

STATE CONSERVATION AS SETTLER COLONIAL GOVERNANCE AT KA'ENA POINT, HAWAII

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ABSTRACT

This paper argues, by illustrating, that liberal multiculturalism and natural resources are interlinked strategies of settler colonial governance in political debates surrounding the construction of a “predator-proof” fence for conservation purposes across Native Hawaiian lands of deep cultural and historical significance at Ka'ena Point, a state wilderness park in Hawai'i. First, this paper shifts debates framed in terms of the seeming recalcitrance of Native Hawaiian cultural practitioners to recognize the necessity of natural resource management. Second, it considers how these political debates are repeated in the context of legal questions over the forms through which Native Hawaiian cultural claims may be placed against settler state actions. Third, and most pertinently, the paper speaks to an emerging field of critical indigenous legal scholars who analyze the limits of law as coterminous with settler colonialism.

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INTRODUCTION

“[W]ithout the resources provided to us by the land and sea, our lawai`a [fishing] traditions would not exist.” – Lawai`a Action Network.¹

We do not always know when we are looking at settler colonialism.² “Settler colonialism” is a cluster of processes through which Native sovereignty is frustrated, subordinated, or made to look impossible.³ It encompasses the State of Hawai`i as itself a project of maintaining a U.S. polity on Hawaiian territory.⁴ And, more than having merely moved into a subjugated others’ space,⁵ settler colonialism is a structure of displacing and replacing indigenous peoples;⁶ “a historical force that ultimately derives from the primal drive

¹. Lawai`a Action Network, *Mālama Ka`ena, a mālama Ka`ena ia `oe: A Community Plan for Culturally-based Resource Management at Ka`ena, O`ahu*, 5 (2010) (unpublished manuscript) (on file with the Office of Hawaiian Affairs, Compliance Division) [hereinafter *Final Lawai`a Proposal*].

². Michael J. Shapiro argues that nation-states enact forms of *cultural* governance to cohere settler polities, over and against indigenous presences. See MICHAEL J. SHAPIRO, *METHODS AND NATIONS: CULTURAL GOVERNANCE AND THE INDIGENOUS SUBJECT* (2004).

³. See generally Jeff Corntassel, *Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse*, 33 *ALTERNATIVES* 105 (2008); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 *J. GENOCIDE RES.* 387 (2006).

⁴. See generally J. KĒHAULANI KAUANUI, *HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY* (2008).

⁵. See Wolfe, *supra* note 3.

⁶. Given the diversity of indigenous groups, a uniform definition for “indigenous peoples” under international law would unnecessarily risk under- or over-inclusiveness. Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources; Norms and Jurisprudence of the Inter-American Human Rights System*, 35 *AM. INDIAN L. REV.* 263, 279 (2010). Rather, indigenous peoples are afforded full international human rights as well as a set of specific individual and collective rights (see United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 1 (Sept. 13, 2007)). *Id.* at 278.

to expansion that is generally glossed as capitalism.”⁷ But, where do we see these historical forces, primal drives, and capitalism? This view is especially difficult to achieve when we are looking at settler state *conservation*.⁸ Protecting land and natural resources for future generations seems far from the genocidal violence of Native dispossession.⁹ It is a sense of distance that gets mobilized as an aggressive belief in the virtuousness of state conservation work.¹⁰ This paper argues, by illustrating, that liberal multiculturalism and natural resources are interlinked strategies of settler colonial governance in political debates surrounding the construction of a “predator-proof” fence for conservation purposes across Native Hawaiian lands of deep cultural and historical significance at Ka`ena Point, a state wilderness park in Hawai`i.

The State of Hawai`i’s Department of Land and Natural Resources (DLNR)¹¹ avows “honoring . . . [the] cultural significance” of Ka`ena Point.¹² Ka`ena Point is home to native species, coastal fisheries, and

⁷. PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPHIC EVENT*, 167 (1999).

⁸. See Timothy Neale, *Duplicity of Meaning: Wildness, Indigeneity and Recognition in the Wild Rivers Act Debate*, 20 GRIFFITH L. REV. 310 (2011) (elaborating a genealogy of the term “wild” in an conservation law, entitled the “Wild Rivers Act,” as indicative of Australian nationalism’s reliance on indigeneity).

⁹. See LILIKALĀ KAME`EHIWA, *NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI?* (1992); DAVID STANNARD, *BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT* (1989) (quantifying the decimation of the Hawaiian population upon and after Western colonization).

¹⁰. A more usual concept used to discuss beliefs in state rationality is “hegemony,” as first elaborated by Antonio Gramsci. See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Quintin Hoare & G. Nowell Smith trans. 1971).

¹¹. See *infra* note 53.

¹². DEP’T LAND & NAT. RES., STATE OF HAWAII, *FINAL INTEGRATED KA`ENA POINT ACTION PLAN 16* (2011) available at <http://hawaii.gov/dlnr/kpsa/Kaena-Final-Action-Plan.pdf> [hereinafter *KPAG Plan*].

sites of sacred significance.¹³ Ka`ena Point is also a deeply historied landscape, the site of “intense” conflicts between Hawaiian cultural practitioners, environmental interests, and recreational users, among whom DLNR seeks to “achieve a balance” while “reduc[ing] the mounting impacts to both land and sea.”¹⁴ Insofar as it seeks to protect the natural resources that are integral to Hawaiians’¹⁵ cultural

¹³. MELVIN S. KURAOKA, DEP’T LAND & NAT. RES., STATE OF HAWAI’I, FINAL INTEGRATED KA’ENA POINT ACTION PLAN, KA’ENA POINT STATE PARK CONCEPTUAL PLAN 16 (1978) [hereinafter KA’ENA CONCEPTUAL PLAN].

¹⁴. Dep’t of Land & Natural Resources, State of Hawai’i, Ka’ena Point Stewardship Area, <http://hawaii.gov/dlnr/kpsa> (last visited Jan. 24, 2012).

¹⁵. In Hawai’i, the term “Hawaiian” is commonly understood to refer to a Native Hawaiian, a person whose ancestors inhabited the Hawaiian island chain prior to 1778. HAW. REV. STAT. § 10H-3 (LEXIS through 2011 Reg. Session). In vernacular usage, “Hawaiian” does not refer to a resident of Hawai’i unless they have this genealogy. See Neal Milner & Jon Goldberg-Hiller, Post-Civil Rights Context and Special Rights Claims: Native Hawaiian Autonomy, US Law, and International Politics 1 (May-Jun. 2002) (unpublished manuscript) (on file with author). This paper employs the term “Hawaiian” with this vernacular meaning out of recognition for the space from which it is written. “Hawaiian” refers also to Kānaka Maoli (full-blooded Hawaiian people) and Kānaka Ōiwi (native sons of Hawai’i). MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127, 200 (1986) (entry for “Kānaka Ōiwi”). For legal purposes, “Native Hawaiian” references “an individual who is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawai’i[.]” HAW. REV. STAT. § 10H-3 (LEXIS through 2011 Reg. Session). By contrast with “Native Hawaiians,” lower-case “native Hawaiians” are those persons with fifty-percent or more blood quantum as identified by the Hawaiian Homes Commission Act (Act 42 of Jul. 9, 1921), Pub. L. No. 34, 42 Stat. 108 (1921). This genealogical definition of “Native Hawaiian” does not reflect state negotiations with Hawaiians only, but also Hawaiian political theorists’ recommendations based on their analyses of the Kingdom’s historical experiences with multiracial citizenship. Hawaiian national sovereignty-advocates, such as Ka Lāhui Hawai’i and the Council of Regency, also consider genealogy to be a defining aspect of Native Hawaiian citizenship. They note, “[a]llowing haole citizenship did not make haole loyal to the Kingdom in the same way that Natives were loyal, and for the maka’ainana of the 1840s, that loyalty was important, not just politically but also socially and culturally.” Jonathan Kamakawiwo`ole Osorio, *Kū`ē and Kū`oko`a (Resistance and Independence): History, Law and Other Faiths*, 1 HAW. J.L. & POL. 92, 109 (2004). Such a genealogical definition also makes sense as a safeguard against fraudulent claims to Native Hawaiian rights by non-Hawaiians. See Lisa Kahaleole Hall, *‘Hawaiian at Heart’ and other Fictions*, 17 THE CONTEMPORARY PACIFIC 404 (2005).

patrimony,¹⁶ DLNR *appears* an unproblematic exercise of state authority.¹⁷ However, this has not been the case.

On its face, the state's commitment to conserving natural resources seems to recognize the cultural significance of Hawai'i's lands.¹⁸ In practice, however, state actions have restricted access, squelched protest against the desecration of culturally important sites, and produced the *illusion* of having empowered communities closest to the land while retaining control over decision making.¹⁹ For example, since 2009, DLNR has erected a predator-proof fence,²⁰ upheld a "camping paraphernalia" statute to insulate the park from overnight use,²¹ and assembled a community advisory group on Ka'ena.²² As will be discussed in this paper, Hawaiian cultural practitioners, and lawai'a (practitioners of Hawaiian fishing traditions) in particular, have protested these actions.²³ These protests emphasize Hawaiian natural

¹⁶. See Noelani Goodyear-Ka'ōpua, *Kuleana Lāhui: Collective Responsibility for Hawaiian Nationhood in Activists' Praxis*, 5 AFFINITIES 130 (2011) (describing Hawaiian relationships to 'āina as integral to Hawaiian sovereignty).

¹⁷. Hawaiian cultural claims and struggles for political sovereignty are closely aligned, both conceptually and in practice. See Goodyear-Ka'ōpua, *supra* note 16, at 142.

¹⁸. Dep't. Land & Natural Res., State of Hawai'i, *Website available at* <http://hawaii.gov/dlnr> (last visited Feb. 4, 2012) [hereinafter *DLNR Website*].

¹⁹. See *infra* Part II.

²⁰. Press Release, Dep't Land & Nat. Res., State of Hawai'i, First Predator Proof Fence in Hawai'i is Completed at Ka'Ena [*sic*] Point (Apr. 15, 2011) *available at* hawaii.gov/dlnr/chair/pio/nr/2011/NR10-225.pdf/at_download/file [hereinafter *Fence Press Release*].

²¹. See HAW. CODE. R. § 13-126-2 (2010).

²². See *Ka'ena Point Website*, *supra* note 14.

²³. See Telephone interview with Laulani Teale, former Peacemaker, Native Hawaiian Legal Corporation (Jan. 23, 2012) [hereinafter *Teale Interview*]; Pathways to Paradise, *Fishermen Speak Up!* (Mar. 2010), <http://carrollcox.com/FishermenSpeakUp.htm> (first televised on 'Ōlelō Community Television) [hereinafter *Fishermen Speak Up!*]; and *Final Lawai'a Proposal*, *supra* note 1.

resource stewardship traditions that are part of decolonizing struggles in Hawai'i.

This paper proceeds from indigenous critical theory²⁴ and approaches Ka'ena's contentious landscape with three questions. How might we make sense of state conservation efforts that both "honor" Hawaiian cultural understandings of place *and* restrict cultural practices in the protected areas themselves?²⁵ How might protecting native wildlife and cultural sites *also* be a project of securing settler state authority?²⁶ Third, how might clearing away a settler state's agenda for natural resource management make space for new, decolonizing encounters with lands, the sea, and each other?²⁷

Part I provides several backgrounds to present-day Ka'ena Point: the administrative framework for DLNR authority, historical land use at Ka'ena, and three conflicts between Hawaiian cultural practitioners and DLNR governance.²⁸ Part II frames state conservation efforts at Ka'ena as exercises of a settler colonial *biopolitics*²⁹—life itself is a political object in which settler populations³⁰ function as instruments of Native

²⁴. See *infra* Part II.

