Must Agree on the Meaning of Sovereignty to Achieve it*, HONOLULU CIV. BEAT (Sept. 26, 2021), https://www.civilbeat.org/2021/09/peter-apo-hawaiians-must-agree-on-the-meaning-of-sovereignty-to-achieve-it/; Kristin Rados, *130th anniversary of Hawaiian Kingdom overthrow brings keiki and kūpuna together*, HAW. PUB. RADIO (Jan. 17, 2023), https://www.hawaiipublicradio.org/local-news/2023-01-17/onipaa-hawaiian-kingdom-overthrow-hundreds-of-native-hawaiian-keiki-and-kupuna.

[5] M.J. Palau-McDonald, *Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands*, 57 HARV. C.R.-C.L. L. REV. 393, 396-97 (2022).

[6] *Federally recognized Indian tribes and resources for Native Americans,* USA GOV., https://www.usa.gov/tribes#:~:text=for%20Native%20Americans,Federally%20Recognized%20Indian%20Tribes,contiguous%2048%20states%20and%20Alaska.

[7] Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, 43 C.F.R. § 50 (U.S. Dep't of the Interior, Oct. 14, 2016).

Senators from Hawai‘i,[8] the federal government has yet to recognize Native Hawaiian tribal sovereignty.

Tribal sovereignty allows tribes[9] to establish their own form of government, define citizenship, establish laws and law enforcement systems, collect taxes, regulate land use, and entitles a tribe to protection under the federal government's trust obligation to sovereign tribes.[10] That said, it is unclear how federal recognition of tribal sovereignty would impact Native Hawaiian participation in environmental management decisionmaking. This note aims to evaluate that question by using the Ladder Model of Citizen Participation, developed by participation expert Sherry Arnstein, as a framework.

This note proceeds in three parts. Part I will present the history of Hawai‘i, the State's constitutional trust obligation to the Native Hawaiian people, and the State's failure to uphold this trust obligation. Part II will explore the current state of participation in environmental management decisionmaking by federally recognized sovereign tribes. Part II suggests that while the federal trust obligation does little to increase participatory outcomes for sovereign tribes, there are three features of tribal sovereignty which lead to increased participatory outcomes. Part III uses Arnstein's Ladder Model of Participation to analyze the anticipated impact of tribal sovereignty on the participatory rights of Native Hawaiians. This note argues that federally recognized tribal sovereignty would allow Native Hawaiians to achieve Citizen Control, the highest degree of citizen participation, in environmental management decisionmaking.

II. HAWAI‘I: THE HISTORICAL AND THE MODERN

A. Early Beginnings, the Kingdom of Hawai‘i, and the Illegal Overthrow of the Hawaiian Monarchy

Native Hawaiians lived peacefully amongst themselves and the land for many hundreds of years prior to contact with the West.[11] Upon contact with the West in 1778, the Native Hawaiian people began participating in international commerce, trading actively with China, England, and the United States.[12] In 1819, King Kamehameha I unified the Hawaiian islands for the first time, forming Hawai‘i's first unified monarchial government.[13] By 1823, the Hawaiian Kingdom had been considerably impacted by the settlement of foreign missionaries and

[8] Native Hawaiian Government Reorganization Act of 2011, S. 675, 112th Cong. §§ 5-6 (2011-2012).
[9] Under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479(a) (1994), "tribe" means "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe". For the purposes of this note, the term "tribe" will be used to include both federally recognized and non-federally recognized indigenous communities.
[10] *Understanding Tribal Sovereignty*, FED. BAR ASSOC. (Mar. 1, 2017) https://www.fedbar.org/blog/understanding-tribal-sovereignty/.
[11] McGregor, *supra* note 1, at 106; *see also* Patrick Kirch, *When Did the Polynesians Settle Hawai'i? A Review of 150 Years of Scholarly Inquiry and a Tentative Answer*, 12 HAWAIIAN ARCHAEOLOGY 1, 5-6 (2011).
[12] McGregor, *supra* note 1, at 106.
[13] *Id.*

whalers.[14] The settlers brought with them venereal and other infectious diseases, causing the Native Hawaiian population to wither to 135,000—a decline of sixty-six percent from the pre-contact population of 400,000.[15] Kamehameha II took the throne in 1819 upon the death of his father and, in 1840, transformed the government into a constitutional monarchy.[16] In 1848, King Kamehameha III proposed and initiated the Great Mahēle,[17] giving one-third of the land in Hawai‘i to the monarchy, one-third to the *ali‘i*[18] and *konohiki*,[19] and one-third to the *maka‘ainana*.[20] Although this redistribution of land was meant to give more land rights to the Hawaiian people, it ultimately paved the way for foreign purchase of Hawaiian lands.[21] Once foreigners were given the right to own land in 1850, the government began to sell its land to American corporate interests keen on developing sugar and pineapple plantations and expanding shipping and commerce capabilities in the Pacific.[22]

At this point in time, the United States treated the Kingdom of Hawai‘i the same way it did any foreign power, entering into treaties, trading, and interacting with the Hawaiian monarchs as it would France or Great Britain.[23] This changed in 1887, when a group of American agriculture interests forced King David Kalākaua, at gunpoint, to sign a governance document transferring the king's governing power to a new settler-friendly legislature and

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[14] *Id.*

[15] *See id.* Some scholars suggest the pre-contact population ranged from 683,000 to 1 million; *see also* Sara Kehaulani Goo, *After 200 Years, Native Hawaiians Make a Comeback,* PEW RESEARCH CTR. (Apr. 6, 2015), https://www.pewresearch.org/short-reads/2015/04/06/native-hawaiian-population/.

[16] McGregor, *supra* note 1, at 105.

[17] *Mahēle* means to divide, apportion, or cut into parts. (Neither the author nor the editors of this paper are Native Hawaiian speakers; the English translation of the Native Hawaiian term provided may only represent a portion of the full definition provided by the Hawaiian dictionary website cited in this footnote) *Mahēle,* ULULUKAU: THE HAWAIIAN ELEC. LIB., https://wehewehe.org/gsdl2.85/cgi-bin/hdict?e=q-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4--textpukuielbert%2ctextmamaka-----0-1l--11-en-Zz-1---Zz-1-home-mahele--00-3-1-00-0--4----0-0-11-00-0utfZz-8-00&a=d&d=D11847#hero-bottom-banner (last visited Mar. 23, 2023).

[18] Meaning chief, chiefess, or officer. *Ali‘i*, ULULUKAU: THE HAWAIIAN ELEC. LIB., https://wehewehe.org/gsdl2.85/cgi-bin/hdict?e=q-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4--textpukuielbert%2Ctextmamaka-----0-1l--11-en-Zz-1---Zz-1-home-alii--00-3-1-00-0--4----0-0-11-00-0utfZz-8-00&a=d&d=D67045 (last visited Mar. 23, 2023) (Neither the author nor the editors of this paper are Native Hawaiian speakers; the English translation of the Native Hawaiian term provided may only represent a portion of the full definition provided by the Hawaiian dictionary website cited in this footnote).

[19] Meaning headman of a land division, under the chief. *Konohiki,* ULULUKAU: THE HAWAIIAN ELEC. LIB., https://wehewehe.org/gsdl2.85/cgi-bin/hdict?e=q-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4--textpukuielbert%2ctextmamaka%2ctextandrew%2ctextparker%2ctextpeplace%2ctextclark-----0-1l--11-en-Zz-1---Zz-1-home-konohiki--00-4-1-00-0--4----0-0-11-00-0utfZz-8-00&a=d&d=D8914#hero-bottom-banner (last visited Mar. 23, 2023) (Neither the author nor the editors of this paper are Native Hawaiian speakers; the English translation of the Native Hawaiian term provided may only represent a portion of the full definition provided by the Hawaiian dictionary website cited in this footnote).

[20] Meaning the common people or the general public. *Maka‘ainana*, ULULUKAU: THE HAWAIIAN ELEC. LIB., https://wehewehe.org/gsdl2.85/cgi-bin/hdict?d=D70954&l=en&e=d-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4--textpukuielbert%2Ctextmamaka-----0-1l--11-en-Zz-1---Zz-1-home---00-3-1-00-0--4----0-0-11-00-0utfZz-8-00 (last visited Mar. 23, 2023) (Neither the author nor the editors of this paper are Native Hawaiian speakers; the English translation of the Native Hawaiian term provided may only represent a portion of the full definition provided by the Hawaiian dictionary website cited in this footnote).

[21] McGregor, *supra* note 1, at 106.

[22] *Id.*

[23] *Id.*

granted settlers the right to vote by making this right conditional on land ownership.[24] This gave the American businessmen the right to vote and, as the amount of land they owned increased, so did their influence.[25] The document became known as the Bayonet Constitution, due to the threat of force used to coerce the king to sign it.[26]

Although stripped of its power in the wake of the Bayonet Constitution, the Hawaiian monarchy was left intact for six more years until 1893 when the monarchy, headed by King Kalākaua's successor and sister Queen Lili'uokalani, was conspiratorially and illegally overthrown by a small group of non-Hawaiian residents of Hawai'i, headed by the United States Minister to the Kingdom of Hawai'i, John L. Stevens.[27] Stevens caused 162 armed naval forces of the United States to invade the Hawaiian Nation, storming the queen's residence, 'Iolani Palace, and trapping her inside.[28] Stevens then extended diplomatic recognition to a provisional government made up mostly of American settlers.[29] This was all done "without the consent of the native people of Hawai'i or the lawful government of Hawai'i, in violation of treaties between the two nations and of international law[,]" perpetuating a long history of a lack of consent in American interactions with the Native Hawaiian people.[30]

Nearly one year later, President Grover Cleveland responded to the coup by calling it an "act of war" and ordering that the United States "endeavor to repair" the "substantial wrong."[31] But the provisional government installed by Stevens refused to restore Queen Lili'uokalani to power, and President Cleveland, unwilling to risk American lives, declined to intervene.[32] On January 24, 1895, Queen Lili'uokalani was forced to abdicate her power to the provisional government while being held prisoner in her own palace.[33]

B. The Hawaiian Sovereignty Movement

Following the illegal overthrow of the Hawaiian monarchy, the United States annexed Hawai'i as a territory in 1898,[34] and it remained a territory until it was inducted into statehood in

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[24] *See id.*
[25] *See id.*
[26] McGregor, *supra* note 1, at 106.
[27] *Id.*
[28] *Id.* at 106-07.
[29] *Id.* at 107.
[30] *Id.*
[31] Memorandum from U.S. President Grover Cleveland to the U.S. Senate and House of Representatives regarding the overthrow of Hawaii's royal government, DIGIT. HISTORY (on file with Digital History), https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1283.
[32] McGregor, *supra* note 1, at 108.
[33] *Id.* The queen, once released from imprisonment, renounced her abdication. She claimed that the terms of the abdication had been falsely represented to her, with one of the conditions being that the royalists who had been arrested while trying to reinstall the monarchy would be freed. They were not. *Id.*
[34] *See* H.R.J. Res. 259, 55th Cong. (1898) (enacted), https://www.archives.gov/milestone-documents/joint-resolution-for-annexing-the-hawaiian-islands (last visited Mar. 23, 2023) Through this Resolution, the United States bestowed upon itself 1.75 million acres of land owned by the Hawaiian monarchy and government.

1959.[35] The movement for Hawaiian sovereignty has been ongoing since Hawai‘i became a state.[36] Though various Native Hawaiian groups support diverse arguments related to sovereignty, this note will focus on the argument for sovereignty advanced by the Native Hawaiian Government Reorganization Act (the "Akaka Bill") and the 2019 rule promulgated by the Department of the Interior entitled "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community" (hereinafter, "the DOI Rule").[37]

The Akaka Bill was first proposed by United States Senators from Hawai‘i, Daniel Akaka and Daniel Inouye in 2000.[38] The Bill was drafted to "explicitly and unambiguously clarify the trust relationship between Native Hawaiians and the United States."[39] The Bill would have recognized "the right of the Native Hawaiian people to reorganize a Native Hawaiian governing entity to provide for their common welfare and to adopt an appropriate constitution and bylaws" and would have given "the Native Hawaiian governing entity the inherent powers and privileges of self-government as an Indian tribe under applicable federal law."[40]

The Bill passed the United States House of Representatives in 2000 but failed to pass the Senate.[41] Although it was continuously reintroduced over the course of a decade, the Bill never received the votes necessary for introduction to the Senate floor.[42] The last version of the Bill was seen by the 112th Congress,[43] and Senator Akaka's retirement in 2013 "effectively marked the end of the bill."[44]

Perhaps affected by Senator Akaka's steadfast advocacy for Native Hawaiian tribal sovereignty, the Obama Administration's Department of the Interior issued the DOI Rule in 2016.[45] The rule sets forth a process by which the Native Hawaiian people can establish self-governance and "mark[s] a commitment by the executive branch to recognize a Native Hawaiian

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[35] For more information regarding Hawaii's induction into statehood, see McGregor, *supra* note 1, at 109-11; *see id.* at 109-10 (presenting an interesting argument that the state plebiscite should be considered invalid given that the Hawaiian plebiscite did not meet the three requirements of a free and fair plebiscite ("(1) neutrality of the plebiscite area; (2) freedom from foreign occupations; and (3) control of the administration of the plebiscite by a neutral authority").

[36] MICHAEL KIONI DUDLEY & KEONI KEALOHA AGARD, A CALL FOR HAWAIIAN SOVEREIGNTY 167 (1993).