²⁵. Jon Goldberg-Hiller and Noenoe Silva pose a substantially similar question to the State of Hawai'i's conservation practices in game management. See Jon Goldberg-Hiller & Noenoe Silva, *Sharks and Pigs: Animating Hawaiian Sovereignty against the Anthropological Machine*, 110 S. ATLANTIC Q. 429, 434 (2011). See *infra* Part II.D.

²⁶. See *infra* Part II.C.

²⁷. See *infra* Part IV; Trevor Tamashiro, *Molokai: Resurrecting the 'Aha Moku on the "Last Hawaiian Island,"* 12 ASIAN-PAC. L. & POL'Y. J. 295 (2011) (assessing 'Aha Moku, contemporary application of traditional natural resource management council governance).

²⁸. These conflicts concern a "camping paraphernalia" rule, the Ka'ena Point Advisory Group, and the predator-proof fence. See *infra* Part I.

²⁹. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE, 1975-1984, 247 (2003).

³⁰. FOUCAULT (2003), *supra* note 29, at 245 ("Biopolitics deals with the population, with the population as a political problem, as a problem that is at once scientific and political, as a biological problem and as power's problem.").

dispossession.³¹ In this view, maintaining a settler polity demands *making live* a kind of life separated from wilderness and harboring a recreational and aesthetic appreciation for nature.³² These “lives” belong to “city dwellers”³³ engaged in passive recreation, tourists who do the same, Hawaiian cultural practitioners who accomplish the acrobatics of interpreting traditions for state conservation policies, and the compliant wildlife itself.³⁴

Settler colonialism should not be seen only in the subordination of indigenous peoples, thereby leaving under-examined efforts to *incorporate* indigeneity into the settler nation.³⁵ The state does not openly denigrate Hawaiian culture, but recruits, shapes, and regulates the kinds of Hawaiian lives, cultures, and claims that can achieve state recognition.³⁶ This form of settler colonialism is not synonymous with oppression (although it also means this).³⁷ Part III considers the settler state’s attention to Hawaiian culture and values as an unsurprising

³¹. See Scott L. Morgensen, *The Biopolitics of Settler Colonialism: Right Here, Right Now*, 1 SETTLER COLONIAL STUD. J. 52, 52 (2011) (“settler colonialism . . . is exemplary of biopower.”).

³². KA’ENA CONCEPTUAL PLAN, *supra* note 13, at 29.

³³. *Id.*

³⁴. *Id.*

³⁵. *Paraphrasing* Morgensen, *supra* note 31, at 56.

³⁶. See ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF MULTICULTURALISM*, 6 (2002) (colonial states require indigenous subjects to produce “domesticated nonconflictual ‘traditional’ forms of sociality”). Povinelli’s analysis of Australia resonates with analyses of Hawai’i. See Keiko Ohnuma, “*Aloha Spirit*” and the Cultural Politics of Sentiment as National Belonging, 20 CONTEMP. PACIFIC 365 (2008) (discussing the exploitation of Hawaiian concepts of “aloha” by a settler colonial tourism industry in Hawai’i).

³⁷. Oppression produces situations of deprivation, which are not necessarily good sites to seek redemptive plans for emancipation. As Povinelli writes, “the options presented to those persons who choose, or must, live at the end of liberalism’s tolerance and capitalism’s trickle, are often not great options. To pretend they are is to ignore the actual harms that liberal forms of social tolerance and capital forms of life- and wealth-extraction produce.” ELIZABETH A. POVINELLI, *THE EMPIRE OF LOVE: TOWARD A THEORY OF INTIMACY, GENEALOGY AND CARNALITY*, 25 (2006) [hereinafter POVINELLI, “EMPIRE”].

consequence of its simultaneous *reliance and subordination* of Hawaiians' political "priority."³⁸ Priority concerns *how* who came here first matters; and constitutes a shared political terrain of struggle between indigenous and liberal multicultural settler nations.³⁹

In recognizing *settler colonial* natural resource conservation, we confront a problem that must be met beyond what is usual for governance.⁴⁰ Part IV discusses new approaches to indigenous governance and the human place in nature— "sustainable sovereignty"⁴¹—in Hawaiian community stewardship proposals for Ka`ena.⁴²

I. BACKGROUND ON KA`ENA POINT CONFLICTS

Increasing urbanization has created a need in the city-dweller – a need to escape the confinement of the urban scene of automobiles, concrete and glass. [Ka`ena Point] . . . will be preserved to fulfill the non-urban needs of the people.

- *Ka`ena Conceptual Plan (1978).*⁴³

The Ka`ena region comprises the westernmost portion of O`ahu and encompasses 15,700 acres, which includes ten miles of shoreline.⁴⁴ Its coastal areas contain tidepools, fisheries, bird-nesting grounds, ancient burials, heiau (Hawaiian temples), and are sites of the most

³⁸ Elizabeth A. Povinelli, *The Governance of the Prior*, 13 INTERVENTIONS 13 (2011) [hereinafter Povinelli, *Governance*].

³⁹ As Povinelli discusses, the political purchase of "prior-ness" began with British colonialism and gained a new utility for settler states such as the U.S. and Australia in articulating their national independence from Britain. *Id.* at 15.

⁴⁰ See Goodyear-Ka`ōpua, *supra* note 16.

⁴¹ See Corntassel, *supra* note 3.

⁴² See *infra* Part IV.

⁴³ KA`ENA CONCEPTUAL PLAN, *supra* note 13, at 29.

⁴⁴ KA`ENA CONCEPTUAL PLAN, *supra* note 13, at 4.

vigorous land use and governance controversies.⁴⁵ This section describes Hawaiian cultural practitioners' contests to a predator-proof fence,⁴⁶ the Ka'ena Point Advisory Group,⁴⁷ restrictions on overnight camping,⁴⁸ and an overview of state administration at Ka'ena Point and historical land use.⁴⁹

A. STATE ADMINISTRATION OF KA'ENA POINT

When Hawai'i was admitted to the U.S. in 1959, the State of Hawai'i became responsible for all public lands, including those 'ceded' to the U.S. upon the overthrow of the Hawaiian Kingdom.⁵⁰ Lands transferred to the state pursuant to section 5(b) of the Admission Act of 1959 became part of the state's public land trust.⁵¹ In 1959, DLNR was established⁵² to manage these lands, which include Ka'ena Point as well as water resources.⁵³

⁴⁵. *Id.*

⁴⁶. *See infra* Part I.E.

⁴⁷. *See infra* Part I.C.

⁴⁸. *See infra* Part I.D.

⁴⁹. *See infra* Part I.A & B.

⁵⁰. *See* An Act to Provide for the Admission of the State of Hawai'i into the Union, Pub. L. No. 86-3, 73 Stat. 4., (1959). [hereinafter "Admissions Act"].

⁵¹. *Id.*

⁵². DLNR was established through the Hawai'i State Government Reorganization Act of 1959 and Act 132, S.L.H. 1961.

⁵³. DLNR's mission is "[to e]nhance, protect, conserve and manage Hawai'i's unique and limited natural, cultural and historic resources held in public trust for current and future generations of visitors and the people of Hawai'i nei in partnership with others from the public and private sectors." *See DLNR Website, supra* note 18. DLNR was established to centralize the land and water management activities formerly performed by a variety of territorial commissions, boards, and authorities. *Id.* DLNR has the authority to manage, administer, and exercise control over Hawai'i's public lands (except for those designated important agricultural lands), water resources, navigable streams, ocean waters and coastal areas (excluding commercial harbor areas, but including public fishing areas, boating, ocean recreation, and coastal areas programs), minerals, soil conservation, forests and forest reserves, aquatic life, wildlife,

Several DLNR divisions have jurisdiction over Ka`ena Point.⁵⁴ Land Division has jurisdiction over the flat portions between the coast and mauka (mountainward) areas of the north side on the Point.⁵⁵ Division of State Parks' jurisdiction encompasses all coastal areas on both sides of the Point except for the westernmost tip.⁵⁶ Division of Forestry and Wildlife (DOFAW) oversees mauka areas,⁵⁷ and the Natural Area Reserves System maintains jurisdiction over the westernmost tip of Ka`ena.⁵⁸

aquatic and wildlife sanctuaries, state parks, historical sites, forests, forest reserves, game management areas, public hunting area, and natural area reserves. HAW. REV. STAT. §§ 26-15, 171-3.

DLNR is comprised of the Board of Land and Natural Resources (BLNR), the Office of the Chairperson, and the Commission of Water Resources Management (CWRM), and eleven operating divisions. *Id.* Pursuant to HRS § 171-4, BLNR is composed of seven members, one from each land district and three at large, who are nominated and appointed by the governor with the advice and consent of the State Senate. HRS § 171-4(a). Each member's term is four years (HRS § 26-34) and they serve without pay. HRS § 171-4(d). The composition of the Board is statutorily directed to contain: not more than three members on the board from the same political party and at least one member must have a background in conservation and natural resources. That background is evidenced in a college degree in a relevant field or work history in land and natural resources conservation management. HRS §§ 171-4(a)(1) and (2).

⁵⁴. The legal framework for all DLNR lands is contained in Hawai`i Administrative Rules, chapter 13-7. HAW. CODE R. § 13-7 (1996).

⁵⁵. Land Division implements Hawai`i Revised Statutes section 171-6 and Hawai`i Administrative Rules chapter 13-221. HAW. REV. STAT. § 171-6 (1971) *and* HAW. CODE R. § 13-221 (1998). Historic Preservation implements Hawai`i Revised Statutes, chapters 6E and Hawai`i Administrative Rules, chapter 13-300, 13-275. HAW. REV. STAT. § 6E (1976) *and* HAW. CODE R. §§ 13-300 (1996), 13-275 (2003).

⁵⁶. State Parks Division implements by Hawai`i Administrative Rules chapter 13-146. HAW. CODE R. § 13-146 (1999).

⁵⁷. DOFAW implements Hawai`i Administrative Rules chapters 13-121, 13-122, 13-123 (Game Management Area), chapter 13-124 (Threatened and Endangered Wildlife), chapter 13-130-28 (Nā Ala Hele), chapter 13-183 (Forestry Reserve), and chapters 13-208 and 209 (Natural Area Reserve System). HAW. CODE R. §§ 13-121 (2010), 13-122 (1999), 13-123 (1999), 13-124 (1998), 13-130-28 (1999), 13-183 (1981), 13-208 (1981), 13-209 (1981).

⁵⁸. NARS implements Hawai`i Administrative Rules chapters 13-208 (establishing the NARS Commission), 209 (activities within NARS), and 210 (application, approval,

B. HISTORICAL AND ONGOING LAND USE AT KA`ENA

Traditional fishing ko`a (shrines) have been built along the coast, testifying to Ka`ena's rich Hawaiian history of fishing.⁵⁹ From the 1800s through the early 1900s, small fishing villages lined the Ka`ena coast.⁶⁰ Early settlers noted communities of fishermen, often in family groups, who gathered along the shore for sustenance.⁶¹ In the 1970s, the state began to purchase lands that would become Ka`ena Point State Park,⁶² and articulated the Park's purpose in the 1978 Ka`ena Point Conceptual Plan.⁶³

In 1983, the state established the Ka`ena Point Natural Area Reserve⁶⁴ to protect sand dunes from degradation by off-road vehicles

and administration of the Natural Area Partnership Program). HAW. CODE R. §§ 13-208 (1981), 13-209 (1981), 13-210 (1999).

⁵⁹. See KA`ENA CONCEPTUAL PLAN, *supra* note 13, at 65.