[37] S. 675, 112th Cong. (2011-2012); Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, 43 C.F.R. § 50 (2016).

[38] McGregor, *supra* note 1, at 101.

[39] *Id.*

[40] S. 675, 112th Cong. (2011-2012).

[41] *See* Ian Falefuafua Tapu, *How to Say Sorry: Fulfilling the United States' Trust Obligation to Native Hawaiians by Using the Canons of Construction to Interpret the Apology Resolution*, 44 N.Y.U. REV. L & SOC. CHANGE 445, 480 (2020); *see generally* J. Kēhaulani Kauanui, *Resisting the Akaka Bill*, *in* A NATION RISING; HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 312 (Noelani Goodyear-Ka‘ōpua, Ikaika Hussey, and Erin Kahunawaika‘ala Wright eds., Duke University Press 2014) (discussing arguments in opposition to the Akaka Bill).

[42] Tapu, *supra* note 41.

[43] S. 675, 112th Cong. (2011-2012).

[44] Tapu, *supra* note 41.

[45] Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, 43 C.F.R. § 50 (2016).

government."[46] The process set forth by the DOI Rule requires that the Native Hawaiian community submit a formal request to reestablish a formal government-to-government relationship with the United States, including the following seven elements:

> a) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community drafted the governing document…
> b) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community determined who could participate in ratifying the governing document…
> c) The duly ratified governing document…
> d) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community adopted or approved the governing document in a ratification referendum…
> e) A written narrative with supporting documentation thoroughly describing how and when elections were conducted for government offices identified in the governing document…
> f) A duly enacted resolution of the governing body authorizing an officer to certify and submit to the [DOI] Secretary a request seeking the reestablishment of a formal government-to-government relationship with the United States; and
> g) A certification, signed and dated by the authorized officer, stating that the submission is the request of the governing body.[47]

Mobilizing the Native Hawaiian community to meet these seven requirements has been a challenge, and the process of achieving self-governance and self-determination is still evolving.[48]

C. Cultural Oppression and Environmental Justice Considerations

As early as the 1800s, missionaries began to discourage vital aspects of Hawaiian culture in favor of Western practices.[49] The missionaries denounced hula[50] as irreverent and immoral, banned the Hawaiian language from being taught in schools, and discouraged it from being spoken at home.[51] Following the islands' annexation as a territory in 1898[52] and subsequent

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[46] *Id.*; *see* Tapu, *supra* note 41; Lane Kaiwi Opulauoho, *Trust Lands for the Native Hawaiian Nation: Lessons from Federal Indian Law Precedents*, 43 AM. INDIAN L. REV. 75, 93-96 (2018) (showing a full treatment of the terms of the DOI Rule).
[47] 43 C.F.R. § 50.
[48] *See* sources cited *supra* note 4.
[49] Emma Kauana Osorio, *Struggle for Hawaiian Cultural Survival*, BALLARD BRIEF, https://ballardbrief.byu.edu/issue-briefs/struggle-for-hawaiian-cultural-survival.
[50] For a discussion of the importance of hula to Hawaiian culture, see DOROTHY B. BARRERE ET AL., HULA, HISTORICAL PERSPECTIVES (1980).
[51] *Id.*
[52] H.R.J. Res. 259, 55th Cong. (1898). Hawaii was annexed as a territory of the United States in 1898 through the Newlands Resolution. The United States bestowed upon itself 1.75 million acres of land owned by the Hawaiian monarchy and government. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, H.R.J. Res. 259; McGregor, *supra* note 1, at 108.

induction as a United States state in 1959,[53] the United States continued this 'Westernization' program, attempting to "Americanize the multiethnic society of the Hawaiian Islands."[54] The term 'Hawaiian' was redefined to be racial in nature, rather than a reflection of nationality, imposing the belief that Native Hawaiians were "an ethnic group living on American soil."[55] Government proceedings were carried out only in English, and Native Hawaiian children were conscripted into the American public school system, where only English was taught.[56] During this time, Native Hawaiians felt a stigma associated with being Hawaiian.[57] As an indication of the suppression of the Native Hawaiian culture, only 2,000 native Hawaiian speakers remained in Hawai'i by 1987.[58]

Despite the United States' best efforts to suppress Native Hawaiian identity, there remained an undercurrent of Native Hawaiian pride during Hawai'i's status as a territory and into early statehood.[59] Some Native Hawaiians maintained secret societies and lodges, discretely continuing the practice of Native Hawaiian culture and traditions.[60] Others privately observed traditional practices in their own homes or with close relations.[61] Following Hawai'i's induction into statehood in 1959, this quiet cultural maintenance erupted into an outright resurgence of Native Hawaiian culture—a period which has been dubbed the Hawaiian Renaissance.[62]

Seemingly at once, cultural practitioners of all types re-emerged. The Hawaiian language was re-embraced, beginning with one man's public radio show interviewing Native Hawaiian speakers.[63] The radio show, started by Larry Kimura, influenced the establishment of more than twenty Hawaiian language immersion preschools and the creation of the University of Hawai'i's

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[53] For more information regarding Hawaii's induction into statehood, see McGregor, *supra* note 1, at 109-11.
[54] *Id.* at 108.
[55] Ruby Fa'agau, *Hawaiian Cultural Rejuvenation*, 7 HOHONU ACAD. J. 34, 35 (2009), https://hilo.hawaii.edu/campuscenter/hohonu/volumes/documents/Vol07MASTER.pdf.
[56] *Id.*; *see* McGregor, *supra* note 1, at 108.
[57] Adrienne LaFrance, *Who Remembers the Hawaiian Renaissance?*, HONOLULU CIV. BEAT (Oct. 7, 2011), https://www.civilbeat.org/2011/10/13158-who-remembers-the-hawaiian-renaissance/. During his childhood in Hawaii during the late 1920s and early 1930s, Senator Daniel Akaka says, "When I was growing up, we didn't have the Hawaiian language in Hawaii schools… My parents spoke Hawaiian but I was discouraged from learning it. They thought that I should learn English the best I can, and not Hawaiian. There was a stigma associated with being a Hawaiian during my childhood".
[58] McGregor, *supra* note 1, at 105.
[59] *See* Laurie D. McCubbin and Anthony Marsella, *Native Hawaiians and Psychology: The Cultural and Historical Context of Indigenous Ways of Knowing*, 15:4 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOLOGY 379 (2009).
[60] *See id.*
[61] *See id.*
[62] Sara Kehaulani Goo, *The Hawaiian Language Nearly Died. A Radio Show Sparked its Revival*, NPR (June 22, 2019), https://www.npr.org/sections/codeswitch/2019/06/22/452551172/the-hawaiian-language-nearly-died-a-radio-show-sparked-its-revival; *see also* HPR News Staff, *Native Hawaiian activists stopped military bombing on Kaho'olawe 32 years ago*, HAW. PUB. RADIO (Oct. 5, 2022), https://www.hawaiipublicradio.org/local-news/2022-10-05/native-hawaiian-activists-stopped-military-bombing-on-kahoolawe-32-years (discussing Native Hawaiian protests over the military practice bombing of Kahoʻolawe—the smallest of the eight Hawaiian islands. This early grassroots movement protesting actions by the U.S. government was one of the events which galvanized the Hawaiian Renaissance).
[63] For more on Larry Kimura and his 90-minute radio show, see Goo, *supra* note 62.

College of Hawaiian Language.[64] As a result of this program, the number of native speakers rebounded to 18,000 by 2016.[65] Hula resurfaced as a prominent practice, in part due to the establishment of the Merrie Monarch Festival—a three-day competition honoring the ancient artform.[66] The community revitalized non-instrument voyaging and navigation—when the Hōkūleʻa, a double-hull voyaging canoe built by Native Hawaiian craftsmen, made its first voyage to Tahiti in 1976, it stood as a symbol of the renewed strength of the Native Hawaiian culture.[67] These investments in Native Hawaiian traditions continue today.

Although there have been significant strides in promoting Hawaiian cultural customs, Native Hawaiians continue to face environmental justice challenges. Native Hawaiians are three times more likely to suffer from heart disease, stroke, heart failure, cancer and diabetes than other ethnic groups, and typically become afflicted with these ailments a decade earlier than other ethnic groups.[68] This staggering disparity may be attributable, at least in part, to the siting of industrial power plants and landfills in communities that are predominantly Native Hawaiian or people of color.[69] The disparity may also be traced to historical exposure to harmful chemicals and pesticides on the plantations where Native Hawaiians have worked and lived.[70]

Similarly, Native Hawaiian communities experience decreased access to important natural resources like land and water and have been pushed out of desirable neighborhoods and into disaster-prone and medically dangerous ones. On the Island of Hawaiʻi, for example, Native Hawaiians live disproportionately close to volcanoes that emit "vog," a respiratory irritant

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[64] *Id.*; *see* HAW. STATE DATA CTR., DEP'T OF BUS. ECON. DEV. AND TOURISM, DETAILED LANGUAGES SPOKEN AT HOME IN THE STATE OF HAWAII (2016), https://files.hawaii.gov/dbedt/census/acs/Report/Detailed_Language_March 2016.pdf.

[65] Goo, *supra* note 62.

[66] *Chronicling America: Historic Newspapers from Hawaii and the U.S.: Hula*, UNIV. OF HAW. AT MĀNOA, https://guides.library.manoa.hawaii.edu/c.php?g=105252&p=687126 (last visited Apr. 7, 2023).

[67] *See generally* POLYNESIAN VOYAGING SOC'Y: HŌKŪLEʻA, https://www.hokulea.com/; *see also Blog,* POLYNESIAN VOYAGING SOCIETY: HŌKŪLEʻA, https://www.hokulea.com/voyage/ (discussing annual voyages since the program's inception in 1976).

[68] *See* Deborah Manog Dimaya, *UH report finds Native Hawaiians still face significant health disparities, propose Hawaiian framework to improve health*, UNIV. OF HAW. AT MĀNOA: JOHN A. BURNS SCH. OF MED. (Dec. 15, 2020), https://jabsom.hawaii.edu/uh-report-finds-native-hawaiians-still-face-significant-health-disparities-propose-hawaiian-framework-to-improve-health/.

[69] *See Environmental Justice*, KAHEA: THE HAWAIIAN ENV'T ALL., http://kahea.org/issues/environmental-justice [hereinafter KAHEA]; *see also* Trisha Kehaulani Watson-Sproat, *4 Principles for Environmental Justice: Lessons from Hawaii*, NON-PROFIT Q. (Apr. 13, 2020), https://nonprofitquarterly.org/4-principles-for-environmental-justice-lessons-from-hawaii/ (describing the Waiʻanae community in ʻOahu. The Waiʻanae community is 60% Hawaiian compared to an average 12% across ʻOahu. Both of the island's landfills and the island's largest emitter of carbon dioxide, Kahe power plant, are located in Waiʻanae).

[70] *See* KAHEA, *supra* note 69; *see also* Kylie Wager Cruz, *After Civil Rights Complaint By Native Hawaiian Groups, U.S. EPA Acts On Pesticide Impact,* EARTH JUSTICE (June 4, 2019), https://earthjustice.org/press/2019/after-civil-rights-complaint-by-native-hawaiian-groups-u-s-epa-acts-on-pesticide-impact; Angelique Kokal, *Connecting Past to Present: Confronting Environmental Racism and Social Injustice in Hawaii*, CLIMATE XCHANGE (July 14, 2020), https://climate-xchange.org/2020/07/14/connecting-past-to-present-confronting-environmental-racism-and-social-injustice-in-hawaii/ (describing the Kahuku Wind Farm controversy. Despite public protest, a wind farm was sited only 0.36 from a predominantly Native Hawaiian elementary school and 0.29 miles from majority Native Hawaiian-owned residential homes. This led to an estimated 10-25% reduction in residential home value).

notorious for causing and aggravating asthma.[71] On the coast in Hilo, Native Hawaiian families have been pushed into flood and tsunami zones, rendering them vulnerable to property damage.[72] Further, as a result of droughts and overall freshwater shortages, some Hawai‘i residents are subject to fines up to $500 for using water for nonessential activities, while water consumption by the tourism industry go unchecked.[73]

All that said, the environmental justice movement goes beyond physical health impacts to the "cultural, spiritual, and mental health impacts of land-use decisions."[74] Indeed, one of the principles of environmental justice adopted by the Delegates to the First National People of Color Environmental Leadership Summit is the affirmation of "the fundamental right to political, economic, cultural and environmental self-determination of all peoples."[75] Native Hawaiians have been subject to the desecration of sacred sites, threats to traditional and cultural practices, and an inability to participate in the decisionmaking process to ensure that environmental policies are protecting their cultural and traditional rights. The value of cultural and traditional resources cannot be overstated.

The next section explains the root cause of Native Hawaiians' negative environmental justice outcomes: the State of Hawai‘i's failure to uphold its constitutional trust obligation to the Native Hawaiian people.

D. The Constitutional Trust Obligation

The State of Hawai‘i has an obligation to hold land, resources, and benefits in trust for Native Hawaiians. The Hawai‘i Constitution includes four provisions which designate the State as a trustee of the Native Hawaiian people. Under Article XII, Section 4, the land granted to the State of Hawai‘i by the Admission Act[76] is to be held "as a public trust for native Hawaiians and the general public."[77] The trust obligation is also embodied in the creation of the Office of Hawaiian Affairs, a state agency created pursuant to Article XII, Section 5 of the Hawai‘i Constitution, with the goal of "provid[ing] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base."[78] In accordance with the Hawai‘i Constitution and Hawai‘i statutory law, the Office of Hawaiian Affairs is to annually collect a

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[71] Kokal, *supra* note 70 (explaining that nearly 600 homes disproportionately owned by Native Hawaiians were destroyed in a 2018 lava flow).
[72] *See id.*
[73] Jessica Lipscomb, *Maui residents rail against spike in tourism during water shortage: 'Stop coming' to Hawaii*, THE WASH. POST (Aug. 3, 2021).
[74] KAHEA, *supra* note 69.
[75] *Principles of Environmental Justice*, UNITED CHURCH OF CHRIST, https://www.ucc.org/what-we-do/justice-local-church-ministries/justice/faithful-action-ministries/environmental-justice/principles_of_environmental_justice/ (last visited Apr. 7, 2023).
[76] *See* U.S. DEPARTMENT OF THE INTERIOR, AN ACT TO PROVIDE FOR THE ADMISSION OF THE STATE OF HAWAI‘I INTO THE UNION, PUB. L. 86-3, 73 STAT. 4 (1959), https://www.doi.gov/sites/doi.gov/files/uploads/An-Act-to-Provide-for-the-Admission-of-the-State-of-Hawai.pdf.
[77] HAW. CONST. art. XII, § 4.
[78] STATE OF HAW., PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, VOLUME I, at 645-46 (1980).

20% share of the proceeds from the Public Land Trust to be administered for the benefit of Native Hawaiians.[79]

Further, the public trust doctrine, a common law doctrine which dictates that the State must hold public natural resources in trust for the public, is incorporated into the Hawai‘i Constitution.[80] While this provision applies to *all* citizens of Hawai‘i—not exclusively Native Hawaiians—there is no doubt that Native Hawaiians are encompassed within the state's affirmative duty under the trust to favor the interests of citizens of Hawai‘i over industrial and corporate interests.

Finally, Article XII, Section 7 of the Hawai‘i Constitution obligates the State to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes…."[81] Under this constitutional mandate, the State recognizes that "Native Hawaiian practices must be allowed to evolve in contemporary times consistent with the purpose and spirit of the original traditional practice."[82]

The protections of the trust obligation, however, are undermined in several ways. The following sections will explore how the trust obligation is undermined by the State's failure to deliver funds to OHA, the U.S. Supreme Court's determination that Native Hawaiians constitute a racial classification rather than a political classification, and the State's failure to ensure that adequate resources are available to Native Hawaiians, driving them to litigation compelling the State to uphold the trust obligation.

1. The Office of Hawaiian Affairs

The Office of Hawaiian Affairs (OHA), established by Article XII, Section 5, of the Hawai‘i Constitution, was created with the goal of "provid[ing] a form of self-determination for Native Hawaiians and advocat[ing] for their well-being."[83] The Constitution proclaims that OHA holds title to "all the real and personal property now and hereafter set aside or conveyed to it which *shall be held in trust for native Hawaiians and Hawaiians*."[84] The need for such a government office was inspired by the need "to address historical injustices and challenges arising out of those circumstances."[85] Today, OHA operates with a focus on improving opportunities and outcomes for Native Hawaiians in four realms: Educational Pathways, Health

[79] HAW. CONST. art. XII, § 4; HAW. REV. STAT. § 10-13.5 (2009); *see also* Palau-McDonald, *supra* note 5.
[80] HAW. CONST. art. XI, § 1 ("All public natural resources are held in trust by the State for the benefit of the people"). Hawai‘i's public trust doctrine is considered the most expansive public trust doctrine in the United States. *See* Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Court*, 45 ENV'T L. 561, 612 (2015).
[81] HAW. CONST. art. XII, § 7.
[82] *Native Hawaiian Traditional and Customary Rights*, STATE OF HAWAI‘I: LAND USE COMM. 6 (2022), https://luc.hawaii.gov/wp-content/uploads/2022/06/3.-NH-Traditional-and-Customary-Practices_Summary_June-2022.pdf.
[83] *Legal Basis,* OFF. OF HAW. AFFS., https://www.oha.org/about/abouthistory/aboutabouthistoryconstitution/ [hereinafter *Legal Basis*].
[84] HAW. CONST. art. XII, § 5 (emphasis added).
[85] *Legal Basis*, *supra* note 83.

Outcomes, Quality Housing, and Economic Stability.[86] OHA does this by influencing governmental decisionmaking, providing scholarships and business grants, managing land for cultural and agricultural purposes,[87] and facilitating collaboration between Native Hawaiian communities and state and non-profit organizations.[88] All of these projects are meant to be funded in part by the twenty percent of Public Land Trust funds statutorily allocated to OHA.[89] Even so, the State has persistently failed to deliver the required twenty percent of funds to OHA.[90] In 2006, the Hawai'i Legislature officially prescribed $15.1 million as the interim amount to be transferred annually to OHA.[91] However, the legislature's 2006 allocation has yet to be updated, meaning that the annual allocation of funds regularly fails to meet the twenty percent requirement established by law.[92] This diminishes the ability of OHA to provide programs and resources for Native Hawaiians as directed by the Hawai'i Constitution.

2. *Rice v. Cayetano*

Another major limitation on the full realization of the constitutional trust obligation is the United States Supreme Court's decision in *Rice v. Cayetano*.[93] Article XII, Section 5 of the Hawai'i Constitution states that the board of trustees for OHA should all be Native Hawaiian, and that only Native Hawaiians may vote in OHA Board elections.[94] Rice, a descendant of the early missionary families in Hawai'i and not of Native Hawaiian descent, was therefore prohibited from voting in an OHA Board election.[95] Rice challenged the prohibition, seeking a declaration that the election scheme was based on racial qualifications and violated the Fourteenth and Fifteenth Amendments of the United States Constitution.[96] The District Court referred to the United States Supreme Court's holding in *Morton v. Mancari*[97] —which stated that a hiring preference for Indians in the Bureau of Indian Affairs "did not constitute invidious racial discrimination, but was reasonable and rationally designed to further Indian self-government"[98]—to hold that despite a lack of federally recognized tribal sovereignty, the

[86] *What We Do,* OFF. OF HAW. AFFS., https://www.oha.org/about/what-we-do/ [hereinafter *What We Do*].
[87] *See Legal Basis*, *supra* note 83 (explaining that OHA manages more than 27,000 acres of land. Under Article XII, Section 5 of the Hawaii Constitution, OHA was granted title to "all the real and personal property now and hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians").
[88] *Id.*
[89] HAW. REV. STAT. § 10-13.5 (2009) ("Twenty per cent of all funds derived from the public land trust… shall be expended by the [O]ffice [of Hawaiian Affairs]").
[90] *What We Do*, *supra* note 86.
[91] *Id.*
[92] *Id.* According to OHA, 20% of the annual public land trust revenues would be $78.9 million. At an annual receipt of $15.1 million, OHA is only receiving 3.8% of the public land trust revenues.
[93] Rice v. Cayetano, 941 F. Supp. 1529 (D. Haw. 1996).
[94] HAW. CONST. art. XII, § 5.
[95] *Rice,* 941 F. Supp. at 1548-49.
[96] *Id.*
[97] Morton v. Mancari, 417 U.S. 535 (1974); *see also infra* notes 254-260 (describing the *Mancari* litigation).
[98] *Rice*, 941 F. Supp. at 1550; *Mancari*, 417 U.S. at 548; *see also infra* notes 254-260 below (describing the *Mancari* litigation).

character of the relationship between the federal government and Native Hawaiians as a distinctively guardian-ward-type relationship meant that the Fourteenth and Fifteenth Amendments were not violated.[99] The court pointed out that, according to the United States Supreme Court's reasoning in *Mancari*, "the right to vote is not based upon race, but upon a recognition of the unique status of Native Hawaiians."[100] The court again used *Mancari* to decide that in the context of Native Hawaiians, "seemingly race-conscious legislation" should be evaluated using rational basis review, as opposed to strict scrutiny.[101] Applying rational basis review, the court found that the OHA policy of limiting voting to Native Hawaiians was rationally related to legitimate state interests.[102]

Rice appealed to the United States Supreme Court. In a majority opinion authored by Justice Kennedy, the Court held that Article XII, Section 5 of the Hawai'i Constitution violated the Fifteenth Amendment. Justice Kennedy distinguished *Rice* from *Mancari* on the basis that "[a]lthough the classification [in *Mancari*] had a racial component, the [*Mancari*] Court found it important that the preference was 'not directed towards a "racial" group consisting of "Indians,"' but rather 'only to members of "federally recognized' tribes.'"[103]

Justice Kennedy declined to assume that Native Hawaiians have the same status as "Indians in organized tribes."[104] Kennedy asserted that, "[t]o extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result."[105]

The United States Supreme Court's holding in *Rice v. Cayetano* thus undercuts the trust obligation established by the Hawai'i Constitution. The creation of OHA was meant to preserve a limited degree of self-determination for the Native Hawaiian people by ensuring that they could vote for and serve as representatives in a state agency designed to make decisions that directly affect their well-being.[106] To hold that OHA is not allowed to exclude non-Native Hawaiian voters is to dilute the voices of Native Hawaiians in the decisionmaking processes that directly affect them.[107]

As a result of the State's refusal to deliver the requisite funding to OHA and the United States Supreme Court's decision in *Rice v. Cayetano*, Native Hawaiians must resort to litigation to force the State to uphold its trust obligations. The next section will discuss two prominent Hawai'i Supreme Court cases which illustrate Native Hawaiian efforts to compel the State to

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[99] *Rice*, 941 F. Supp. at 1548-49.
[100] *Id.* at 1153-54.
[101] *Id.* at 1550.
[102] *Id.* at 1556-58.
[103] Rice v. Cayetano, 528 U.S. 495, 519-520 (2000) (quoting *Mancari*, 417 U.S. at 553, n.24).
[104] *Id.* at 518.
[105] *Id.* at 522.
[106] *Legal Basis*, *supra* note 83.
[107] Native Hawaiians make up only 21.3% of the total population of Hawai'i. DEMOGRAPHIC, SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS FOR SELECTED RACE GROUPS IN HAWAII, STATE OF HAW (2018), https://files.hawaii.gov/dbedt/economic/reports/SelectedRacesCharacteristics_HawaiiReport.pdf.

enforce its trust obligation to protect water access, traditional and customary rights, and access to sacred sites.

3. *Carmichael v. Board of Land and Natural Resources*

Taro has been the "spiritual and nutritional center of Hawaiian culture" since Polynesian wayfarers first settled on the Hawaiian islands.[108] Taro is a starchy root vegetable, similar to a sweet potato, which grows best in "nutrient rich wetland environments irrigated by sophisticated *'auwai*[109] systems to facilitate 'steady flows of cool, fresh water.'"[110] Before Western contact, there were an estimated 35,000 acres of flourishing taro patches; this number has since decreased to a mere 310 acres.[111] Even so, taro retains its "spiritual, cultural, political, and economic dimension" in Native Hawaiian communities.[112] The continued vitality of the practice of taro cultivation is thus essential to the maintenance of traditional practices and, in turn, the integrity and self-sufficiency of the Native Hawaiian community.[113]

Foreign-owned agricultural interests, including Alexander & Baldwin sugar plantations, have diverted water from the East Maui streams that supply many taro patches since 1876.[114] Alexander & Baldwin and its water provider, East Maui Irrigation Co., have legally diverted more than 100 million gallons of water per day since May 2000, through renewable watershed leases approved by the Board of Land and Natural Resources (BLNR) and the Commission on

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[108] *Id.; see also A Brief History of Taro in Hawai'i,* BISHOP MUSEUM, http://hbs.bishopmuseum.org/botany/taro/key/HawaiianKalo/Media/Html/history.html.

[109] Meaning ditch or canal. *'Auwai,* ULULUKAU: THE HAWAIIAN ELEC. LIB., https://wehewehe.org/gsdl2.85/cgi-bin/hdict?e=q-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4--textpukuielbert%2ctextmamaka%2ctextandrew%2ctextparker%2ctextpeplace%2ctextclark-----0-1l--11-haw-Zz-1---Zz-1-home-auwai--00-4-1-00-0--4----0-0-11-00-0utfZz-8-00&a=d&d=D1651#hero-bottom-banner (last visited Mar. 23, 2023) (Neither the author nor the editors of this paper are Native Hawaiian speakers; the English translation of the Native Hawaiian term may only represent a portion of the full definition provided by the Hawaiian dictionary website cited in this footnote).

[110] Summer Sylva, *Indigenizing Water Law in the 21st Century: Na Moku Aupuni O Ko'Olau Hui, a Native Hawaiian Case Study*, 16 CORNELL J. L. & PUB. POL'Y 563, 566 (2007) (quoting Elizabeth Ann Ho'oipo Kala'ena'auao Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 86-87 (1996)).

[111] Ligaya Mishan, *A Story on Hawaiian Taro Farming Grows Into Much More*, N.Y. TIMES (Nov. 18, 2019), https://www.nytimes.com/2019/11/18/reader-center/hawaii-taro-farming-ligaya-mishan.html. This statistic is accurate as of 2018.

[112] Sylva, *supra* note 110, at 567 (quoting Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 355 (2001)).

[113] *Id.* at 568.