⁶⁰. DIV. FORESTRY & WILDLIFE, STATE OF HAWAI`I, DEP'T LAND & NAT. RES., KA`ENA POINT ECOSYSTEM RESTORATION PROJECT 20 (Aug. 14, 2009) *available at* <http://hawaii.gov/dlnr/dofaw/nars/narsc/NARSC-Meeting-8.25.09/KPERP%20Briefing%20Packet%208-14-09.pdf> [hereinafter KPERP BRIEFING].

⁶¹. A journal written between 1822-1849 records a settlement called "Nenelea," which is listed on the Hawai`i Register of Historic Places. KA`ENA CONCEPTUAL PLAN, *supra* note 13, at 65.

⁶². KPERP BRIEFING, *supra* note 60, at 31.

⁶³. See KA`ENA CONCEPTUAL PLAN, *supra* note 13, at 4.

⁶⁴. The Hawai`i State Legislature passed Act 139 in 1970, which created the Natural Area Reserve System "to preserve in perpetuity specific land and water areas which support communities, as relatively unmodified as possible, the natural flora and fauna, as well as geological sites[.]" HAW. REV. STAT. § 195-1 (1970). Earlier, in 1904, a Board of Commissioners of Agriculture and Forestry was commissioned to protect the 1.2 million acres of forest throughout the islands and established the first Forest Reserve in Hawai`i. See Cynthia Josayma, *Facilitating Collaborative Planning in Hawaii's Natural Area Reserves*, 8 RES. NETWORK REP. (1996) *available at* <http://www.asiaforestnetwork.org/pub/pub03.htm>. The Hawai`i government came to control sixty-eight percent of the forest and watershed regions, with the rest held by private owners. *Id.* Currently, Hawai`i hosts twenty NARs consisting of 123,431 acres. Dept. Land & Natural Res., State of Hawai`i, Natural Area Reserves System, <http://hawaii.gov/dlnr/dofaw/nars/about-nars> (last visited Feb. 8, 2012).

and to prevent the spread of invasive species.⁶⁵ DOFAW erected a boulder barricade on the Mokulē`ia side (north) to prevent off-road vehicles from entering the NAR.⁶⁶ Fishers, hunters, Hawaiians, and others weary of loss of open public lands for recreational and cultural practices protested against DOFAW's barrier as "another state land grab . . . [for] elite territorial control."⁶⁷ In 1996, fishers formed the O`ahu Shoreline Fishing Coalition (OSFC) to prevent the closure of roads they use to access fishing sites at Ka`ena Point.⁶⁸ When DOFAW closed these roads in response to complaints about off-road drivers "tearing up the landscape" with four-wheel vehicles in 2002,⁶⁹ OSFC protested the road closures.⁷⁰

Importantly, fishers' vehicular access to the ocean and off-roading recreation have unequal ecological impacts and affect distinct communities.⁷¹ Ka`ena fishers identify with local communities and drive *on* roads to access their fishing spots.⁷² By contrast, *off*-roading enthusiasts are predominantly non-local military personnel and cause

⁶⁵. KPERP BRIEFING, *supra* note 60, at 6 (*citing* Hawai`i Office of the Governor, Exec. Order No. 3162 (Jan. 12, 1983)). Initially composed of twelve acres, a 1986 gubernatorial Executive Order (Hawai`i Office of the Governor, Exec. Order No. 3338 (May 12, 1986)) expanded the Ka`ena Point NAR to thirty-two acres and set aside acreage for a State Park on the northern shore (Mokulē`ia side) of Ka`ena Point. *Id.*

⁶⁶. *Id.* at 32.

⁶⁷. H. Clark, *Hunters Feel Crowded Out*, HONOLULU ADVERTISER, Mar. 8, 1999.

⁶⁸. *See* DLNR's Ka`ena Point Policy is Muddied, ENVIROWATCH, Jan. 8, 2002, <http://www.envirowatch.org/KaenaPT.htm> [hereinafter ENVIROWATCH].

⁶⁹. *Id.*

⁷⁰. *Id.*

⁷¹. *See* Interview with Summer Mullins and Fred Mullins of the Ka`ena Cultural Practice Project with Kyle Kajihiro (host) (*Making Waves: Defending Ka`ena 2010*) available at http://olelo.granicus.com/MediaPlayer.php?view_id=30&clip_id=21987 (last visited Jan. 2, 2012) [hereinafter *Making Waves*].

⁷². *Id.*

erosion and run-off, killing coastal plant life and tidepools.⁷³ Ka`ena Point Park Cultural Ambassador, Fred Mullins describes the problem:⁷⁴

[B]efore [off-roaders] was a few groups, mostly local people. In the last few years, [they] became almost exclusively military. Ninety-percent. Ten percent locals. When we see them we tell them, ‘just stay on the main road,’ and they don’t go do any more off-roading. But the military, we tell them, ‘this is not the place to four-wheel,’ and they say, ‘yeah, yeah, and they come back next week and they see my truck and they start digging—they going back [to] off-road We tried erosion control with hay to stop the mud [from flowing over coastal plants or into the tidepools and ocean]. And then the military guys came and burned them [the hay] for their bonfire They didn’t grow up here, they don’t care, they treat this like their playground.’⁷⁵

Stemming off-roading activities, and its consequent ecological degradation, is of common interest to Hawaiian cultural stewards, lawai`a, conservationists, and DLNR.⁷⁶ In 2008, DLNR sought community input on the issue of road designation by convening the Ka`ena Point Advisory Group (KPAG).⁷⁷

C. KA`ENA POINT ADVISORY GROUP (KPAG)

KPAG originates from the statewide Hawai`i Ocean Resources Management Plan (ORMP), which aspires to an “integrated, place-based approach to management of ocean resources, based on land and sea links, the rule of human activities, and improved collaboration in governance.”⁷⁸ On November 18, 2008, attendees at a public meeting

⁷³. See *KPAG Plan*, *supra* note 12, at 11.

⁷⁴. See *Making Waves*, *supra* note 72.

⁷⁵. *Id.*

⁷⁶. *Id.*

⁷⁷. Telephone interview with Fred Mullins, Cultural Ambassador to Ka`ena Point, Dep’t of Land & Nat. Res., State of Hawai`i (Jan. 24, 2012) [hereinafter Mullins Interview]. After roads are designated, the state will have the authority to punish off-roading vehicles and prevent them from re-entering Ka`ena Point.

discussed the Ka`ena Point ORMP Draft and initiated the formation of KPAG.⁷⁹ KPAG's stated purpose is "to advise the [DLNR] . . . on the management of Ka`ena Point through recommendations developed through communication and involvement with the public and neighboring communities and users."⁸⁰

On July 22, 2010, DOFAW submitted KPAG's Final Integrated Plan for Ka`ena Point to the DLNR Board (BLNR).⁸¹ Crucially, KPAG's Plan made five recommendations, none of which conveyed Hawaiian cultural practitioners' specific demands for an archaeological survey of Ka`ena Point to ascertain impacts of predator-proof fence construction on Hawaiian burials and sacred sites.⁸² KPAG's Plan instead included a controversial permitting program that would involve installing a locked gate and allotting access to permit holders only.⁸³

The restricted scope of KPAG's interventions may reflect the group's failure to include more than a single fisher representative⁸⁴ and a cultural representative—William Ailā, Jr., current DLNR chair, a lineal descendant of the area,⁸⁵ and a proponent of overnight camping

⁷⁸. See Hawai`i Coastal Zone Management Program, Hawai`i Ocean Resources Management Plan, Report to the Twenty-Sixth Legislature, Reg. Sess., 2011 (2010)

⁷⁹. *Id.*

⁸⁰. *Id.* at 7.

⁸¹. See Letter from Dan Quinn, Administrator, Div. State Parks, to Board Land & Nat. Res., State of Hawai`i, Request Approval for Final Integrated Ka`ena Point Action Plan (July 22, 2010) *available at* .

⁸². See *infra* Part II.E.

⁸³. KPAG recommended that DLNR: 1) work with OHA to better protect the Leina a ka `uhane from vandalism; 2) protect sand dunes from erosion and off-road vehicles; 3) stop degradation at an area called Manini Gulch; 4) identify a "designated road" and thereafter enforce Administrative Rules against vehicles driving on areas apart from that designated road; 5) install a locked gate at the end of a currently paved road and create a permit system whereby a restricted number of people would be informed of the lock combination passcode. *KPAG Plan, supra* note 12, at 6.

⁸⁴. *KPAG Plan, supra* note 12, at 6.

⁸⁵. Mullins Interview, *supra* note 77.

restrictions and the predator-proof fence.⁸⁶ Fishers constituted sixty- to seventy- percent of the attendees at the 2008 public meeting during which DLNR's plans for KPAG were announced, but were allocated only one representative.⁸⁷ KPAG's first fisher representative,⁸⁸ Denis Park, did not support the gate-access permit program.⁸⁹ Park was also a vocal opponent of the camping paraphernalia rule⁹⁰ and filed a contested case hearing request to challenge the construction of the predator-proof fence.⁹¹ From its inception, KPAG has been beleaguered by conflicts: accusations of "bullying" fisher representatives and criticisms of failure to open KPAG meetings to the public.⁹² Because of the "unhealthy situation going on with the Advisory Group[,]” Park resigned, leaving KPAG without a representative from the lawai`a community.⁹³

Lawai`a Action Network (LAN), a community group organized by Hawaiian traditional fishing practices at Ka`ena,⁹⁴ proposed an alternate

⁸⁶. See *Ka`ena Point Website*, *supra* note 14.

⁸⁷. Teale Interview, *supra* note 23.

⁸⁸. Park stepped down and was briefly replaced by Sandra Arakaki, who also left KPAG. Mullins Interview, *supra* note 77.

⁸⁹. See Teresa Dawson, *Ka`ena Point Advisory Group Proposes Limiting Access*, 21 ENVIRONMENT HAWAII at 11-12 (Nov. 2010).

⁹⁰. See *Relating to Ka`ena Point: Hearing on H.B. 645 House Draft 2 Before the H. Comm. On Ocean, Land, & Water Resources*, 2009 Leg., 25th Sess. (Haw. 2009) (statement of Denis and Sandra Park).

⁹¹. See Letter from Randall W. Kennedy for Paul J. Conry, Administrator, Div. Forestry & Wildlife, to Board Land & Nat. Res., State of Hawai`i, Denial of Request for Contested Case Hearing By Summer K. Nemeth, Sandra M.L. Park, Denis Park, and Michael Nawaiki O`Connell (May 22, 2009) *available at* <http://hawaii.gov/dlnr/chair/meeting/submittals/080522/C-FW-Submittals-C2.pdf> [hereinafter Kennedy Letter (May 22, 2009)].

⁹². *Id.* at 2.

⁹³. Board of Land & Nat. Res., State of Hawai`i, Meeting Minutes, 6 (Oct. 14, 2010) *available at* <http://hawaii.gov/dlnr/chair/meeting/minutes/2010/101014-minutes.pdf/view> [hereinafter BLNR Minutes (Oct. 14, 2010)].

⁹⁴. Open Letter, Summer Kamalia Nemeth, Representative, Lawai`a Action Network (Nov. 15, 2010) *available at*

plan⁹⁵ for Ka`ena Point in response to the draft version⁹⁶ of the KPAG Plan.⁹⁷ Amongst the salient differences, LAN's proposals (a draft and final version) address a specific community linked by lawai`a (fishing) traditions, rather than the general public, provided for greater community stewardship over Ka`ena than the KPAG plan, and found permitting systems culturally inappropriate.⁹⁸ Permitting systems have been problematic "for indigenous practices worldwide[,] encourage people unfamiliar with the area to access certain lands, are difficult to enforce, sometimes force disclosure of cultural secrets, and potentially exclude lawai`a practitioners."⁹⁹

D. "CAMPING PARAPHERNALIA" PROHIBITION

Denis Park was also active in protests against an administrative regulation that prohibited fishers from bringing "camping paraphernalia" into the state park.¹⁰⁰ Under the Hawai`i Administrative Rules (HAR), "camping paraphernalia" includes "backpacks, tents, blankets, [and] tarpaulins."¹⁰¹ Because fishing, particularly night-long

<http://carrollcox.com/Documents/KaenaComplaint.pdf> [hereinafter Nemeth, Open Letter].