[114] Carmichael v. Bd. of Land & Nat. Res., 443 P.3d 121 (Haw. Ct. App. 2019); For more detail on the history of water diversions engineered by the sugarcane industry, see Shannon Wianecki, *An Upstream Battle of East Maui Water Rights*, FLUX, https://fluxhawaii.com/east-maui-water-rights-an-upstream-battle/; KEPĀ MALY AND ONAONA MALY, KUMU PONO ASSOC., WAI O KE OLA: HE WAHI MO WAI'OLELO NO MAUI HIKINA: A COLLECTION OF NATIVE TRADITIONS AND HISTORICAL ACCOUNTS OF THE LANDS OF HĀMĀKUA POKO, HĀMĀKUA LOA AND KO'OLAU, MAUI HIKINA (EAST MAUI), ISLAND OF MAUI 1 (2001), https://www.kumupono.com/wp-content/uploads/2021/03/Volume_1_Wai_O_Ke_Ola_He_Wahi_Moolelo_No_Maui_Hikina.pdf.

Water Resource Management (CWRM).[115] Traditional practitioners and the taro farming community have challenged these diversions since the mid-1980s.[116]

Nā Moku ʻAupuni ʻO Koʻolau Hui (Na Moku) is a community of taro farmers, fishermen, hunters, and traditional practitioners who organized in 1996 "to educate, perpetuate, serve and protect historical, spiritual, traditional, [and] environmental well being" of their community in East Maui.[117] In 2015, Na Moku was one of several plaintiffs to sue the State, Alexander & Baldwin, and East Maui Irrigation Co., among other defendants, to stop these diversions.[118] They alleged that BLNR should not have authorized revocable permits with holdover status authorizing the use of public lands to divert millions of gallons of water without requiring an environmental assessment first.[119] Environmental assessments are required under the Hawai'i Environmental Protection Act (HEPA) unless the "action" in question constitutes a "minimal or no significant effect on the environment."[120]

In 2016, the First Circuit Court of Hawai'i granted summary judgment in favor of the taro farmers, holding that the revocable permits were invalid due to the continuous nature of the agricultural interests' leases.[121] According to the opinion, Hawaii Revised Statutes §§ 171-10 and 171-55 authorize a "temporary" occupation of public lands, but the occupation by Alexander & Baldwin on a holdover basis for thirteen years straight was not consistent with the meaning of "temporary" in those statutes.[122] The opinion suggests that the permits essentially authorize holdover tenants to occupy public lands in perpetuity, an outcome inconsistent with the public interest and legislative intent.[123]

In 2019, the Intermediate Court of Appeals vacated and remanded the lower court's decision, finding that "whether or not BLNR's… [d]ecision to continue the holdover status of the Revocable Permits was 'temporary' or de facto indefinite under the circumstances of this case presents a genuine issue of material fact that should not have been resolved by summary

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[115] Carmichael v. Bd. of Land & Nat. Res., 506 P.3d 211, 217 (Haw. 2022).
[116] Lee Imada, *A&B water diversion permits ruled invalid*, THE MAUI NEWS (Jan. 19, 2016), https://www.mauinews.com/news/local-news/2016/01/a-b-water-diversion-permits-ruled-invalid/.
[117] *Id.*; *see Ke Ēwe Hānau o Ka ʻĀina*, NĀ MOKI ʻAUPUNI ʻO KOʻOLAU HUI, https://www.namoku.net/what-we-do; *Ke'anae Peninsula*, MAUI GUIDEBOOK, https://mauiguidebook.com/road-to-hana-maui/road-to-hana-sites-to-see-maui/keanae-peninsula/ (explaining that Ke'anae is an unincorporated village on Maui, known for its taro production); *Wailua Nui, Maui,* in ATLAS OF HAWAIIAN WATERSHEDS & THEIR AQUATIC RES., STATE OF HAW. (2008), https://www.hawaiiwatershedatlas.com/watersheds/maui/64014.pdf (explaining that Wailuanui is a 6.6 square mile watershed on Maui).
[118] First Amended Complaint, Carmichael v. Bd. of Land & Nat. Res., No. 1CC15-1-0650 (Haw. Cir. Ct. Apr. 20, 2015), 2015 WL 13836077, at *2; HAR § 11-200.1-15(a).
[119] Sources cited *id.*
[120] HAR § 11-200.1-15(a).
[121] Order Granting Plaintiffs' Motion For Partial Summary Judgment, Carmichael v. Bd. of Land & Nat. Res., No. 15-1-0650-04 (Haw. Cir. Ct. Jan. 8, 2016), 2016 WL 11631329, at *4.
[122] *Id.*
[123] *Id.*

judgment."[124] On remand, the plaintiffs' Motion for Reconsideration was denied.[125] The plaintiffs petitioned the Hawai'i Supreme Court for certiorari, which was granted.[126]

In March 2022, the Supreme Court of Hawai'i delivered a victory for the taro farmers and traditional practitioners of East Maui when it held that the revocable permits issued by BLNR were subject to HEPA environmental review and thus required an environmental assessment consistent with HEPA.[127] The Supreme Court of Hawai'i also held that BLNR was "a trustee of the public trust" and that by allowing the diversion of million gallons of water per day from public lands without making any findings of fact or conclusions of law to demonstrate that the revocable permits "'serve[d] the best interests of the state,'" it failed to uphold its trust obligation.[128]

4. *Mauna Kea I* and *Mauna Kea II*

Mauna Kea is a 13,796-foot-tall shield volcano on the Island of Hawai'i.[129] According to the Hawai'i creation story, Mauna Kea is the first-born child of the Earth Mother, Papahānaumoku, and the Sky Father, Wākea, and is the *piko*[130] of the Island of Hawai'i.[131] Because Mauna Kea is the first-born child of the creators of Hawai'i, it is also revered as the "elder sibling to all Hawaiian people."[132] The volcano is a burial ground of Native Hawaiian ancestors, is home to multiple sacred sites which play a critical and ongoing role in traditional and religious rituals, and contains traditional cultural properties eligible to be listed in the National Register of Historic Places.[133]

Despite the cultural significance and sacred nature of the volcano, the summit of Mauna Kea is the site of thirteen observatories established and funded by multiple countries, non-profit

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[124] Carmichael v. Bd. of Land & Nat. Res., 443 P.3d 121, 2019 WL 2511192, *8 (Haw. Ct. App. 2019) (memorandum).
[125] Order Denying Motion for Reconsideration, Carmichael v. Bd. of Land & Nat. Res., 443 P.3d 121 (Haw. Ct. App. 2019) (NO. CAAP-16-0000071), 2019 WL 2897779.
[126] *Carmichael*, 443 P.3d at *8.
[127] *Carmichael*, 506 P.3d at 235.
[128] *Id.* at 227 (quoting HRS § 171-55).
[129] Christine Hitt, *The Sacred History of Maunakea*, HONOLULU MAG. (Aug. 5, 2019), https://www.honolulumagazine.com/the-sacred-history-of-maunakea/.
[130] Meaning navel or umbilical cord. *Piko,* ULULUKAU: THE HAWAIIAN ELEC. LIB., https://wehewehe.org/gsdl2.85/cgi-bin/hdict?e=q-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4--textpukuielbert%2ctextmamaka%2ctextandrew%2ctextparker%2ctextpeplace%2ctextclark-----0-1l--11-haw-Zz-1---Zz-1-home-piko--00-4-1-00-0--4----0-0-11-00-0utfZz-8-00&a=d&d=D17849#hero-bottom-banner (last visited Mar. 18, 2024) (Neither the author nor the editors of this paper are Native Hawaiian speakers; the English translation of the Native Hawaiian term may only represent a portion of the full definition provided by the Hawaiian dictionary website cited in this footnote).
[131] Hitt, *supra* note 129.
[132] Tanigawa-Lau, *supra* note 3, at 1392.
[133] Dominique Saks, *Indigenous Religious Traditions: Mauna Kea*, COLO. COLL., https://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/sacred-lands-mauna-kea/ (last visited Apr. 10, 2023) Some of the religious and traditional practices performed at the Mauna Kea sites include "the construction of shrines and leavings of offerings, umbilical cord deposition, scattering of cremation remains, calendric rites, pilgrimage, prayer, and burial blessings." Tanigawa-Lau, *supra* note 3, at 1392.

institutions, and scientific cooperatives.[134] The summit has been deemed "uniquely suited for ground-based astronomy," as the telescope technology used at the summit works best in arid environments and at high elevations.[135] The early observatories were not required to obtain permits and even once permitting requirements were established, they were generally approved without discrimination.[136] The most recent development in the long history of mismanagement of Mauna Kea is the permitting of the Thirty-Meter Telescope, the largest observatory proposed for construction at the Mauna Kea summit.[137]

The Thirty-Meter Telescope (TMT) was resisted by the Native Hawaiian community beginning at the start of the siting process in 2007.[138] The TMT developers considered alternative locations, including La Palma in the Canary Islands, for development of the telescope, but La Palma was ultimately passed over for the "slightly better" conditions for capturing infrared light at the Mauna Kea summit.[139] BLNR first approved a permit for TMT in 2011 on the condition that the group hold a public hearing at which the public would have the opportunity to air its grievances or show its support of the development.[140] At the contested case hearings, project opponents raised concerns about insufficiency of proposed measures to mitigate the visual and environment impacts of the development at the summit, desecration of places of worship, and negative effects on cultural practices.[141] Despite these concerns, the hearings officer affirmed BLNR's approval of the permit.[142]

In response to the first permit's approval, an opposition group called Mauna Kea Hui formed and filed a petition to contest the permitting process.[143] They argued that BLNR violated due process by scheduling the contested case hearing after the approval of the permit, thereby lessening the effect that public comment could have on the permit's approval or denial.[144] Despite a finding by the Supreme Court of Hawai'i in August 2015 that BLNR did, indeed, violate due process by holding the contested case hearings after the approval of the permit, a new series of contested case hearings ended in the same result: TMT's permit was once again

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[134] *An Introduction to the 13 Observatories on Mauna Kea*, BIG ISLAND GUIDE, https://bigislandguide.com/introduction-mauna-kea-observatories.
[135] *Id.*
[136] Tanigawa-Lau, *supra* note 3, at 1397. The first conservatory was constructed in 1968. *Id.*
[137] *Id*. at 1392.
[138] *Id.* at 1397; *see also* KEYSTONE CTR., ASSESSMENT OF THE RISKS FOR SITING THE THIRTY METER TELESCOPE ON MAUNA KEA 3-8 (2007) (noting that there has been a "failure to consult Native Hawaiians in management decisions, and inadequate access for cultural and spiritual practices" at Mauna Kea).
[139] Frances Nguyen, *The pandemic hasn't stopped Native Hawaiians' fight to protect Maunakea*, VOX (Aug. 7, 2020), https://www.vox.com/2020/8/7/21354619/mauna-kea-tmt-telescope-native-hawaiians.
[140] Tanigawa-Lau, *supra* note 3, at 1400.
[141] Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 363 P.3d 224, 234 (Haw. 2015).
[142] Tanigawa-Lau, *supra* note 3, at 1401.
[143] *Id.* at 1400.
[144] *Maunakea I*, 363 P.3d at 234.

approved by BLNR, notwithstanding overwhelming opposition by Native Hawaiians.[145] In its approval of the permit, BLNR stated:

> [T]here are already twelve observatories on Mauna Kea, some of them almost as large as TMT. They will remain even if the TMT is not built. No credible evidence was presented that the TMT would somehow be worse from a spiritual or cultural point of view than the other large observatories.[146]

The Native Hawaiian community challenged BLNR's approval of the permit in *In re contested case Hearing re Conservation Dist. Use Application Ha-358 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve* (hereinafter *Mauna Kea II*).[147] The plaintiffs challenged the permit on many grounds,[148] including an argument that BLNR failed to uphold its trust obligations under Article XII, Section 7 of the Hawai'i Constitution, which obligates the State to protect customary and traditional rights.[149] The Hawai'i Supreme Court applied a three-part test established in *Ka Pa'Akai O Ka'Aina v. Land Use Commission*,[150] which requires that to fulfill the obligations of Article XII, Section 7, an administrative agency must determine:

> (1) the identity and scope of valued cultural, historical, or natural resources in the relevant area, including the extent to which traditional and customary Native Hawaiian rights are exercised in the area; (2) the extent to which those resources—including traditional and customary Native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the agency to reasonably protect Native Hawaiian rights if they are found to exist.[151]

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[145] *Id.* at 224; Findings of Fact, Conclusions of Law and Decision and Order § 796 at 138, Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hamakua, Hawai'i, No. BLNR-CC-16-002 at ii (Sept. 28, 2017), aff'd, 143 Haw. 379 (2018) [hereinafter Contested Case Hearing HA-3568]; Tanigawa-Lau, *supra* note 3, at 1402.

[146] Contested Case Hearing HA-3568, at ii.

[147] In re Conservation Dist. Use Application (CDUA) Ha-3568 (*Maunakea II*), 431 P.3d 752, 761 (Haw. 2018).

[148] *See* Tanigawa-Lau, *supra* note 3, at 1403. The plaintiffs challenged the BLNR permit based on the following claims:

> "(1) Whether the BLNR fulfilled its duty to protect the customary, traditional, and subsistence rights of native Hawaiians under Article XII, Section 7 of the Hawaii State Constitution, (2) Whether the BLNR erred in concluding that the Constitution does not protect contemporary native Hawaiian cultural practices, (3) Whether the TMT Project violates religious exercise rights of Native Hawaiians protected by federal statutes, (4) Whether the hearing officer should have allowed briefing and a hearing on a motion to disqualify UHH as an applicant for the permit based on its hostility toward the traditional Hawaiian faith, (5) Whether the hearing officer should have allowed briefing and hearing on a motion to dismiss based on violation of the desecration statute of the Hawai'i Penal Code, and (6) Whether the hearing officer should have excluded challenges to the legal status of the state of Hawai'i and its ownership of Mauna Kea as well as the existence of the Kingdom of Hawai'i."

[149] *Maunakea II*, 431 P.3d at 761. Native Hawaiians had also been filing desecration complaints under HRS § 711-1107 since the siting process began, claiming that TMT's construction constituted the desecration of a Native Hawaiian sacred site. *Id.*

[150] Ka Pa'Akai O Ka'Aina v. Land Use Comm'n, 7 P.3d 1068 (Haw. 2000).

[151] *Id.* at 1984.

The Supreme Court reported that as to the first prong of the *Ka Pa'Akai* test, BLNR "found no evidence of Native Hawaiian cultural resources, including traditional and customary practices, within the TMT Observatory site area and the Access Way,[152] which it characterized as the relevant area."[153] As to the second prong, BLNR reported that "the TMT Project will not adversely impact cultural resources, whether in the relevant area of the TMT Observatory site and Access Way, or in other areas of Mauna Kea."[154] As to the third prong, BLNR determined that no action was required to reasonably protect Native Hawaiian rights because none were found to exist.[155] The Supreme Court controversially accepted BLNR's reasoning in favor of approving the permit, and Governor Ige greenlighted construction to begin the following week.[156]

After the Hawai'i Supreme Court's decision in *Mauna Kea II*, the Native Hawaiian community mobilized in full force to oppose the development of the observatory, with hundreds of protesters assembling a *pu'uhonua,*[157] thus blocking the access road to Mauna Kea's summit.[158] In response to the road blockage, Governor Ige declared a state of emergency, enabling law enforcement to begin making arrests.[159] Thirty-three Native Hawaiian elders were arrested and charged with obstruction of government operations.[160]

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[152] *Maunakea II*, 431 P.3d at 759 (explaining that the "Access Way" is the access road to the summit of Mauna Kea).
[153] *Id.* at 769.
[154] *Id.* at 770.
[155] *Id*.
[156] Tanigawa-Lau, *supra* note 3, at 1403; *see also Joint Press Release: Thirty Meter Telescope Set to Start Construction*, OFF. OF THE GOVERNOR, STATE OF HAW., (July 10, 2019), https://governor.hawaii.gov/newsroom/latestnews/governors-office-joint-news-release-thirty-meter-telescope-set-to-start-construction.
[157] Meaning sanctuary, place of refuge, peace, or safety. *Pu'uhonua,* ULULUKAU: THE HAWAIIAN ELEC. LIB., https://wehewehe.org/gsdl2.85/cgi-bin/hdict?e=q-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4--textpukuielbert%2ctextmamaka%2ctextandrew%2ctextparker%2ctextpeplace%2ctextclark-----0-1l--11-haw-Zz-1---Zz-1-home-puuhonua--00-4-1-00-0--4----0-0-11-00-0utfZz-8-00&a=d&d=D19502#hero-bottom-banner (last visited Mar. 18, 2024) (Neither the author nor the editors of this paper are Native Hawaiian speakers; the English translation of the Native Hawaiian term may only represent a portion of the full definition provided by the Hawaiian dictionary website cited in this footnote).
[158] *See* Kevin Dayton & Timothy Hurley, *Activists stand their ground at Mauna Kea*, STAR ADVERTISER (July 15, 2019), https://www.staradvertiser.com/2019/07/15/hawaii-news/activists-stand-their-ground-at-mauna-kea/.
[159] *Proclamation*, OFF. OF THE GOVERNOR, STATE OF HAW. (July 17, 2019), https:// governor.hawaii.gov/wp-content/uploads/2019/07/1907086-Mauna-Kea.pdf; Tanigawa-Lau, *supra* note 3, at 1403.
[160] Kevin Dayton, *Gov. David Ige issues emergency proclamation over ongoing TMT protests atop Mauna Kea*, STAR ADVERTISER (July 17, 2019), https://www.staradvertiser.com/2019/07/17/breaking-news/thirty-meter-telescope-protesters-brace-for-arrests-at-mauna-kea/ (explaining that the source further offers a play-by-play reporting of the protest); *see OHA statement on today's arrest of kūpuna and others on Maunakea*, OFF. OF HAWAIIAN AFFS. (July 17, 2019), https://www.oha.org/news/oha-statement-on-todays-arrest-of-kupuna-others-on-maunakea/ (explaining that OHA released a statement condemning the arrests stating, "[t]he Native Hawaiian community weeps today. To see some of our most respected kupuna, advocates and ohana get arrested for voicing the same concerns our community has expressed for decades over the state's mismanagement of Maunakea brings a kaumaha (grief) to our hearts that is unbearable. Regardless of your position on TMT, we must all agree with Gov. Ige's 2015 statement that the state has 'failed' Maunakea").

Due to local and international pressure, Governor Ige withdrew the emergency proclamation on July 30, 2019, and announced that the deadline for beginning construction would be moved back by two years.[161] As of this writing, construction has not begun on the Thirty-Meter Telescope.[162] Governor Ige admitted that the state spent $15 million to maintain access to the summit of Mauna Kea during the protests, reasoning that "we [the government] believe we have an obligation to ensure that those that are legally permitted with projects have the ability to access their construction sites so that the projects can move forward."[163]

Most recently, Governor Ige signed a new law establishing the Mauna Kea Stewardship and Oversight Authority—a new board including representatives from both the astronomy and Native Hawaiian communities.[164] The creation of the new board signifies a way forward for the development of the Telescope, which incorporates guidance from the Native Hawaiian community.

III. APPLYING THE LADDER MODEL

A. Arnstein's Ladder of Participation

Participation is an essential component of environmental justice. The U.S. Environmental Protection Agency (EPA) has identified two benefits of public participation in decisionmaking:

> 1. Sponsor agencies will make better and more easily implementable decisions that reflect public interests and values and are better understood by the public
> 2. Communities develop long-term capacity to solve and manage challenging social issues, often overcoming longstanding differences and misunderstandings.[165]

However, not all participation is created equal. While having a seat at the table is important, "[t]here is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process."[166] The EPA has recognized that "[m]eaningful participation requires much more than simply holding public meetings or hearings or collecting public comment."[167] Even still, environmental justice communities across the globe continue to fight for adequate participatory rights, maintaining that

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[161] Tanigawa-Lau, *supra* note 3, at 1406.
[162] *See* Mark Zastrow, *Path Forward for Thirty Meter Telescope and Mauna Kea Begins to Emerge*, ASTRONOMY (Mar. 29, 2023), https://www.astronomy.com/science/path-forward-for-thirty-meter-telescope-and-mauna-kea-begins-to-emerge/ (explaining the current state of development for the Thirty Meter Telescope as of this writing).
[163] *Governor Says Hawaii Spent $15M to Ensure Mauna Kea Access*, ASSOC. PRESS (Dec. 18, 2019), https://apnews.com/1bf23e5ac0f425100cd5009369e5b3f5.
[164] H.B. 225, 31st Leg., Reg. Sess., (Haw. 2022), https://www.capitol.hawaii.gov/sessions/session2022/bills/GM1358_.PDF.
[165] INTRODUCTION TO THE PUBLIC PARTICIPATION TOOLKIT, EPA 4, https://www.epa.gov/sites/default/files/2014-05/documents/ppg_english_full-2.pdf [hereinafter PUBLIC PARTICIPATION TOOLKIT].
[166] Sherry Arnstein, *A Ladder of Citizen Participation,* 35 J. OF THE AM. INST. OF PLANNERS 216, 216 (1969).
[167] PUBLIC PARTICIPATION TOOLKIT, *supra* note 165, at 1.

"[e]nvironmental justice demands the right to participate as equal partners at every level of decisionmaking including needs assessment, planning, implementation, enforcement and evaluation."[168]

Arnstein's Ladder Model of Citizen Participation is a useful tool[169] for representing the current state of Native Hawaiian participation in environmental management decisionmaking,[170] as well as for framing the effect of tribal sovereignty on such participation, because it operationalizes the various types of participation such that improvements or setbacks in participatory outcomes are easily discernible.

[168] *Principles of Environmental Justice*, UNITED CHURCH OF CHRIST (1991) https://www.ucc.org/what-we-do/justice-local-church-ministries/justice/faithful-action-ministries/environmental-justice/principles_of_environmental_justice/ (last visited Apr. 7, 2023).

[169] Arnstein's Ladder Model is a useful tool, but not the only tool. Other models of citizen participation can be used to measure citizen participation, including the Deliberative Democracy model ("emphasizes active and informed public engagement in decision-making processes. It values the exchange of ideas, respectful dialogue, and the consideration of multiple perspectives"), the Political Participation Spectrum ("outlines different forms of political participation, ranging from passive to active engagement, and is often used to evaluate the level of citizen engagement in a particular political system"), the Four Types of Political Participation ("categorizes political participation into four types: electoral, institutional, non-institutional, and behavioral. It highlights the different ways in which citizens can participate in the political process and emphasizes the importance of diverse forms of engagement"), and The Community Participation Matrix ("outlines different levels of community involvement in decision-making processes, from consultation to co-creation. It is often used in the context of community development and planning"). Joe Simons, *Arnstein's Ladder of Participation*, FACILITATION HUB (Jan. 30, 2023), https://thefacilitationhub.com/arnsteins-ladder-of-participation/.

[170] *See, e.g.*, Marcus D. Hendricks et al., *Moving Up the Ladder in Rising Waters: Community Science in Infrastructure and Hazard Mitigation Planning as a Pathway to Community Control and Flood Disaster Resilience*, 7 CITIZEN SCI.: THEORY & PRAC. 18 (2022) (explaining that Arnstein's Ladder of Participation is often used to analyze citizen participation in environmental decisionmaking); Ted H. Grossardt & Keiron Bailey, *Justice and the Public's Involvement in Infrastructure Planning: An Analysis and Proposal*, 9 KY. TRANSP. CTR. FACULTY & RESEARCHER PUBLICATIONS 1 (2007); Keiron Bailey et al., *Toward environmental justice in transportation decision making with structured public involvement*, 23020 TRANSP. RSCH. REC. 102 (2012).

The Ladder Model (Figure 1) is divided into three categories of participation—*Nonparticipation*, *Degrees of Tokenism*, and *Degrees of Citizen Power*—which are further divided into eight distinct levels of participation.

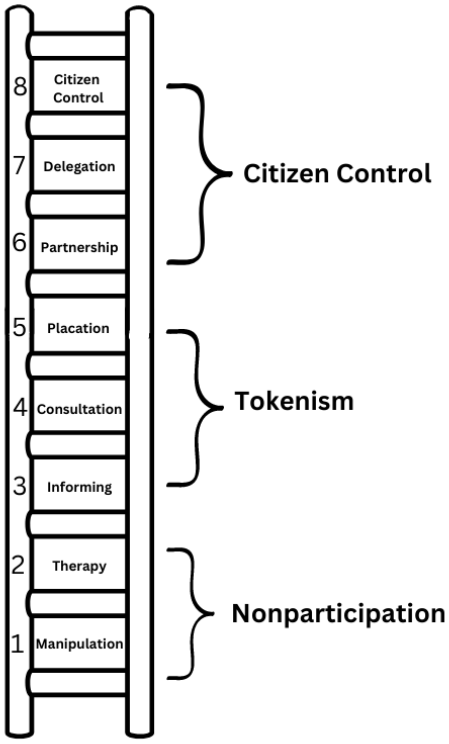

Figure 1: Adapted from Arnstein, A Ladder of Citizen Participation (1969)

1. Nonparticipation

The first two rungs of the ladder are *Manipulation* and *Therapy*. These are considered nonparticipation because rather than meaningfully engaging citizens in the decisionmaking process, *manipulation* and *therapy* aim to "educate" or "cure" citizens.[171] *Manipulation*, the lowest rung of the ladder, is a way of engineering support for a cause by drawing in people as signatories or representatives of a cause, who have no true power in the program but who will be "trotted forward at appropriate times" to promote that cause.[172] *Therapy* is more "invidious" in that it, "under a masquerade of involving citizens in planning,… subject[s] the citizens to clinical group therapy."[173] The goal is to treat participants' problems rather than treating the underlying cause of their problems: racism and victimization.[174]

[171] Arnstein, *supra* note 166, at 217.
[172] *Id.* at 218.
[173] *Id.*
[174] *Id.*

2. Degrees of Tokenism

Informing, *Consultation*, and *Placation* are considered *Degrees of Tokenism*. *Informing*, at Rung 3, includes "informing citizens of their rights, responsibilities, and options."[175] While *informing* is an important component of citizen participation, "too frequently the emphasis is placed on a one-way flow of information—from officials to citizens—with no channel provided for feedback and no power for negotiation," making it difficult for citizens to influence the operations or outcomes of the program in a meaningful way.[176] *Consultation*, at Rung 4, consists of inviting citizens' opinions using methods such as attitude surveys, neighborhood meetings, and public hearings.[177] Arnstein writes:

> [w]hen powerholders restrict the input of citizens' ideas solely to this level… [p]eople are primarily perceived as statistical abstractions, and participation is measured by how many come to meetings, take brochures home, or answer a questionnaire. What citizens achieve in all this activity is that they have 'participated in participation. And what powerholders achieve is the evidence that they have gone through the required motions of involving 'those people.'[178]