⁹⁵. *Final Lawai`a Proposal*, *supra* note 1, at 4. (2010).

⁹⁶. DEP'T LAND & NAT. RES., STATE OF HAWAI`I, INTEGRATED RESOURCE STEWARDSHIP-MOKU MANAGEMENT: KA`ENA POINT ORMP DRAFT ACTION PLAN (Apr. 30, 2008) *available at*

⁹⁷. Summer Kamalia Nemeth, a lineal Hawaiian descendant of Ka`ena and a LAN representative, informed BLNR that lawai`a created their own management plan and requested that it be considered at the next meeting. Board of Land & Nat. Res., State of Hawai`i, Meeting Minutes, 2 (Oct. 14, 2010) *available at* <http://hawaii.gov/dlnr/chair/meeting/minutes/2010/101014-minutes.pdf/view>.

⁹⁸. *Final Lawai`a Proposal*, *supra* note 1, at 6.

⁹⁹. Lawai`a Action Network Stewardship Draft Proposal, 13 (Jan. 5, 2010) (unpublished manuscript) (on file with KAHEA: The Hawaiian-Environmental Alliance, Honolulu) [hereinafter Draft Lawai`a Proposal].

¹⁰⁰. HAW. CODE. R. § 13-146(2) (1999).

¹⁰¹. HAW. CODE. R. § 13-146(2) (1999).

fishing, requires these implements, the Rule effectively prohibited overnight fishing at Ka'ena Point.¹⁰² Yet, according to then-DLNR chair Thielen, the Rule is necessary, because the state is anxious to protect endangered species and tourists from an invasion of “tent-cities” of houseless people that might attempt to pass as campers.¹⁰³

Fishers counter that fishing is a traditional, customary practice that they have a right to pass onto their families; state administrators do not know the land they purport to care for; and, fishers are not the ‘homeless’ who are the true target of the camping paraphernalia prohibition.¹⁰⁴ Fishers aired their protest at the state capitol,¹⁰⁵ in the pages of Hawai'i Fishing News,¹⁰⁶ and by broadcasting their own informational video.¹⁰⁷ On that broadcast, Lawrence Yasumura explained:

We don't have any input on the restrictions. We've been doing this for hundreds of years. Me, personally, I personally been fishing on Kaena point for fifty years. Way over fifty years, fifty-five years. Never had the restrictions before; why the restrictions now? I cannot bring my grandkids in there [Ka'ena Point] because of the camping paraphernalia restrictions. I cannot protect them against the weather. I cannot protect myself against the weather. What's the reason for that?¹⁰⁸

In 2009, the State House's Committee on Water, Land, and Ocean Resources introduced H.B. 645,¹⁰⁹ which would establish a pilot

¹⁰². *Id.*

¹⁰³. Letter from Laura H. Thielen, Chair, Dep't Land & Natural Res., State of Hawai'i, to HAWAII FISHING NEWS, 23 (Mar. 2010).

¹⁰⁴. The author is critical of the last of these claims; see Bianca Isaki, *HB 645, Settler Sexuality, and the Politics of Local Asian Domesticity in Hawai'i*, 2 SETTLER COLONIAL STUD. J. 82 (2011).

¹⁰⁵. See Carroll Cox, Editorial, HAWAII FISHING NEWS (Feb. 2010).

¹⁰⁶. See Sandra Park, *Ode to the DLNR*, HAWAII FISHING NEWS, 6-7 (Feb. 2010).

¹⁰⁷. See *Fishermen Speak Up!*, *supra* note 23.

¹⁰⁸. *Id.*

¹⁰⁹. See H.B. 645, 25th Leg., Reg. Sess. (Haw. 2009).

program for issuing annual passes for overnight camping at Ka`ena.¹¹⁰ H.B. 645 specifically recognized that Ka`ena Point “has long been a place where local residents can exercise and enjoy their cultural practice of fishing.”¹¹¹ Many fishers supported this bill,¹¹² but it proved politically impracticable.¹¹³ Too many questions remained about the permitting process and the ecological impacts of *any* camping at Ka`ena Point.¹¹⁴ Currently, DLNR has struck on an informal resolution—less zealous enforcement officers¹¹⁵ with a greater sensitivity to the cultural importance of overnight fishing have been more judicious in their enforcement of the camping paraphernalia rule.¹¹⁶ Underlying this informal truce between fishers and DLNR remain tensions between settler state governance of natural and cultural resources, its tacit accommodation of *some* Hawaiian cultural practices, and Hawaiian self-determination.¹¹⁷

¹¹⁰. See H. Stand. Comm. Rep. No. 167 at 1887, 25th Leg., Reg. Sess. (Haw. 2009).

¹¹¹. See H.B. 645, 25th Leg., Reg. Sess. (Haw. 2009).

¹¹². See, e.g., *Relating to Ka`ena Point: Hearing on H.B. 645 House Draft 2 Before the H. Comm. On Ocean, Land, & Water Resources*, 2009 Leg., 25th Sess. (Haw. 2009) (statements of Ollie Lunasco and Chad Yasumura).

¹¹³. H.B. 645 was deferred to committee and was not reintroduced after its first year. *Relating to Ka`ena Point*, H.B. 645, 2009 Sess. (Haw. 2009).

¹¹⁴. See *Relating to Ka`ena Point: Hearing on H.B. 645 House Draft 1 Before the H. Comm. On Finance*, 2009 Leg., 25th Sess. (Haw. 2009) (statements of Laura H. Thielen, Chairperson, Dept. Land & Nat. Res. and Office of Hawaiian Affairs, State of Hawai`i) and *Relating to Ka`ena Point: Hearing on H.B. 645 House Draft 2 Before the H. Comm. On Ocean, Land, & Water Resources*, 2009 Leg., 25th Sess. (Haw. 2009) (statement of William J. Ailā, Jr.).

¹¹⁵. Fishers and hunters complained about the state game warden, Henry Haina, in particular for enforcement methods that included pointing guns at their children. See Eloise Aguiar, *State reassigns game official*, HONOLULU ADVERTISER (Nov. 14, 2008) available at <http://the.honoluluadvertiser.com/article/2008/Nov/14/ln/hawaii811140347.html> and *Fishermen Speak Up!*, *supra* note 23.

¹¹⁶. See Mullins Interview, *supra* note 77.

¹¹⁷. See *supra* Part I.A.

E. PREDATOR-PROOF FENCE

The final environmental assessment for the Ka`ena Point Ecosystem Restoration Project (KPERP), features the controversial predator-proof fence—a joint initiative of DOFAW, the State Parks Division, the O`ahu NARS Program, the U.S. Fish and Wildlife Service (USFWS), and the Wildlife Society, Hawai`i Chapter.¹¹⁸ Spanning 700 yards and enclosing fifty-nine acres, the fence was completed in 2011.¹¹⁹ The fence is a conservation instrument; it was built to exclude small mammals (dogs, cats, mongooses, rats, and mice) that prey on nesting seabirds¹²⁰ and their eggs from the tip of Ka`ena Point, reduce stress on coastal plants, and to facilitate rodent-behavior research.¹²¹ It was also designed to allow for continued public access through unlocked double-door gates at major entry-ways.¹²² A third gate was also installed for the Leina ka `uhane,¹²³ where wandering souls leap into the next world.¹²⁴

¹¹⁸. DIV. FORESTRY & WILDLIFE & DIV. STATE PARKS, DEP'T LAND & NAT. RES., STATE OF HAWAI'I, FINAL ENVIRONMENTAL ASSESSMENT: KA`ENA POINT ECOSYSTEM RESTORATION PROJECT 6 (May 23, 2009) *available at* http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/2000s/2009-06-23-OA-FEA-Kaena-Point-Ecosystem-Restoration.pdf [hereinafter KPERP FEA].

¹¹⁹. *Fence Press Release*, *supra* note 20.

¹²⁰. Seabird species include Laysan albatross, wedge-tailed shearwaters, kaupu (black-footed albatross), and ou (Bulwer's petrel). *See KPERP FEA*, *supra* note 118, at 8.

¹²¹. KPERP FEA, *supra* note 118, at 11, 39.

¹²². *Id.* at 42.

¹²³. KA`ENA CONCEPTUAL PLAN, *supra* note 13, at 66 (Hawaiian traditional histories, explain that when a person was about to die, that person's soul would first go to a fishing ko`a (shrine) named Hauone and then wander until it arrived at Leina ka `uhane where "two minor gods" would throw the soul into a pit, allowing death to finally take the body).

¹²⁴. HOLLY MCELLOWNEY, DIV. STATE PARKS & DIV. FORESTRY & WILDLIFE, DEP'T LAND & NAT. RES., STATE OF HAWAI'I, SUMMARY OF KNOWN AND POSSIBLE HISTORIC PROPERTIES AT KA`ENA POINT (2007) [hereinafter MCELLOWNEY REPORT].

The Leina ka `uhane is among five features that constitute the Ka`ena Complex, which was added to the Hawai`i Register of Historic Places in 1988.¹²⁵ The Ka`ena Complex also includes cultural deposits in sacred dunes,¹²⁶ two stone platforms, and Pōhaku o Kaua`i (also known as “Kaua`i Ramp”).¹²⁷ Ka`ena is also a site of traditional Hawaiian burials, heiau,¹²⁸ and ancient hiking trails.¹²⁹

In 2008, Hawaiian lineal descendants¹³⁰ and lawai`a of Ka`ena (Summer Nemeth, Sandra M.L. Park, Denis Park, and Michael Nawaikī O`Connell) filed petitions for an administrative contested case hearing (CCH) before the BLNR to ensure protections for cultural sites at Ka`ena.¹³¹ On May 22, 2009, BLNR adopted these recommendations

See also MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY, 200 (1986) (entry for “leina a ka `uhane”).

¹²⁵. KPERP FEA, *supra* note 118, at 6. Inclusion on the Hawai`i Register of Historic Places “signifies . . . that the preservation and maintenance of the property is contributing to the State’s and nation’s historic patrimony, and is thus serving the public.” HAW. CODE R. § 13-198-9 (1981).

¹²⁶. Against the protests of the Hawaiian Ka`ena Defenders group and its own O`ahu Island Burial Council, DLNR and U.S. Fish and Wildlife Services are constructing an anti-predator fence that cuts through these dunes. Samson Ka`ala Reiny, *O`ahu Island Burial Council Calls For a Stop to Ka`ena Point fence*, *Questions State Procedures*, HAWAII INDEPENDENT, Dec. 14, 2010, <http://hawaiiindependent.net/story/predatory-fence-around-kaena-point>.

¹²⁷. MCELDFOWNEY REPORT, *supra* note 124, at 13.

¹²⁸. KPERP FEA, *supra* note 118, at 26-28.

¹²⁹. KA`ENA CONCEPTUAL PLAN, *supra* note 13, at 64-66.

¹³⁰. A “lineal descendant” is a claimant to Native Hawaiian skeletal remains who sufficiently establishes “direct or collateral genealogical connections” to those remains. *Kaleikini v. Thielen*, 124 Haw. 1, 6 n.5, 237 P.3d 1067, 1072 (2010) (quoting HAW. CODE R. § 13-300-2 (1996): Rules of Practice and Procedure Relating to Burial Sites and Human Remains, “Definitions”).