Placation, at Rung 5, is where "citizens begin to have some degree of influence though tokenism is still apparent."[179] At this level of participation, members of the target group may be placed in public roles like the board of education, police commission, or housing authority, so that citizens feel that they have a representative voicing their concerns at the table where decisions are made.[180] However, citizen representatives may be rendered ineffective or irrelevant if they are not accountable to a constituency in the community or if the majority of seats are held by the "traditional power elite."[181] In such situations, the citizens may be able "to advise or plan ad infinitum," but powerholders retain "the right to judge the legitimacy or feasibility of the advice."[182] Additionally, the degree of placation of the citizens depends on the "quality of technical assistance they have in articulating their priorities" and "the extent to which the community has been organized to press for those priorities."[183]

3. Degrees of Citizen Control

The three highest levels of participation are considered *Degrees of Citizen Control*. Rung 6 is *Partnership*. At this level, decisionmaking power is "redistributed through negotiation

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[175] *Id.* at 219.
[176] Arnstein, *supra* note 166, at 219.
[177] *Id.*
[178] *Id.*
[179] *Id.* at 220.
[180] *Id.*
[181] Arnstein, *supra* note 166, at 220.
[182] *Id.*
[183] *Id.*

between citizens and powerholders. They agree to share planning and decisionmaking responsibilities through structures such as joint policy boards, planning committees and mechanisms for resolving impasses."[184] The effectiveness of a partnership is dependent on the organization of the community, as well as the degree of resources that the community has available to compensate its leaders for their efforts and to hire or fire its own technicians, lawyers, and community organizers.[185] When a community meets these components, it may have "genuine bargaining influence over the outcome of the plan."[186]

Rung 7 is *Delegation*. At this level, citizens may achieve "dominant decisionmaking authority over a particular plan or program."[187] These may be public boards on which the target groups have a clear majority of seats and genuine specified powers.[188] When citizens are delegated authority in this way, they have the ability to "ensure the accountability of the program to them."[189] They also have a greater degree of planning and operational freedom, as the powerholders will "need to start the bargaining process rather than respond to pressure from the other end."[190]

Finally, *Citizen Control* sits at the apex of the Ladder. At this final rung, the target group internally controls planning, policymaking, and managing the program.[191] Typically, *citizen control* is exemplified by programs in which there are no intermediaries between the program and the source of funds.[192] At this level, the target group has the greatest degree of power over the lives of its members.[193]

B. Applying Native Hawaiian Participation to the Ladder

1. The Trust Obligation

The inclusion of a trust obligation in the Hawai‘i Constitution appears to fall on the third rung of the ladder, *informing*, because it puts Native Hawaiians on notice of their rights under the trust obligation. Because *informing* is a *degree of tokenism*, the constitutional trust obligation purports to include considerations of Native Hawaiians in decisions which impact them while ultimately restricting Native Hawaiians' opportunity to provide feedback or negotiate their rights under the trust obligation.

In fact, the opportunity for feedback and negotiation is so restricted that Native Hawaiians must often resort to litigation to provide any sort of feedback or to negotiate their

[184] *Id.* at 221.
[185] *Id.* at 221-22.
[186] Arnstein, *supra* note 166, at 221-22.
[187] *Id.* at 222.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] Arnstein, *supra* note 166, at 223.
[192] *Id.*
[193] *Id.*

rights under the trust obligation. While the *Carmichael* plaintiffs secured a renegotiation of Native Hawaiian water rights for the irrigation of taro patches essential to traditional and customary rights, the *Mauna Kea* litigation has not reached such a favorable outcome.

Scholars and activists have said that the State of Hawai‘i "weaponized" the legal system "to ignore and deny Indigenous Hawaiian rights" throughout the TMT permitting process by picking and choosing which facts to consider during the permitting process, disregarding and devaluing the voices of Native Hawaiians during the siting and permitting processes, disregarding evidence by "imposing colonial standards of what is reliable and probative" and generally imposing colonial standards and beliefs in making its findings.[194] By using standards formulated using a Western worldview of property ownership, the Native Hawaiians were relegated to a very low level of citizen participation throughout this controversy. The Native Hawaiian people were perhaps "considered" briefly as required by the Constitution, but this consideration was only symbolic and did not represent a level of actual concern or reasoned decisionmaking in terms of impact on Native Hawaiians. As Matthew Lynch, the University of Hawai‘i Director of Sustainability Initiatives, pointed out, the Mauna Kea controversy is an "indicator of process failures. There are voices in our community that do not feel that they have been heard authentically."[195]

The *Mauna Kea* controversy confirms the unfortunate reality that the courts may refuse to compel the State to uphold its trust obligation to Native Hawaiians. As a result, the constitutional trust obligation begins to more closely resemble *manipulation*, a degree of *nonparticipation*. Despite a positive outcome in *Carmichael*, the ongoing Mauna Kea controversy indicates that, at least in some cases, the State's trust obligation to Native Hawaiians is not given meaningful effect. To the extent that the trust obligation is incorporated into the Constitution to give the illusion of effective consideration of Native Hawaiian interests, while ultimately distracting from the continued injustices afflicting the Native Hawaiian people, the trust obligation indicates *manipulation*—the lowest possible level of citizen participation.[196]

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[194] Tanigawa-Lau, *supra* note 3, at 1429; *see also* William N.K. Crowell, *Chipping Away at the Public Trust Doctrine: Mauna Kea and the Degradation Principle*, 21 ASIAN-PAC. L. & POL'Y J. 1 (2020); Terina Kamailelauli'I Fa'agau, *Reclaiming the Past for Mauna a Wakea's Future: The Battle over Collective Memory and Hawai'i's Most Sacred Mountain*, 22 ASIAN-PAC. L. & POL'Y J. 1 (2021); Adam Keawe Manalo-Camp, *The Protectors of Mauna Kea: I Accuse*, HONOLULU CIV. BEAT (Apr. 16, 2015), https://www.civilbeat.org/2015/04/the-protectors-of-mauna-kea-i-accuse/.

[195] Kokal, *supra* note 70.

[196] The recent creation of the Mauna Kea Stewardship and Oversight Authority represents an attempt to elevate Native Hawaiians to the *placation* rung of the ladder. At the *placation* level of participation, citizens are given representatives at the state level who can advocate for their needs. It remains to be seen whether the Authority will have the power to adequately incorporate the voices of Native Hawaiians into the management of the Thirty Meter Telescope.

2. Grassroots Successes in Native Hawaiian Participation

Despite the low levels of participation evidenced by the State's failure to uphold its constitutional trust obligation, the grassroots resurgence of Hawaiian cultural practices has scattered successes in increasing participation of Native Hawaiians in environmental management decisionmaking. For example, the Hawai'i Tourism Authority Board was majority Native Hawaiian for the first time in history in 2022.[197] With the advantage of a Native majority opinion, the Board created a six-year plan to transform sustainability, cultural attractions, community enrichment, and vacation marketing messaging, with the underlying goal of moving away from a picture of Native Hawaiian people and culture as "Disneyland attractions."[198] One result of this overhaul is the creation of the Mālama[199] Program, which allows tourists to engage in educational opportunities while contributing to environmental or cultural restoration projects on Hawai'i.[200]

In the same vein, in 2021, the co-trustees of Papahānaumokuākea Marine National Monument, the first natural and cultural UNESCO World Heritage Site in the United States and one of the largest marine conservation areas in the world, released Mai Ka Pō Mai, a guidance document focused on integrating Native Hawaiian culture and practices into the active management of the Monument.[201] The development of the collaborative document began in 2010 through "continuous and regular meetings" with the Native Hawaiian Cultural Working Group, a collection of Native Hawaiian individuals invited to participate in the development of the guidance document.[202] The chair of the Native Hawaiian Cultural Working Group suggested a true effort at effective consultation when he said, "Mai Ka Pō Mai was birthed by the Native Hawaiian community and represents our vision for how we should *mālama*[203] this special place."[204]

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[197] Andrew Alsdorf, *Malāma: How Native Hawaiians Are Achieving Environmental Justice By Advancing Regenerative Tourism*, LEWIS & CLARK L. SCH.: ENV'T, NAT. RES., & ENERGY L. BLOG (June 16, 2022), https://law.lclark.edu/live/blogs/196-malma-how-native-hawaiians-are-achieving.

[198] Nikki Ekstein and Jen Murphy, *Indigenous Groups Are Finally Getting a Seat at Tourism's Table*, BLOOMBERG (Jan. 12, 2022), https://www.bloomberg.com/news/articles/2022-01-12/indigenous-groups-are-finally-getting-a-seat-at-tourism-s-table.

[199] Meaning to take care of, preserve, or protect. *Mālama,* ULULUKAU: THE HAWAIIAN ELEC. LIB., https://wehewehe.org/gsdl2.85/cgi-bin/hdict?e=q-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4--textpukuielbert%2ctextmamaka%2ctextandrew%2ctextparker%2ctextpeplace%2ctextclark-----0-1l--11-haw-Zz-1---Zz-1-home-malama--00-4-1-00-0--4----0-0-11-00-0utfZz-8-00&a=d&d=D12558#hero-bottom-banner (last visited Mar. 23, 2023) (Neither the author nor the editors of this paper are Native Hawaiian speakers; the English translation of the Native Hawaiian term may only represent a portion of the full definition provided by the Hawaiian dictionary website cited in this footnote).

[200] Alsdorf, *supra* note 197.

[201] *New guidance document to integrate Native Hawaiian culture into management of Papahānaumokuākea*, OFF. OF HAWAIIAN AFFS. (June 21, 2021), https://www.oha.org/news/new-guidance-document-to-integrate-native-hawaiian-culture-into-management-of-papahanaumokuakea/ (hereinafter *New guidance*). The co-trustees are the Department of Commerce, Department of the Interior, State of Hawai'i and the Office of Hawaiian Affairs. *Id.*

[202] *Id.*

[203] *See supra* note 199 (defining mālama); *New guidance*, *supra* note 201.

[204] *Id.*

Further, the U.S. Secretary of the Interior and the Secretary of Agriculture released an order in November 2021 which directed the bureaus and offices within the Department of the Interior and the Department of Agriculture to "manage Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes, including the Native Hawaiian Community.…"[205] The National Park Service's Policy Memorandum elaborating on the order states: "The NPS has a special political and trust relationship with the Native Hawaiian Community that exists even without a formal government-to-government relationship…."[206] The policy envisions a degree of participation beyond mere consultation, which it describes as "co-stewardship." Co-stewardship, as envisioned by the Policy Memorandum, includes co-management with tribal authorities, collaborative and cooperative management accomplished through agreements, and self-governance agreements such as annual funding agreements.[207] And, where co-stewardship is not permitted by law, the National Park Service "will give consideration and deference to… Native Hawaiian proposals, recommendations, and knowledge that affect management decisions on such lands and waters wherever possible."[208]

These examples show that there are grassroots movements to increase the number of Native Hawaiians in state leadership roles and to incorporate Native Hawaiian management principles into the management of important environmental and cultural landmarks. These examples exhibit higher levels of participation than demonstrated by the constitutional trust obligation. Adding more Native Hawaiians to the Hawaiian Tourism Authority Board (HTAB) represents *placation.* At this level of participation, Native Hawaiians have representatives at the state level who influence state-run policies and programs. A typical limitation at the *placation* level of participation is that majority powerholders retain the ultimate decisionmaking power. In this particular situation, the majority is Native Hawaiian so this limitation does not apply. That said, majority-led Native Hawaiian state agencies are not the norm. Despite increased representation across state government, Native Hawaiians may still face barriers typical of *placation*, such as ultimate decisionmaking power retained by the non-Native majority and lack of resources or effectiveness in expressing Native concerns.

The creation of the Mai Ka Pō Mai guidance document for the management of Papahānaumokuākea Marine National Monument represents *consultation*, because state actors invited Native Hawaiians to create a "working group" to contribute to the management planning process for the Monument by participating in continuous and regular meetings. While consultation may sometimes be limited by the failure to actually incorporate the target group's

[205] U.S. DEP'T OF THE INTERIOR & U.S. D.A., JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS, ORDER NO. 3403 (Nov. 15, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf.
[206] U.S. DEP'T OF THE INTERIOR, FULFILLING THE NATIONAL PARK SERVICE TRUST RESPONSIBILITY TO INDIAN TRIBES, ALASKA NATIVES, AND NATIVE HAWAIIANS IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS, POLICY MEMORANDUM, 22-03 AT 3 (2022), https://www.nps.gov/subjects/policy/upload/PM_22-03.pdf.
[207] *Id.* at 5.
[208] *Id.* at 6.

voice into the ultimate decision, in this case, Native Hawaiians' voices were heard and integrated into the management plan.

The Department of the Interior/Department of Agriculture Order and the National Park Service Policy Memorandum calling for co-stewardship of national parks represent the *partnership* level of participation. The National Park Service (NPS) explicitly stated that it envisions building a working relationship with Native Hawaiians beyond mere consultation by forming a "collaborative partnership" with them.[209] At the *partnership* rung of the ladder, Native Hawaiians have "genuine bargaining power" in the decisionmaking process, advanced by opportunities for negotiation over management decisions and annual planning and funding agreements with the NPS. This federal inclusion of Native Hawaiians in a policy designed to increase participatory outcomes for indigenous peoples in America proves that the United States government can affirmatively choose to include Native Hawaiians in its policymaking, even without federal recognition of Native Hawaiians' tribal sovereignty.

These examples are evidence of the potential for grassroots advocates to expand participatory power in environmental management decisionmaking, despite the limited level of participation created by the constitutional trust obligation. Unfortunately, these examples of progress are the exception rather than the norm. There is little that Native Hawaiians can do to compel the expansion of these types of programs, so long as the constitutional trust obligation is able to be undercut by powerful industrial and corporate interests.

The next section explores the potential of federally recognized tribal sovereignty to improve levels of participation for Native Hawaiians by exploring the current status of Native American participation in the 574 federally recognized tribes in the contiguous United States and Alaska.

IV. LEVELS OF PARTICIPATION IN SOVEREIGN TRIBES

The United Nation Declaration on the Rights of Indigenous People (UNDRIP) defines the term "indigenous" using five criteria: self-identification, historical continuity with preinvasion or pre-colonial societies, non-dominance, ancestral territories, and ethnic identity.[210] Even though many indigenous groups in the United States meet these criteria, there are approximately four hundred non-federally recognized tribes in the United States.[211] In the United States, the UNDRIP definition is not a factor in determining whether a tribe receives federal recognition. Rather, tribal status may only be obtained through an Act of Congress, through administrative procedures under 25 C.F.R. Part 83, or by a United States federal court decision.[212]

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[209] *Id.* at 5.
[210] G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).
[211] *See* GAO, INDIAN ISSUES: FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES (2012), https://www.gao.gov/products/gao-12-348.
[212] *See Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://www.bia.gov/frequently-asked-questions (last visited Mar. 18, 2024) [hereinafter *Frequently Asked Questions*].

Most of the tribes that are federally recognized today received their federal recognition through of treaties, acts of Congress, presidential executive orders, federal administrative actions, or federal court decisions.[213] Treaties were crucial to many of the early recognitions of Indian tribes. In the late eighteenth century until the late nineteenth century, the treaty process was the only means of establishing a government-to-government relationship between Indian tribes and the federal government, but the treaty process came to a stop in 1871.[214] Tribes that did not receive federal recognition during the treaty process struggled, in many cases, to establish a government-to-government relationship with the United States government.[215]

Despite only three mentions of Native Americans in the United States Constitution,[216] there is a wide body of law detailing the sovereign rights of federally recognized Native American tribes. This Part will not endeavor to detail the entire history of Native American participation in environmental management decisionmaking, but will examine the highlights of case law and programs which have shaped the current state of Native American participation in environmental management decisionmaking.

A. A Federal Trust Obligation

The federal government has proclaimed its trust obligation to federally recognized Native American tribes.[217] The obligation is "a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources[.]"[218]

In the case *Winters v. United States*, the water rights of the Gros Ventre and Assiniboine Tribes were challenged by a non-tribe member who settled on the other side of a river bordering the reservation.[219] The United States sued on behalf of the Gros Ventre and Assiniboine Tribes to determine who held the water rights to the rivers that bordered both Tribes' Tribes' reservation

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[213] *See id.*

[214] *See* Act of June 30, 1834, ch. 161, §12, 4 Stat. 730 (codified at 25 U.S.C. §177); Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 St. 544, 566 (codified at 25 U.S.C. § 71 (2000)); *see also* Carl H. Johnson, *A Comity of Errors: Why John v. Baker is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1, 4 n.7 (2001) ("The decision to terminate the treaty process was not based on a shifting view toward Indian tribes… but on an increasing inter-institutional jealousy by the House of Representatives over the Senate's exclusive treaty power and its ability to shape federal Indian policy. Also, Congress wanted to end what had been viewed as the intolerable conduct of the Office of Indian Affairs in negotiating false or fraudulent treaties which it intended to ignore or violate.").

[215] *See, e.g.*, Johnson, *supra* note 214, at 4 ("It was only four years prior to the termination of [the treaty process] that the United States purchased the Alaska territory from the occupying Russian government. Because of this short time frame, the indigenous peoples of Alaska never entered into any treaties with the United States. The principles of federal Indian law that developed regarding the tribes of the Lower Forty-Eight seemed inapplicable to the Natives of Alaska").

[216] *See* U.S. CONST. art. I, § 2 (excluding "Indians not taxed" from the apportionment of taxes); *id.* art. I, § 8 (giving Congress the power to regulate commerce with Indian tribes); *id.* amend. XIV, § 2 (excluding "Indians not taxed" from counts for determining number of Congressional representatives for each state).

[217] *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (declaring that the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (acknowledging the trust obligation for the first time).

[218] *See Frequently Asked Questions*, *supra* note 212.

[219] *See* Winters v. United States, 207 U.S. 564 (1908).

land. The United States Supreme Court held that the Gros Ventre and Assiniboine Tribes had an implied right to water because the water is necessary to support agriculture on their tribal lands.[220] This implied right existed even without explicit treaty language guaranteeing water rights.[221] The *Winters* case is the source of the modern Winters Doctrine, which requires the federal government to "set aside sufficient water to fulfill the purposes for which Indian reservations were established."[222]

Building upon the Winters Doctrine, the court in *United States v. Washington Phase II* used the Implied Rights Doctrine to find that the state of Washington has an obligation to ensure in-stream flows sufficient to support tribal fishery runs.[223] The holding in *Washington Phase II* has been used to extend an implied right to environmentally safe land and resources.[224] Additionally, although states are not generally able to regulate environmental matters on Indian reservations, the United States Supreme Court established in *Washington Department of Ecology v. United States Environmental Protection Agency* that while the State of Washington could not itself regulate environmental issues on Indian reservations within the state, "[t]he absence of state enforcement power over reservation Indians… does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards [for hazardous waste management, water quality, and air quality] are met on the reservations."[225]

Despite the trust obligation, Native Americans are more likely than any other demographic group to lack access to fresh water with 58 out of every 1,000 Native American households lacking complete plumbing, compared to three out of every 1,000 white households.[226] Because reservations are less likely to have clean and reliable water, Native Americans experience higher mortality, poverty, and unemployment rates.[227] Additionally, the National Tribal Air Association estimates that there are 200 methane and coal power plants within fifty miles of tribal lands, and Native American communities are also more likely to be located within a half-mile of oil and gas facilities compared to the total population in the encompassing state, increasing the communities' exposure to ozone smog, nitrogen oxides,

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[220] *Id.* at 577.
[221] *Id.*
[222] *See* Sylva, *supra* note 110, at 573. The reservation of water for Native American use has been analogized to the Public Trust Doctrine, which obligates the state to hold natural resources in trust for the public; *see, e.g.*, Keala C. Ede, *He Kanawai Pono no ka Wai (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in In re Water Use Permit Applications*, 29 ECOLOGY L.Q. 283 (2002).
[223] *See* United States v. Washington (Washington Phase II), 506 F. Supp. 187, 204-05 (W.D. Wash. 1980).
[224] *See* Benjamin A. Kahn, *Separate and Unequal: Environmental Regulatory Management on Indian Reservations*, 35 ENVIRONS: ENV'T L. & POL'Y J. 203, 212 (2012).
[225] *Id.* at 216.
[226] *See* CLOSING THE WATER ACCESS GAP IN THE UNITED STATES, DIG DEEP 22 (2019), https://static1.squarespace.com/static/5e80f1a64ed7dc3408525fb9/t/6092ddcc499e1b6a6a07ba3a/1620237782228/Dig-Deep_Closing-the-Water-Access-Gap-in-the-United-States_DIGITAL_compressed.pdf (last visited May 7, 2024).
[227] *Id.*

benzene, formaldehyde, and acetaldehyde.[228] Exposure to these chemicals can also harm native plants and agriculture, impacting access to traditional food sources.[229]

Native Americans also struggle to preserve sacred sites and traditional and customary practices. In the case of the Dakota Access Pipeline ("the Pipeline"), for example, the Standing Rock Sioux Tribe maintains that the Pipeline violates Article II of the Fort Laramie Treat, which provides for the "undisturbed use and occupation" of the reservation lands surrounding the proposed site of the pipeline.[230] The Standing Rock Sioux are also concerned that the Pipeline would pose a threat to its water supply and cultural resources in the event of an oil spill.[231]

The tribe maintains that "they were not adequately consulted about the route" the Pipeline would take.[232] When the plan for the Pipeline route was first published in 2015 and opened for public comment, the Standing Rock Sioux were vocal in their opposition to the plan, requesting further archaeological surveys and passing a resolution declaring that "the Dakota Access Pipeline poses a serious risk to the very survival of our Tribe and… would destroy valuable cultural resources."[233] Despite this, the United States Army Corps of Engineers approved the location of the Pipeline, stating that "no significant comments remain unresolved" and that "the anticipated environmental, economic, cultural, and social effects, and any cumulative effects… [would not be] injurious to the public interest."[234]

Like the inclusion of a trust obligation in the Hawai'i Constitution, the creation of a federal trust obligation appears to fall on the third rung of the ladder, *informing*, because it puts Native Americans on notice of their rights under the trust obligation. However, the health disparities and disregard for Native American perspectives demonstrate that despite the federal government's trust obligation to provide the water, natural resources, and protection of traditional and customary rights needed to live on Indian reservations, the trust obligation is frequently violated. Much like the State of Hawai'i's constitutional trust obligation to Native Hawaiians, the mere existence of a federal trust obligation does not ensure meaningful Native American participation in environmental management decisionmaking. Without meaningful effect consistently given to the federal trust obligation, it is clear that in some cases, the federal

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[228] *See Indigenous People and Air Pollution in the United States*, MOMS CLEAN AIR Force (2021), https://www.momscleanairforce.org/resources/indigenous-people-and-air-pollution/.
[229] *Id*.
[230] *See Treaties Still Matter: The Dakota Access Pipeline*, NATIVE KNOWLEDGE 360, https://americanindian.si.edu/nk360/plains-treaties/dapl; Treaty of Fort Laramie, Apr. 29, 1868, 15 Stat. 635, https://www.archives.gov/milestone-documents/fort-laramie-treaty#:~:text=Citation%3A%20Treaty%20with%20the%20Sioux,Record%20Group%2011%3B%20National%20Archives.
[231] *See id*.
[232] Rebecca Hersher, *Key Moments In The Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight
[233] NATIVE KNOWLEDGE 360, *supra* note 230; Resolution No. 406-15, Standing Rock Sioux Tribe, (Sept. 2, 2015).
[234] Hersher, *supra* note 232. The U.S. Army Corps of Engineers received nearly 28,000 comments during the public comment period. *DAPL Public Comments*, U.S. ARMY CORPS OF ENG'R, https://www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/Oil-and-Gas-Development/Dakota-Access-Pipeline/DAPL-Public-Comments/ (last visited Feb. 18, 2024).

trust obligation more closely resembles *manipulation*, a degree of *nonparticipation*—the lowest possible level of citizen participation.

B. Native American Consultation in Environmental Management Decisionmaking

The federal government has, on several occasions, proclaimed its obligation to consult with Indian tribes whenever it takes federal actions that impact those tribes.[235] Each federal agency has developed its own consultation policy.[236] The EPA has robust tribal consultation policies, including a self-imposed affirmative obligation to consider Indian treaty rights in its decisionmaking.[237]

Under this policy, the EPA will consider a number of questions when making decisions: "Are there treaty rights there? What resources do the treaty rights cover and how might the decision being made affect those treaty rights?"[238] For example, under the Stevens Treaties established between Pacific Northwest tribes and the federal government, tribes hold fishing rights to fifty percent of the harvestable catch at their "usual and accustomed fishing places" outside of their reservations.[239] Because of the EPA's consultation policy, any land use or environmental management decisions which could impact the Indian fishing rights established by the Stevens Treaties requires a thorough consideration of how those rights would be impacted.[240]

The EPA's consultation policy appropriately falls on the *consultation* rung of the ladder. At this level of participation, Native American needs and opinions are taken into consideration by the federal government in its decisionmaking. However, this does not mean that Native American needs and opinions are given priority in the decisionmaking process. Even in cases where Native Americans have been consulted, the federal government may make decisions contrary to the needs and opinions of Native Americans. As demonstrated by the case of the Dakota Access Pipeline,[241] consultation, if not meaningful, is hardly consultation at all.

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[235] *See* Cynthia Harris et al., *Environmental Protection in Indian Country: The Fundamentals*, 47 ENV'T L. REP. NEWS & ANALYSIS 10905 (2017); Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000); Memorandum on Tribal Consultation From President Barack Obama, to the Heads of Executive Departments and Agencies (Nov. 5, 2009), https://www.cms.gov/Outreach-and-Education/American-Indian-AlaskaNative/AIAN/Downloads/PresidentialMemoTribalConsultationNov2009.pdf.

[236] Harris, *supra* note 235, at 10909.

[237] *See* EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES, EPA, https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf (2011) [hereinafter EPA POLICY ON CONSULTATION].

[238] Harris et al., *supra* note 235, at 10912.

[239] *See id.* at 10911.

[240] *See id.* at 10912.

[241] *See supra* notes 230-34 and accompanying text (discussing the Dakota Access Pipeline controversy).