¹³¹. On October 24, 2008, Summer Nemeth, Sandra M.L. Park, Denis Park, and Michael Nawaikī O`Connell, submitted requests for a contested case hearing (CCH) against BLNR’s authorization of a cooperative agreement with FWS and the Wildlife Society for KPERP. *See* Kennedy Letter (May 22, 2009), *supra* note 91. Sandra Park, a “disabled Hawaiian Grandmother and cultural practitioner[,]” cited concerns that the

and denied CCH petitions from the Parks, O'Connell, and Nemeth.¹³² On January 8, 2010, BLNR voted unanimously to approve a right-of-entry permit required to construct the 600-meter predator-proof Fence across the Ka`ena Point NAR and the State Park.¹³³ Nemeth voiced her concerns at that meeting—the fence is culturally inappropriate in an area with sacred ties to Hawaiian cosmology, the proposed gate is insufficient for souls seeking the Leina ka `uhane, fence construction materials are inadequate for their proposed uses, and she requested clarification about impacts of rodenticides on native birds.¹³⁴ William Ailā, Jr. spoke in support of the fence, disputing Nemeth's critique of the gate for the Leina ka `uhane,¹³⁵ and articulated the cultural significance of the nesting birds that fence-proponents seek to protect: "Without the birds, there is no culture. You can't catch fish without the birds."¹³⁶ Fishers on boats in pelagic fisheries watch for clusters of birds swooping down onto schooling fish such as `ōpelu.¹³⁷ The failure to

fence would hinder her access to Ka`ena Point in her CCH request. Denis Park, a non-Hawaiian raised in nearby Waiālua, also accesses the area for cultural and subsistence practices. Michael Nawaikī O'Connell is "a native fisherman with long ties to the Ka`ena point area." *Id.* at 3.

¹³². Board of Land & Nat. Res., State of Hawai'i, Meeting Minutes, 18 (May 22, 2009) available at <http://hawaii.gov/dlnr/chair/meeting/minutes/2009/090522-minutes.pdf/view> [hereinafter BLNR Minutes (May 22, 2009)]. DLNR staff recommended that BLNR deny their requests because "no statute or rule call[s] for a contested case hearing in the context of DLNR entering into a cooperative agreement." See Kennedy Letter (May 22, 2009), *supra* note 91, at 3. During this action, Randall W. Kennedy, Native Ecosystem Section Manager of the O'ahu Natural Area Reserve System, was acting-Administrator for the Division of Forestry and Wildlife in place of Paul J. Conry. *Id.* at 3.

¹³³. See Board of Land & Nat. Res., State of Hawai'i, Meeting Minutes, (Jan. 8, 2010) available at <http://hawaii.gov/dlnr/chair/meeting/minutes/2010/100108-minutes.pdf/view> [hereinafter BLNR Minutes (Jan. 8, 2010)].

¹³⁴. See *id.*

¹³⁵. See *id.*

¹³⁶. Teresa Dawson, *Fence to Protect Ka`ena Point's Birds, Plants*, 20 ENVIRONMENT HAWAII at 9-10 (Feb. 2010) (quoting William Ailā, Jr.).

¹³⁷. Personal communication, Lindsay Kane, (July 1998). This is common knowledge amongst fishers, but Ailā may be referring to a more specifically Hawaiian cultural understandings of interactions between fish and birds.

address questions about how to protect Ka`ena's cultural and natural resources continue to beleaguer DLNR administration of these lands.

On August 12, 2010, DOFAW denied Nemeth's second CCH request,¹³⁸ which challenged BLNR approval of the right-of-entry permit for fence construction.¹³⁹ This time, BLNR adopted DLNR staff recommendations to deny her CCH petition based on her lack of standing.¹⁴⁰ Significantly, on December 8, 2010, the O`ahu Island Burial Council (OIBC) received testimony from Nemeth and State NARS employee Emma Yuen with regard to the KPERP fence project.¹⁴¹ Of particular concern to the OIBC was a recommendation by state archaeologist, Holly McEldowney¹⁴² than an Archaeological

¹³⁸. Nemeth charged that BLNR approval impermissibly occurred: 1) prior to completing state and federal environmental review requirements; and, 2) without a current Conservation District Use Permit (CDUP). Letter from Paul J. Conry, Administrator, Div. Forestry & Wildlife, to Board Land & Nat. Res., State of Hawai'i, Denial of Request for Contested Case Hearing By Summer K. Nemeth and Huang Chi Kuo, 10 (Aug. 12, 2010) available at <http://hawaii.gov/dlnr/chair/meeting/submittals/100812/C-FW-Submittals-C1.pdf> [hereinafter Conry Letter (Aug. 12, 2010)].

¹³⁹. BLNR approved the issuance of a right of entry permit to FWS and the Wildlife Society pursuant to a cooperative agreement between these organizations and agencies to commence work on the Fence. *See id.* at 1. In her Petition for a Contested Case, Nemeth also noted that she had not been notified of DLNR staff recommendations to deny her CCH request until the current meeting, thus denying her due process rights. Summer Kamalia Nemeth, Petition for a Contested Case, 2 (Jan. 19, 2010) available at <http://hawaii.gov/dlnr/chair/meeting/submittals/100812/C-FW-Submittals-C1.pdf>.

¹⁴⁰. Big Island Board Member Rob Pacheco expressed concern that DOFAW's recommendation to deny Nemeth a contested case hearing is inconsistent with other cases in which Hawaiian traditional cultural practitioners have been granted standing. Teresa Dawson, *Opponents of Ka`ena Point Fence are Denied Contested Case Hearing*, 21 ENVIRONMENT HAWAII at 4 (Sept. 2010).

¹⁴¹. *See* O`ahu Island Burial Council, State of Hawai'i, Meeting Minutes, (Dec. 8, 2010) available at <http://hawaii.gov/dlnr/hpd/bcd/minutes/oa-minutes-10-12-08.pdf>.

¹⁴². *See* MCELDOWNEY REPORT, *supra* note 124.

Inventory Survey (AIS) be completed at the fence project site.¹⁴³ During OIBC proceedings it became clear that while KPERP relied on the McEldowney report to determine the fence's impacts on historic and cultural resources, but did not require an AIS.¹⁴⁴ OIBC councilmember, Leimaile Quitevis researched the fence project and found that Deputy State Historic Preservation Officer Nancy McMahan had decided not to follow McEldowney's suggestion and then-chairperson Thielen signed off on the project on November 10, 2007 without requiring an AIS.¹⁴⁵ Nemeth herself pushed the issue in an open letter,¹⁴⁶ "we wonder why the construction of this fence is so rushed and cannot begin to imagine the reasons for the rushed action outweighs the need to make sure this fence, if it must be built, is done so in the most pono way possible."¹⁴⁷ In support of Nemeth and other petitioners, OIBC unanimously agreed to request that the state temporarily halt fence construction until an AIS could be completed and sent a written request to Ailā on December 15, 2010.¹⁴⁸ On April 15, 2011, the State announced successful completion of the predator-proof fence without having completed an AIS.¹⁴⁹

II. BIOPOLITICS: AN APPLIED ANALYTICAL FRAMEWORK

"[N]ature has been the primary target through which bodies and populations—both human and nonhuman—have been governed, and it has been the primary site through which institutions of governance have been formed and operated."

¹⁴³. See Reiny, *supra* note 126.

¹⁴⁴. KPERP FEA, *supra* note 118, at 26.

¹⁴⁵. See Reiny, *supra* note 126.

¹⁴⁶. See *id.*

¹⁴⁷. See *id.*

¹⁴⁸. See Letter from Mark Kawika McKeague, Chair and `Ewa Moku Representative, O`ahu Island Burial Council, to William Ailā, Interim Chair, Dep't Land & Nat. Res., Request for Temporary Intervention on the Ka`ena Point Ecosystem Restoration Project (Dec. 15, 2010).

¹⁴⁹. Fence Press Release, *supra* note 20.

Jake Kosek, Understories: The Political Life of Forests in New Mexico (2006).

Situated by and within the State of Hawai'i, DLNR governance of the predator-proof fence, the "camping paraphernalia rule," and KPAG reproduce historical and ongoing processes whereby Hawai'i's lands and resources are removed from a sovereign Hawaiian people in tandem with political sovereignty.¹⁵⁰ This section analyzes Ka'ena controversies within overlapping frames of biopolitics and political priority to highlight resonances between state conservation practices and settler colonial strategies.¹⁵¹

"[A] sustained institutional tendency to eliminate the Native[.]"¹⁵² settler colonialism is exemplary of Michel Foucault's biopolitics—a particularly modern exercise of a state power of "making live and letting die" exercised over segmented populations.¹⁵³ Settler state power proceeds not only from displacing Natives with settler populations, but from subordinating indigenous "priority."¹⁵⁴ Elizabeth Povinelli

¹⁵⁰. See *supra* Part II.

¹⁵¹. See Neale, *supra* note 8.

¹⁵². WOLFE, *supra* note at 7, at 163.

¹⁵³. Michel Foucault developed "biopolitics" to describe the eighteenth-century emergence of a distinctive modern form of governance that takes as its object a "population," over which it has the power to "make live or let die" as opposed to a sovereign power to "make die and let live." See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (1990). Ann Laura Stoler extended Foucault's thesis by pointing out that these new modern forms of governance had their origins even earlier in the colonial administration of, in her examples, Dutch colonies. See ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE: FOUCAULT'S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* (1995); see also Morgensen, *supra* note 31.

¹⁵⁴. Liberal multiculturalism is a political concept whereby nation-states presume to manage "diverse" minority groups equally. Richard J.F. Day & Tonio Sadik, *The BC Land Question, Liberal Multiculturalism, and the Spectre of Aboriginal Nationhood*, 134 BC STUD. 5, 6 (2002). This liberal culture is imprinted with historical imperial agendas, which sought a purposeful neglect of the significance of territory. See Jordana Bailkin, *The Place of Liberalism*, 48 VICTORIAN STUD. 83 (2005). In other words, the very immateriality of ideal liberal space renders equality and difference thinkable within an infinitely partitioned political field, it has also sidestepped material claims to land. *Id.* In this imagination, claims to social remediation build out the argument that differently located identities bear the pressure of flawed social systems unequally. *Id.*

describes this subordination within the “governance of the prior,” a political discourse that affirms the principle that who came here first matters.¹⁵⁵

A. CODA: SCOPE AND METHOD

Two practical challenges of this paper’s methodology bear discussion. First, this paper does not presume to forward a more correct interpretation from the author’s cultural, geographical, genealogical, and social remove from Ka`ena.¹⁵⁶ The aim of using indigenous critical theory to approach these issues is to multiply spaces (political, scholarly, social, and historical) in which proposals for place-based, indigenous stewardship can be read as organizing new principles for decolonizing Hawai`i.¹⁵⁷ The aim is praxis¹⁵⁸—to set academic theories to work beyond the academy to illuminate concrete cases from the field.¹⁵⁹

Liberal multiculturalism, therefore, offers to solve inequality by assuring that society does not produce unequal burdens for those identified as minorities. *Id.*

¹⁵⁵. See Povinelli, *Governance*, *supra* note 38.

¹⁵⁶. The author affiliates with the indigenous critical theory project, but claims no genealogical affiliation with Native Hawaiians at Ka`ena or otherwise.

¹⁵⁷. See Goodyear-Ka`ōpua, *supra* note 16; Goldberg-Hiller & Silva, *supra* note 25; and Final Lawai`a Proposal, *supra* note 1.