C. Delegation of EPA Regulatory Authority

The EPA may delegate its regulatory authority to sovereign Native American tribes as a means of enhancing Native American participation in the environmental management of their lands. For example, under the Safe Drinking Water Act (SDWA) the EPA Administrator is authorized to "treat Indian Tribes as States," which means that the Administrator may "delegate to such Tribes primary enforcement responsibility for public water systems and for underground injection control" and also may "provide such Tribes grant and contract assistance."[242] Similar directives exist in the Clean Water Act[243] and the Clean Air Act,[244] and the EPA may delegate regulatory authority over the Federal Insecticide, Fungicide, and Rodenticide Act and the Solid Waste Disposal Act (the Resource Conservation and Recovery Act, or RCRA) as well.[245]

Beginning in the 1990s, the EPA assumed delegation of regulatory authority of the Clean Air Act to tribes.[246] In contrast, the regulatory authority over the Clean Water Act (CWA) was not automatically delegated to tribes. Rather, tribes were required to explicitly demonstrate that they met one of two exceptions in order to be granted regulatory authority, either a consensual relationship or an effect on the political integrity or health and welfare of the tribe.[247] However, in 2016, the EPA eliminated this distinction between the Clean Air Act (CAA) and CWA so that the delegation of regulatory authority was presumed under both acts.[248]

Despite the statutory allowances for tribal regulation of EPA programs, there are several limitations on the grant of regulatory authority. Under the SDWA, CWA, and CAA, for example, the tribes must demonstrate that they have sufficient management capability such that they are able to take on the regulatory authority supposed in the statutes.[249] Tribes without prior management experience, as demonstrated by the administration of certain programs and services,[250] are thus precluded from delegation of regulatory authority.[251] Out of 567 federally recognized tribes, only forty-nine have obtained regulatory authority under the CAA, and only forty-two have implemented their own water quality standards under the CWA.[252]

The delegation of EPA regulatory authority is an example of the *delegation* level of participation. The tribe is designated as the regulatory authority over specified EPA programs, making the tribe the dominant decisionmaking authority in a limited context. At this level of

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[242] Safe Drinking Water Act, 42 U.S.C. § 300j-11(a) (2006).
[243] Clean Water Act, 52 Fed. Reg. at 37, 396.
[244] Clean Air Act of 1990, 42 U.S.C. § 7601(d)(1)(b) (2000).
[245] *See* Kahn, *supra* note 224, at 209.
[246] *See* Harris et al., *supra* note 235, at 10910.
[247] *Id.*
[248] *Id.*
[249] *See* Kahn, *supra* note 224, at 206-08.
[250] *See, e.g.,* Indian Self-Determination and Education Assistance Act, (25 U.S.C. § 450 et seq.), the Indian Mineral Development Act (25 U.S.C. § 2101 et seq.), and the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004); *see* Kahn, *supra* note 224, at 207.
[251] *See* Kahn, *supra* note 224, at 207 (explaining the argument that to properly uphold its trust obligation to the tribes, the federal government must provide the training and funding required for tribes to acquire the required management experience to obtain regulatory authority).
[252] Harris et al., *supra* note 235, at 10910-11.

participation, tribes can ensure the accountability of these programs to them and their needs by exercising a greater degree of operational freedom in administering the program. At this level, the EPA would be required to initiate a bargaining process with the tribe, rather than requiring the tribe to petitioning for negotiations with the EPA.

D. Self-Governance: Morton v. Mancari

In the 1974 Supreme Court case *Morton v. Mancari*, non-Indian employees of the Bureau of Indian Affairs sued the United States government over a hiring preference for Indians within the Bureau.[253] The Court upheld a hiring preference for "members of quasi-sovereign tribal entities" by reasoning that the tribal entities were "political rather than racial in nature."[254] The Court further stated that other areas of Indian law would "not be disturbed" "[a]s long as the special treatment of Indians can be tied rationally to the fulfillment of Congress' unique obligation toward Indians[.]"[255] Justice Blackmun, writing for the majority, identified three rationales tying the hiring preference at issue in the case to the fulfillment of Congress's unique obligation toward Indians: "to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[256] The decision in *Mancari* allows for governing bodies staffed by tribe members, so that members of the tribe are making decisions on issues that impact that tribe.

In addition to the rights established by *Mancari*, sovereign tribes have sovereign powers to develop their own environmental laws.[257] These laws may be developed using tribal common law and constitutional or statutory provisions.[258] Additionally, sovereign tribes can regulate non-Indians on non-Indian land within a reservation in situations where there is (1) a consensual relationship or (2) a threat to the health and safety of the tribe.[259]

As a result of *Mancari* and the sovereign power to develop laws on the reservation, Native Americans participate at the level of *citizen power*. This is the highest rung of the Ladder of Participation, representing the fullest extent of self-government and self-determination. At this level, Native Americans internally control their programs throughout the planning, policymaking, and management processes. While there are certainly limitations on self-determination of Native American tribes,[260] the *Mancari* decision and the ability of tribes to establish and enforce laws within the reservation suggests that in certain contexts, Native Americans achieve citizen control.

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[253] Morton v. Mancari, 417 U.S. 535 (1974).
[254] *Morton*, 417 U.S. at 553 n.24, 554 (1974).
[255] *Id.* at 536.
[256] *Id.* at 541-42.
[257] Harris et al., *supra* note 235, at 10912.
[258] *Id.*
[259] Montana v. United States, 450 U.S. 544 (1981).
[260] *See supra* Section IV(A) ("A FEDERAL TRUST OBLIGATION") (describing the limitations on Native American self-determination).

V. CLIMBING THE LADDER OF CITIZEN PARTICIPATION THROUGH TRIBAL SOVEREIGNTY

Federal recognition of Native Hawaiian tribal sovereignty would have wide-ranging impacts, though the details of many of these impacts are still unknown. Would the United States return ceded lands to function as a Native Hawaiian land base?[261] Would OHA remain a state agency, or would it be dissolved, and its duties be subsumed by the new tribal governing entity? While the answers to these questions are unclear, this note will assume that Native Hawaiians will be granted some sort of land base on which to operate following federal recognition, and will also assume that OHA will continue to operate as a state agency. This Part will argue that Native Hawaiians can achieve *citizen control*, the highest degree of citizen participation, through federal recognition of tribal sovereignty.

Section I of this article explored the current state of Native Hawaiian participation in environmental management decisionmaking and determined that the most consistent expression of Native Hawaiian participation was through the constitutional trust obligation. In part due to the failure of the state to deliver on its fiduciary obligations to the OHA and the classification of Native Hawaiians as a racial rather than a political group,[262] the state consistently fails to uphold its trust obligation to Native Hawaiians. As a result, Native Hawaiians are forced to turn to litigation to compel the state to uphold its trust obligation—an effort that only sometimes ends in the desired result for Native Hawaiians.

There have been scattered improvements in Native Hawaiian participation, including the majority Native-led Hawaiian Tourism Authority Board, the Mai Ka Pō Mai guidance document for the management of Papahānaumokuākea Marine National Monument, and the Department of the Interior/Department of Agriculture co-stewardship plan. These efforts are promising examples of *placation*, *consultation*, and *partnership* evidencing a desire by Native Hawaiians to amplify their voices in decisionmaking forums. Even so, it is clear that the Native Hawaiian community is most often relegated to the third rung of the ladder, *informing*, or, as I argue, *manipulation*—the lowest level of citizen participation—due to the ineffective nature of the trust.

Similarly, federally recognized sovereign tribes in the contiguous United States and Alaska face a range of limitations to achieving complete self-determination. One of these limitations is the failure of the United States government to uphold its federal trust obligation to

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[261] *See generally* Palau-McDonald, *supra* note 5 (discussing opportunities for indigenous stewardship of lands); Pele Defense Fund v. Paty, 837 P.2d 1247, 1254 (Haw. 1992) (in which plaintiff sought a declaration an exchange of 27,800 acres of state-owned land for approximately 25,800 acres of privately-owned land "was a breach of trust and a violation of law and request[ed] a return of the exchanged lands to ceded land status via a constructive trust or another land exchange"); Off. of Hawaiian Affairs v. Hous. and Community Dev. Corp. of Hawaii, 177 P.3d 884, 891 (Haw. 2008), rev'd and remanded sub nom. Hawaii v. Off. of Hawaiian Affairs, 556 U.S. 163 (2009) (in which "the plaintiffs sought a declaration that the State was not authorized to alienate ceded lands from the public lands trust or, if the trial court ruled the State was so authorized, a declaration that such alienation would not limit the claims of native Hawaiians to the ceded lands.").

[262] *See* Rice v. Cayetano, 528 U.S. 495 (2000); *see also supra* notes 93-107 and accompanying text (describing the holding in *Rice*).

sovereign tribes. Despite the establishment of the federal trust obligation by federal case law, the United States government has repeatedly minimized the trust obligation.[263] In these cases, even federally recognized sovereign tribes find themselves at the *informing* or *manipulation* rungs of the ladder.

While a federally enforceable trust obligation may benefit Native Hawaiians by creating another layer of oversight over the legitimacy of siting and regulatory decisionmaking, the fact that sovereign tribes face the same struggles as Native Hawaiians suggests that the federal trust obligation would not elevate Native Hawaiian participation to a higher rung of the Ladder. More likely, the level of participation would remain at *informing* and may, at times, more closely resemble *manipulation* when Native Hawaiians are required to resort to litigation to compel the state and federal governments to uphold their trust obligations.

There are several features of tribal sovereignty which distinguish participation potential in sovereign tribes from the participation potential of Native Hawaiians: the federal obligation to consult with sovereign tribes, delegation of EPA regulatory authority, and classification of sovereign tribes as political groups rather than racial groups. There is a federal obligation to consult sovereign tribes in environmental decisionmaking which impacts them. There is no such obligation, either state or federal, to consult Native Hawaiians. Currently, Native Hawaiians are at the whim of decision-makers who may occasionally extend an invitation for Native Hawaiian perspectives on a project, but consultation is not a consistent practice in environmental management decisionmaking in Hawai‘i.

The Mai Ka Pō Mai guidance document for the management of Papahānaumokuākea Marine National Monument, for example, is an exceptional document and does not represent a reliable system of consultation. If Native Hawaiians were granted tribal sovereignty, all federal agencies making decisions that impact Native Hawaiians would be required to follow their agency-specific consultation policies when making such decisions, to ensure that Native Hawaiian perspectives and rights are adequately considered and protected.[264] In short, the federal consultation requirement would increase Native Hawaiians' ability to participate more consistently at the *consultation* level of the Ladder.

The EPA presumes delegation of regulatory authority of the CAA and CWA to sovereign tribes. Native Hawaiians do not have an organized political entity to which regulatory authority may be delegated and do not have an established land base, and so, under these conditions, delegation of regulatory authority over environmental programs would make little sense. However, if Native Hawaiians were granted tribal sovereignty, and assuming that they were granted a land base upon which to operate, they would be eligible for delegation of EPA regulatory authority. For the SDWA, CWA, and CAA, Native Hawaiians would still be required to demonstrate sufficient management capability for regulatory authority to be granted[265], but the

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[263] *See supra* notes 230-234 and accompanying text (discussing the Dakota Access Pipeline controversy); *supra* notes 68-73 (detailing negative health outcomes in the Native American community).
[264] Harris et al., *supra* note 235, at 10905; *see* Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000); Memorandum on Tribal Consultation, *supra* note 235; *see also* EPA POLICY ON CONSULTATION, *supra* note 237.
[265] *See* Kahn, *supra* note 224, at 206-08.

mere opportunity for delegation of EPA regulatory authority represents the potential for Native Hawaiians to participate consistently at the *delegation* rung of the Ladder of Participation in matters of environmental management decisionmaking.

Finally, *Morton v. Mancari* establishes that sovereign tribes are a political group and not a racial group for purposes of evaluating equal protection claims. Native Hawaiians, on the other hand, are considered a racial classification for the purposes of evaluating equal protection claims. Because of this, Native Hawaiians cannot exclude non-Native voters for OHA Board positions and may not exclude non-Native OHA Board candidates from serving on the OHA Board.

While it is unknown if OHA would remain a state agency after Native Hawaiians achieve tribal sovereignty, the classification of Native Hawaiians as a political group would enable any state-run programs designed to benefit Native Hawaiians to exclude non-Hawaiians, thereby privileging the voices of the Native Hawaiians who the programs were designed to benefit. Additionally, tribal sovereignty would grant Native Hawaiians the power to make and enforce its own environmental laws, assuming that Native Hawaiians are granted a land base upon which to operate. This would enable Native Hawaiians to achieve the *citizen control* level of the Ladder, a degree of participation currently unavailable to the Native Hawaiian people.

VI. PARTICIPATION IN PARADISE: A WAY FORWARD

Despite the haphazard enforcement of state and federal trust obligations, Native Hawaiians would benefit from federal recognition of their tribal sovereignty. If granted tribal sovereignty by the United States government, Native Hawaiians would be consulted in the case of federal actions that impact them, could be delegated EPA regulatory authority, would be deemed a political classification rather than a racial classification, and would be capable of making and enforcing laws on their land base, granting them a greater potential for self-governance. Instead of inconsistent and sporadic, if well-meaning, programs ranging from *consultation* to *partnership* on the Ladder of Participation, a sovereign Native Hawaiian tribe would consistently participate at the *consultation* and *delegation* levels of the Ladder of Participation, and would achieve *citizen control*, a degree of participation unseen by Native Hawaiians since the Bayonet Constitution divested the Hawaiian Monarchy of governing power in 1887.

Achieving *citizen control* would be the first step in a long journey toward restorative environmental justice for the Native Hawaiian people. With the opportunity to self-govern, Native Hawaiians could begin implementing policies and programs to improve health outcomes, strengthen traditional and customary practices, and protect sacred sites, thus affirming Native Hawaiian self-sufficiency, integrity, and communal strength.

While the future of the Hawaiian tribal sovereignty movement is on unsteady ground, given the retirement of Senator Akaka in 2013, the resulting “death” of the Akaka Bill, and the difficulty of achieving the requirements for establishing a government-to-government relationship set forth in the 2019 DOI Rule, one thing seems clear: federal recognition of the

tribal sovereignty of Native Hawaiians would increase Native Hawaiian participation in environmental management decisionmaking.