¹⁵⁸. This aim points to a second challenge—framing state conservation practices as colonial strategies at the outset seems to employ the logical fallacy of using as a premise a proposition that is yet to be proven. See Carmela Murdocca, ‘*There Is Something in That Water*’: Race, Nationalism, and Legal Violence, 35 LAW & SOC. INQUIRY 369, 392 (2010) (“[T]he case study model has presented unique challenges when attempting to account for ongoing colonialism.”). In other words, this paper’s method of inquiry engages a form of begging the question—showing how something works (settler colonialism in state conservation) by first presuming that it does. *Paraphrasing* GAYATRI CHAKRAVORTY SPIVAK, DEATH OF A DISCIPLINE, 27 (2003). The difference between method and fallacy tracks the difference between a case-study and an event. See Lauren Berlant, *On the Case*, 33 CRITICAL INQUIRY 663, 670 (2007). A case is constructed from an event; “people are compelled to take its history, seek out a precedent, write its narratives, adjudicate claims about it, make a judgment, and file it somewhere[.]” *Id.*

The histories, precedents, narratives, claims, judgments, and files this paper clusters around Ka`ena conflicts constitute a case of settler colonialism. Jackie Lasky, *Indigenism, Anarchism, Feminism: An Emerging Framework for Exploring Post-Imperial Futures*, 5 AFFINITIES 3, 3 (2011) (“[I]ndigenism . . . reflects creative linkages

Indigenous political analyses “reveals what has been wrong with the United States and liberal democracy from the very start.”¹⁶⁰ This body of theory focuses on the intersection between “peoples who define themselves in terms of relation to land, kinship communities, native languages, traditional knowledges, and ceremonial practices” and the processes whereby the (usually liberal) settler colonial state maintains its territories, histories, collectivities, and power.¹⁶¹ What distinguishes this intellectual project is its relationship to the subject of “subjugated knowledges.”¹⁶² The aim is to develop “organic intellectuals”¹⁶³ capable of articulating and defending native sovereignty across different disciplinary grounds.¹⁶⁴ The contrast concerns scholars who endeavor in other critical projects, such as postcolonial studies, who do not see their “role as speaking *for* or *from the place of* the subaltern . . . [but rather] in greater proximity to elite institutions, which [they] seek[] to dismantle from within[.]”¹⁶⁵

between place-based struggles and transnational networks as enactments of self-determination in reconfiguring international relations and challenging (neo)colonial hierarchies within the state and inter-state system”). The proposition is that settler colonialism manifests in these site-specific instances as opposed to a logical proposition. *See infra* Part III.

¹⁵⁹. *See* Jodi A. Byrd & Michael Rothberg, *Introduction: Between Subalternity and Indigeneity, Critical Categories for Postcolonial Studies*, 13 *INTERVENTIONS* 1 (2011) and Povinelli, *Governance*, *supra* note 38.

¹⁶⁰. Finding faults at settler national foundations is integral to the indigenous studies project. *See* Jodi A. Byrd, ‘*In the City of Blinding Lights*’ *Indigeneity, Cultural Studies and the Errants of Colonial Nostalgia*, 15 *CULTURAL STUD. REV.* 13, 19 (2009).

¹⁶¹. Byrd & Rothberg, *supra* note 159, at 3.

¹⁶². MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977*, 81 (Colin Gordon ed. and trans. 1980).

¹⁶³. Antonio Gramsci describes “organic intellectuals” as those intellectuals who are representatives of their class. *See* ANTONIO GRAMSCI, *The Intellectuals, in SELECTIONS FROM THE PRISON NOTEBOOKS*, *supra* note 10.

¹⁶⁴. Byrd & Rothberg, *supra* note 159, at 3.

¹⁶⁵. *Id.* at 10.

This means that indigenous critical theorists engage the problematic of speaking *for* their communities—and not only in the cryptic language of the subaltern.¹⁶⁶ The postcolonial scholar, for instance, does not presume to be *able* to know subaltern experience, and rather readies a space within a dominant, usually academic, institutional sphere for this other's voice.¹⁶⁷ To ethically support an others' right to self-determination demands *not* usurping others' agency to determine the kind of transformations their subaltern community needs.¹⁶⁸ Negotiating within these limits further avoids the risk of romanticizing the content of subaltern visions.¹⁶⁹

What indigenous critical theory does is different. Indigenous subjects of knowledge are positioned *within* the indigenous critical theory project.¹⁷⁰ The epistemic import of this positioning is that indigenous knowledges are not “trac[ed as] disruptions ‘inside’ the dominant.”¹⁷¹ In other words, indigeneity is not *known* only as a disruption to state power, but is tracked in the actual, alternative formations and spaces of possibility that are emerging from indigenous communities.¹⁷² The following sections magnify the most hopeful,

¹⁶⁶. This refers to the fundamental problematic within postcolonial studies that Gayatri Chakravorty Spivak has brilliantly elaborated. See Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE, (Cary Nelson & Lawrence Grossberg eds., 1988). Intellectuals construct an unspeaking subaltern subject that they seek to represent and then cast *themselves* as agents of subaltern's salvation. *Id.*

¹⁶⁷. *Interpreting* Gayatri Chakravorty Spivak's prescription for postcolonial studies. *Id.*

¹⁶⁸. See GAYATRI CHAKRAVORTY SPIVAK, *OUTSIDE IN THE TEACHING MACHINE* (1993).

¹⁶⁹. There is also a risk of romanticizing, and thus presuming the rectitude of, *indigenous* “land use, resource management, and conservation values, creating a late-twentieth-century version of ‘the noble savage.’” Stan Stevens, *The Legacy of Yellowstone*, in CONSERVATION THROUGH CULTURAL SURVIVAL: INDIGENOUS PEOPLES AND PROTECTED AREAS, 21 (1997).

¹⁷⁰. Byrd & Rothberg, *supra* note 159, at 3.

¹⁷¹. *Id.* at 10.

¹⁷². See Robert Warrior, *Native Critics in the World: Edward Said and Nationalism*, in AMERICAN INDIAN LITERARY NATIONALISM, 179 (Craig Womack, et al.

possibility-making dimensions of alternative proposals for place-based community and governance advanced by lawai`a and Hawaiian cultural practitioners at Ka`ena through the lens of biopolitics and a politics of priority.¹⁷³

B. THE BIOPOLITICS OF SETTLER COLONIALISM

“This land belongs to Indonesia, not to you,” said the logging bosses when local farmers in southeast Kalimantan complained that the loggers were destroying their orchards. “Go ask the President if you have complaints.”

- Anna L. Tsing, Friction: An Ethnography of Global Connection (2005).¹⁷⁴

Tsing’s ethnography¹⁷⁵ poses a question that is fundamental to settler colonialism; how does land become nation-state space?¹⁷⁶ While distant from Indonesia, this inquiry is relevant as applied to Hawai`i.¹⁷⁷ How do Ka`ena lands come to “belon[g]”¹⁷⁸ to the State of Hawai`i?¹⁷⁹

eds., 2006) (describing Native nationalism in the context of Native peoples’ increasing control over research that occurs in their communities).

¹⁷³. See Ka`ena Cultural Practice Project, (Mar. 09, 2010, 2:32 PM), <http://kaenapractitioners.blogspot.com>; Final Lawai`a Proposal, *supra* note 1; Mullins Interview, *supra* note 77; and Teale Interview, *supra* note 23.

¹⁷⁴. ANNA L. TSING, FRICTION: AN ETHNOGRAPHY OF GLOBAL CONNECTION, 67 (2005) quoted by Sankaran Krishna, Professor, Univ. Hawai`i at Mānoa, Neoliberalism, Sovereignty, and the Disappearance of the “Commons” in Contemporary India, Presentation at the International Cultural Studies Series at the East-West Center, Honolulu, Hawai`i (Apr. 18, 2012).

¹⁷⁵. See TSING, *supra* note 174.

¹⁷⁶. Interpreting Krishna, *supra* note 174.

¹⁷⁷. See Kauanui, *supra* note 4 (framing Hawaiian dispossession of lands and political rights as a consequence of settler colonialism).

¹⁷⁸. Interpreting TSING, *supra* note 174.

¹⁷⁹. Technically, Ka`ena lands are not held as property by the state, but are rather part of the “public trust lands” that the state acquired from the U.S. federal government

And, how does this incorporation of physical space also corral indigenous inhabitants into a political system (“Go ask the President . . .”)?¹⁸⁰ By foregrounding the state’s interest in a land’s *resources*, Tsing’s quote underscores a crucial modality of settler state authority that Foucault terms, “biopower.”¹⁸¹

Biopower is *not* amassed as the holdings of a wealthy sovereign but from the intrinsic wealth of the state’s natural resources, commercial possibilities, trade balances, and, most of all, “the growth and productivity of its population.”¹⁸² State power is thus power over life itself as opposed to gathering power, as surplus labor, as the proceeds from existing lives.¹⁸³ States “assume responsibility for life processes[;]”¹⁸⁴ thereby exercising biopower at a capillary level of controlling and modifying populations, reproduction, nutrition, etc.¹⁸⁵ HB645 (the now-defunct legislative proposal to allow permit holders to fish overnight) enunciates the state’s biopolitical interests in Ka`ena.¹⁸⁶

upon statehood in 1959. *See* Admissions Act, *supra* note 50. Commonly termed, “ceded lands,” the federal government acquired these lands in 1898 from the Republic of Hawai`i, the leaders of which were primarily responsible for the overthrow of the Hawaiian Kingdom in 1893. *See* State of Hawai`i v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) (recounting the legal mechanisms for Hawaiian Kingdom land transfers from Kingdom era through Hawai`i’s U.S. Statehood).

¹⁸⁰. *Interpreting* TSING, *supra* note 174.

¹⁸¹. FOUCAULT (2003), *supra* note 29.

¹⁸². Couze Venn, *Neoliberal Political Economy, Biopolitics and Colonialism: A Transcolonial Genealogy of Inequality*, 26 THEORY, CULTURE, & SOC’Y 206, 217-18 (2009).

¹⁸³. FOUCAULT (2003), *supra* note 29, at 241 (Biopolitics marks the emergence of a particularly modern state power that regulates the “making live and letting die” of populations).

¹⁸⁴. FOUCAULT (1990), *supra* note 153, at 142.

¹⁸⁵. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1995) (Foucault discusses biopower exercised through bodies as “capillary” power networks, as opposed to power that emanates from a central authority.).

¹⁸⁶. *See infra* Part IV.B.

Ka`ena point . . . has long been a place where local residents can exercise and enjoy their cultural practice of fishing. However, tourists, who are unfamiliar with the area and not aware of the dangers of the illegal activity occurring at Ka`ena point, have experienced being robbed, beaten, sexually assaulted, and pulled out of their vehicles at all hours of the day and night. Due to this unpermitted illegal activity at Ka`ena point, the department of land and natural resources has prohibited overnight camping to protect the natural resources within the park and to promote safety for park users. This prohibition, however, has impeded upon the local cultural practice of fishing.¹⁸⁷

As depicted in HB 645, the state stumbled in its rush to regulate “unpermitted illegal activity” and “protect the natural resources[,]” thus inadvertently impeding a valued “local cultural practice of fishing.”¹⁸⁸ Settler state biopolitics transforms the lives of the public and non-human species into rationales for state intervention.¹⁸⁹

What is biopolitical about the state’s interventions at Ka`ena concerns the *kinds* of lives targeted for governmental intervention—urban lives, houseless lives, and the lives of tourists whose safety and enjoyment are economic baselines for state parks.¹⁹⁰ Environmental conservation here supports state racism, a police-powered state warfare against particular populations within a social body.¹⁹¹ The state’s program of sanitizing, by “externalizing,” Ka`ena’s landscape of undesirable elements in the name of a living social body is a racism that

¹⁸⁷. H.B. 645, 25th Leg., Reg. Sess. (Haw. 2009).

¹⁸⁸. *Id.* That the Act describes “local residents” and not specifically Hawaiian practices may be evidence of a harmful slippage between Asian settler and Native Hawaiian claims to Hawai`i. See CANDACE FUJIKANE & JONATHAN OKAMURA, ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE (2008).

¹⁸⁹. H.B. 645, 25th Leg., Reg. Sess. (Haw. 2009).

¹⁹⁰. In 2007, Ka`ena Park was the tenth most utilized park according to a Hawai`i Tourism Authority survey. OMNITRAK GROUP INC., HAWAI`I TOURISM AUTHORITY, HAWAI`I STATE PARKS SURVEY (2007) *available at* http://hawaii.gov/dlnr/kpsa/docs/HTA_Parks_Survey_07_report.ppt.

¹⁹¹. FOUCAULT (2003), *supra* note 29, at 277.

Foucault recognized as singular to the biopolitical.¹⁹² Crucially, state racism targets criminal and “tent-cit[y]” populations, not *Hawaiians*.¹⁹³ In this framing, the state evades addressing intersections between the populations, which would involve the criminalization of Hawaiians (evident in disproportionate rates of incarceration)¹⁹⁴ and dispossession of homelands, which has left a disproportionate number of Hawaiians literally houseless.¹⁹⁵ This evasion is biopolitical; it *produces* a kind of Hawaiian life that can live under settler colonial governance.¹⁹⁶

C. GREENING BIOPOWER

State intervention into lives associated with Ka`ena did not begin with HB645. The 1974 conceptualization of Ka`ena State Park to fulfill “city dweller”¹⁹⁷ needs for aesthetic respite, for example, marks state intervention on behalf of a kind of person who relates to “wilderness” as a place of recreation, “not a site for productive labor and not a permanent home[.]”¹⁹⁸ Historically, preserving the value of “virgin, ‘uninhabited’ wilderness” has meant the enforced exclusion of Indians as original inhabitants from lands that thereby “lost its savage image and

¹⁹². See MICHEL FOUCAULT, *From the power of sovereignty to the power over life*, in SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE, 1975-1984, *supra* note 29.

¹⁹³. Thielen, *supra* note 103, at 23.

¹⁹⁴. See Raedeen Keahiola-Karasuda, *The Colonial Carceral and Prison Politics in Hawai`i* (Apr. 2009) (PhD, Univ. of Hawai`i at Mānoa).

¹⁹⁵. See SHAWN MALIA KANAŌIAUPUNI, NOLAN J. MALONE, & KOREN ISHIBASHI, KAMEHAMEHA SCHOOLS, INCOME AND POVERTY AMONG NATIVE HAWAIIANS, PASE REPORT (2005) and Neal Milner, *Home, Homelessness, and Homeland in the Kalama Valley: Re-Imagining a Hawaiian Nation through a Property Dispute*, 40 HAWAIIAN J. HIST. 149 (2006).

¹⁹⁶. Morgensen, *supra* note 31, at 56.

¹⁹⁷. KA`ENA CONCEPTUAL PLAN, *supra* note 13, at 29.

¹⁹⁸. William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE 69, 77 (William Cronon ed., 1995).

became safe: a place more of reverie than of revulsion or fear.”¹⁹⁹ The state legislature’s guise of making Ka`ena safer, particularly for tourists and city-dwellers, maintains this conception of wilderness-as-respite.²⁰⁰ This administration of life is not benign,²⁰¹ but suffuses conflicts between “disparate interes[t]” groups at Ka`ena.²⁰²

DLNR sees itself as torn between its legal obligations to protect Hawaiian traditional practices,²⁰³ and the resources that are necessary for those practices, the general public’s interest in these resources, and the imperative to protect the resources themselves.²⁰⁴ This framing of the problem—as one remediable by better-balancing “user conflicts” against finite resources—inoculates the *state’s* interests in Ka`ena Point from scrutiny.²⁰⁵ Specifying the ways settler colonialism directs state interests in Ka`ena allows us to better see these conflicts as enunciations of direct-action land struggles for Hawaiian sovereignty.²⁰⁶

¹⁹⁹. *Id.* at 78.

²⁰⁰. H.B. 645, 25th Leg., Reg. Sess. (Haw. 2009).

²⁰¹. MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979*, 4 (Graham Burchell trans., 2008) (To exist, a state must “fix its rules and rationalize its way of doing things by taking as its objective the bringing into being of what the state should be.”).

²⁰². *See Ka`ena Point Website*, *supra* note 14 (DLNR endeavors “to achieve a balance of use between . . . disparate interests to improve the management of the area and reduce the mounting impacts to both land and sea”).

²⁰³. *See* HAW. CONST. art. XII, §7 (1978).

²⁰⁴. For elaboration of the concept underpinning of the proposition that the state “sees” itself, see JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998) and *DLNR Website*, *supra* note 18.

²⁰⁵. The state’s agenda for Ka`ena includes: the rational management of populations, the regularization of Hawaiian cultural practices, and protecting public trust resources for future generations. *See DLNR Website*, *supra* note 18.

²⁰⁶. *See Goodyear-Ka`ōpua*, *supra* note 16.

Political ecology²⁰⁷ and “green governmentality”²⁰⁸ theories attend to “[t]he ways in which the environment is constructed as in crisis, how knowledge about it is formed, and who then is authorized to save it[.]”²⁰⁹ These theories build on Foucault’s insights into the nature of modern power to critique a “new regime of environmentality[.]”²¹⁰ The “art of govern[ing]”²¹¹ populations by acting on a *discursive* object called the “environment” is a state project in which scientists, non-governmental organizations (NGOs), and community organizations take part.²¹² That is, state and non-state actors interact through a regularized way of talking, understanding, and *producing* knowledge about the “environment” and its terms management.²¹³ In their CCH petitions against BLNR approval of the predator-proof fence,²¹⁴ for instance, petitioners invoked these terms to challenge KPERP assertions about best practices for protecting native species and complying with historic

²⁰⁷. William M. Adams & Jon Hutton, *People, Parks, and Poverty: Political Ecology and Biodiversity Conservation*, 5 CONSERVATION & SOCIETY 147, 149 (2007) (Political ecology is concerned with the interactions between “the way nature is understood” and the politics and processes of environmental actions).

²⁰⁸. Scholars of green governmentality apply Foucault’s insights into modern disciplinary power to formations in environmental policy, politics, and discourses. See Timothy W. Luke, *Environmentality as Green Governmentality*, in DISCOURSES OF THE ENVIRONMENT, (Éric Darier ed., 1999), Sébastien Malette, *Green Governmentality and its Closeted Metaphysics: Toward an Ontological Relationality* (2010) (Ph.D. dissertation, Univ. Victoria), and Stephanie Rutherford, *Green Governmentality: Insights and Opportunities in the Study of Nature’s Rule*, 31 PROGRESS IN HUMAN GEOGRAPHY 291 (2007).

²⁰⁹. Rutherford, *supra* note 208, at 295.

²¹⁰. Timothy W. Luke, *On Environmentality: Geo-Power and Eco-Knowledge in the Discourses of Contemporary Environmentalism*, 31 Cultural Critique 57, 58 (1995).

²¹¹. See MICHEL FOUCAULT, *Governmentality*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY (Graham Burchell, et al. eds., 1991).

²¹². Rutherford, *supra* note 208, at 296.

²¹³. *Id.*

²¹⁴. See *supra* Part I.E.

preservation laws.²¹⁵ Theirs was a tactical engagement with green governmentality to achieve legal intelligibility.²¹⁶ Attending to these tactics exhorts us to ask: what non-“environmentalist” propositions about relating to Ka`ena’s lands, species, and histories are excluded by narrowing the field of debate over the fence to issues such as non-compliance with a recommendation to complete an AIS?²¹⁷ How, for instance, are knowledge of *cultural* reciprocity with Ka`ena lands *not*-addressed by environmental discourses?²¹⁸ In this view, “process” is not only a checklist of reviews and consultations, but of re-building relationships and especially with those who carry memories of disenfranchisement on Ka`ena lands.²¹⁹

Even state actions directed towards accommodating Hawaiian understandings of Ka`ena²²⁰ are consistent with biopolitical management of populations.²²¹ DLNR, for instance, constructed a third gate that opens directly onto the Leina a ka `uhane to address Hawaiian cultural practitioners’ concerns that the fence would prevent souls from

²¹⁵. See Kennedy Letter (May 22, 2009), *supra* note 91; Conry Letter (Aug. 12, 2010), *supra* note 138; and Nemeth, Open Letter, *supra* note 94.

²¹⁶. See Rutherford, *supra* note 208, at 296.

²¹⁷. See *supra* Part I.E.

²¹⁸. See *infra* Part III.C.

²¹⁹. See Kathy E. Ferguson, *Becoming Anarchism, Feminism, Indigeneity*, 5 AFFINITIES 96, 100 (2011) (citing Emma Goldman’s conceptualization of “power and resistance in terms of temporal processes rather than fixed structures.”).

²²⁰. The predator-fence contains an access gate for souls searching for the Leina a ka `uhane. KPERP BRIEFING, *supra* note 60, at 12-13.

²²¹. The state, for instance, facilitates awareness and research of Hawaiian cultural histories by commissioning environmental and cultural assessments. See e.g., KPERP BRIEFING, *supra* note 60. Also, the conservation enterprise itself supports Hawaiian cultural practices insofar as it endeavors to protect Hawai`i’s natural resources. See Kevin Chang, Alex Connelly, Koalani Kaulukukui, Sam `Olu Gon, Jody Kaulukukui, Ulalia Woodside, Namaka Whitehead, `Aulani Wilhelm, Nai`a Watson, Chipper Wichman & Melia Lane-Kamahele, *Hawaiian culture and conservation in Hawai`i*, KA WAI OLA, March 2011, at 14.

accessing the Leina.²²² Some “stakeholders” felt the gate unnecessary because spirits can pass through physical structures, some approved the gate, and others—not mentioned in KPERP—countered that they had no way of knowing whether spirits could unlock gates.²²³ We notice KPERP’s narrow phrasing of the issue;²²⁴ it notes the presence of multiple interpretations of Hawaiian spiritualities, without addressing those that interpret the fence as incompatible with Ka`ena’s sacred landscape.²²⁵ The document does not identify the epistemic conundrum that follows from attempting to “assess” spiritual knowledges for decision making purposes.²²⁶ By so restricting the implications of Hawaiians’ multiple interpretations of culture, practical resolutions such as the spirit gate are *made to seem*²²⁷ appropriate redress.²²⁸

²²². KPERP BRIEFING, *supra* note 60, at 41-42.

²²³. Teale Interview, *supra* note 23.

²²⁴. KPERP BRIEFING, *supra* note 60, at 10 (Hawaiian cultural concerns are identified in the difference between two fence alignments; one which encloses the Leina a ka `Uthane within the fencing, and an other that does not).

²²⁵. See Nemeth, Open Letter, *supra* note 94.

²²⁶. Liberal forms of recognition place indigenous peoples in this conundrum to “constitute them as failures of indigeneity[.]” POVINELLI, *supra* note 36, at 39.

²²⁷. See Morgensen, *supra* note 31, at 60. (“[W]e must consider that the state of exception arises in settler societies as a function of settlers’ inherent *interdependence* with indigeneity”).

²²⁸. By analogy, Merv Tanno discussed the complexity of a government agency’s request that a traditional Native American consultant group offer guidelines for protecting a sacred totem that would be disturbed by state action. Mervyn L. Tano, President, Int’l Instit. for Indigenous Res. Mgmt., Connecting Science with Culture in the Environmental Impact Statement Process, Presentation at the One-Day Workshop on the Strategic Application of the Nat’l Env. Pol’y Act in Hawai’i at the Univ. of Haw., William S. Richardson Sch. of Law (Feb. 23, 2012) [hereinafter Tano Lecture]. What might seem to be a simple request offers openings for Native groups to draw attention to a “penumbra” of systems and institutions necessary to compile guidelines: training programs for cultural practitioners, research funding, cultural centers, etc. *Id.*

D. (SETTLER) COLONIAL BIOPOLITICS

Other scholars have noted Foucault's relative silence on the historical relationship between modern power and colonialism and sought to extend his analyses of biopower to settler colonial regimes.²²⁹ In *The Biopolitics of Settler Colonialism: Right Here, Right Now*, Scott L. Morgensen demonstrates that sixteenth-century settler colonialism conditions the eighteenth and nineteenth century-era situations that Foucault linked to the rise of the modern biopolitical state.²³⁰ Whereas scholarly attention to biopolitical racism emphasized colonial processes of sanitizing and excluding colonial "others" from the European social body, Morgensen notes that the biopolitics of settler colonialism demands techniques of "occupying and incorporating indigenous peoples within white settler nations."²³¹ Settler colonial biopolitics not only eradicates and excludes, but "makes live" indigenous subjects.²³²

²²⁹. Ann Laura Stoler's work brings the metropole, where Foucault locates the origins of modern governmental power, and the colony (the Dutch East Indies, specifically) into one analytical field. See STOLER, *supra* note 153. She traces an *imperial* circuit of knowledge production through which the European state, and its racisms in particular, evolved through their administration of those colonies. *Id.* Stoler's insight is that the *body* upon which modern power is exercised is not mostly, as Foucault supposed, a sexual body, but a racialized one. See Stoler, *State Racism and the Education of Desire: A Colonial Reading of Foucault*, 57 CROSS/CULTURES: DEEP HISTORIES: GENDER AND COLONIALISM IN SOUTHERN AFRICA 1, 8 (Wendy Woodward, Patricia Hayes, & Gary Minkley, eds. 2002). Foucault's view of the sexualized target of modern power, however, may have shifted to better incorporate colonial racisms between his publication of *THE HISTORY OF SEXUALITY* (1990) and *SOCIETY MUST BE DEFENDED* (2003), a shift indigenous critical theorists have extended, along with Stoler's analysis, to modern state power over *indigenous* subjects. See Mark Rifkin, *Romancing Kinship: A Queer Reading of Indian Education and Zitkala-Ša's American Indian Stories*, 12 GLQ 27 (2006); Venn, *supra* note 182; and Aileen Moreton-Robinson, *Towards a New Research Agenda? Foucault, Whiteness and Indigenous sovereignty*, 42 J. SOCIOLOGY 383 (2006).

²³⁰. Morgensen, *supra* note 31, at 56.

²³¹. *Id.* at 60.

²³². FOUCAULT (2003), *supra* note 29, at 247.

On one level, settler states make indigenous lives through official procedures for recognition, nationality, and even sovereignty.²³³ State administration of indigenous lives also takes less blunt forms, such as prescriptions for recognizing traditional and customary practices,²³⁴ claiming an interest in the buried `iwi (bones) of indigenous ancestors,²³⁵ and compiling rolls for a Native Hawaiian self-governing entity.²³⁶ Asserting that the settler state *makes* indigenous lives further emphasizes settler societies' "inherent *interdependence* with indigeneity."²³⁷ Approaching settler colonial power as an assemblage in which the state *relies*²³⁸ on the indigenous, as opposed to merely tolerating²³⁹ them, renders state policies of *accommodating* Hawaiian culture unsurprising.²⁴⁰ Part III discusses the ways the settler state is itself produced through "[a]djudicating life for indigenous people."²⁴¹

²³³. Taiaiake Alfred has argued that the logic of sovereignty itself forecloses distinctive and autonomous forms of indigenous governance. TAIAIAKAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO, 71 (1999). For instance, the State of Hawai'i Department of Hawaiian Homelands employs blood quantum, a most archetypal form of indigenous identity regulation, to recognize program beneficiaries. See Hawaiian Homes Commission Act, 42 Stat. 108 (1921), reprinted in 1 HAW. REV. STAT. 261 (2009).

²³⁴. In *State of Hawai'i v. Pratt*, 124 Hawai'i 329, 351, 243 P.3d 289, 311 (App. 2010), the Hawai'i Intermediate Court of Appeals extensively discussed, and extended, the three-factor test for legal recognition of Hawaiian traditional and customary practices in Hawai'i. *Id.*

²³⁵. See HAW. REV. STAT. § 6E-43 (1988).

²³⁶. See HAW. REV. STAT. § 10H-3 (2011).

²³⁷. Morgensen, *supra* note 31, at 60.

²³⁸. See Neale, *supra* note 8.

²³⁹. See WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE (2008) (discussing "tolerance" as a colonial strategy).

²⁴⁰. Recognizing the settler state's dependence upon indigeneity, calls into question indigenous peoples' "domestic dependence" upon a state tasked with managing their unruly difference. See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 198 (2001) (the idea that Indian nations are "domestic dependent nations" renders them "subordinate societies within the dominant civil society of the United States.").

III. GOVERNANCE OF THE PRIOR: AN APPLIED ANALYTICAL FRAMEWORK

“I believe that we will find that the ‘fence’ [at Ka`ena] has less to do with protecting birds than with establishing control over the land. Controlling who and what is provided right of way.”

- *Paul Kealoha-Blake, Ka`ena Cultural Practice Project.*²⁴²

“Governance of the prior” holds that what matters politically is who arrived first.²⁴³ It is a political formation, based in fundamental tensions between settler states’ and indigenous peoples’ claims to sovereignty.²⁴⁴ The problem with a discourse of priority is that it invidiously equates indigenous peoples’ prior occupancy with a rational self-interest in a property-regime.²⁴⁵ Presuming an indigenous *interest* in their traditions and histories as property allows the settler state to inhabit a position of liberated rationality in contrast with indigenous political perspectives that adhere to their partial, because propertied, vantage on society.²⁴⁶ Embedded in this formation of power, indigenous peoples and the settler state “do not confront each other,” but rather “share a vital set of

²⁴¹. Morgensen, *supra* note 31, at 61.

²⁴². Paul Kealoha-Blake, KA`ENA CULTURAL PRACTICE PROJECT WEBSITE (Apr. 6, 2011, 8:01 PM), <http://kaenapractitioners.blogspot.com/>.

²⁴³. In Povinelli’s words, it is “a formation of power that subtends and articulates modern notions of state sovereignty and the indigenous difference— that is, a formation of power which state and indigenous sovereignty rest but is not itself equivalent to sovereignty.” Povinelli, *Governance*, *supra* note 38, at 16.

²⁴⁴. *See id.*

²⁴⁵. *Paraphrasing* Robert Nichols, *Indigeneity and the Priority of the Settler Contract Today* 1-42, 17 (Jan. 4, 2011) (on file with author). Thus defined as self-interested at the outset, indigenous peoples enter a version of the “settler contract.” Carole Pateman coined this phrase following her famous feminist treatise on the “sexual contract.” *See* Carole Pateman *The Settler Contract*, in *CONTRACT AND DOMINATION* 35 (Carole Pateman & Charles W. Mills eds., 2007).

²⁴⁶. Nichols, *supra* note 245, at 8 (*emphasis in the original*).

organs.”²⁴⁷ They are needed to signal the political priority of the creole settler state *and* to embody a kind of national difference that, because genealogically-linked,²⁴⁸ contrasts with a “universal” liberal polity.²⁴⁹ Crucially, these shared ideological “organs” mean indigenous peoples are not only another sovereign in competition with the settler state, but are also *necessary* to the production of the state itself.²⁵⁰ Competing claims of firstness without specific cultural groundings may merely repeat the logic of governance by priorness.

Historically, “the governance of the prior” proceeds from the emergence of a modern form of governance distinguished from kingly sovereign rule,²⁵¹ British colonial and imperial administration, and the U.S. colonies’ development of a distinctive “creole nationalism”²⁵² in the course of claiming political independence from Britain.²⁵³ The notion of the political priority of the prior person in right as a rule of governance in British colonies.²⁵⁴ The U.S. retained the concept of prior-ness in formulating a “creole nationalism” against an imperial metropole (Britain) and in so doing, projected indigenous peoples as the horizon of the U.S. settler state’s legitimacy.²⁵⁵

²⁴⁷. Povinelli, *Governance*, *supra* note 38, at 16.

²⁴⁸. J. Kēhaulani Kauanui discusses the crucial slippage between “Hawaiian blood” and the non-blood based Hawaiian concept of genealogy, *mo’okū’auhau*; see Kauanui, *supra* note 4.

²⁴⁹. See Povinelli, *Governance*, *supra* note 38.

²⁵⁰. *Id.* at 16.

²⁵¹. Foucault distinguishes biopower, which is exercised by making lives, from that of a kingly sovereign power to determine who will live or do. FOUCAULT (1990), *supra* note 153, at 89-90. Povinelli grounds her “governance of the prior” framework in this biopolitical distinction between different forms of modern power. Povinelli, *Governance*, *supra* note 38, at 17.

²⁵². BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1991).

²⁵³. Povinelli, *Governance*, *supra* note 38, at 17-19.

²⁵⁴. *Id.*

²⁵⁵. Chickasaw scholar, Jodi Byrd, reads the U.S. Constitution’s Commerce Clause (“to regulate commerce with foreign Nations, and among the several states, and with

Although Hawaiians often define *themselves* as a genealogically-linked political body,²⁵⁶ the settler state achieves *its own aims* by defining *itself* in contrast to Hawaiians.²⁵⁷ Critical scholars contend that the “consanguinal logic” of indigenous identity has been instrumental towards “amalgamat[ing] and eliminat[ing] Indigenous peoples . . . [to] thereby enable settler states to performatively universalise the West.”²⁵⁸ A liberal, multicultural, and *universal* U.S. sovereign can absorb indigenous subjects,²⁵⁹ whereas indigenous political collectives are presumed constrained by illiberal tradition and genealogy.²⁶⁰ Put otherwise, settler colonialism lies with a liberal multicultural political discourse that distributes the terms of belonging and obligation within narratives of freedom (liberalism) and constraint (genealogy).²⁶¹ Povinelli proffers escaping the politics of the governance of the prior by “making a new spacing” in which this crisis of obligation and belonging

the Indian Tribes”) as a text that articulates conceptual predicates for the deployment of U.S. imperialist power over Indian nations, as well as Hawai‘i. The parallel grammar accomplished by *with*, rather than *among*, provides a political theory for the colonialist empire accomplished across foreign nations and ‘Indian tribes.’ JODI A. BYRD, *TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM*, xxii-xxiii (2011). Byrd’s theory extends the logic of Povinelli’s “prior-ness” to U.S. colonies, such as Hawai‘i.

²⁵⁶. See *supra* text accompanying note 15.

²⁵⁷. This section glosses Povinelli’s distinction between liberalism’s autological and genealogical discourses of subjectivity. See POVINELLI, “EMPIRE,” *supra* note 37 at 4. She explains that settler liberalism deploys these discourses as interlinked disciplinary forms across sociopolitical fields, rather than only assigning them to white settlers and indigenous peoples exclusively. *Id.* The governance of the prior is partly constituted through these twinned disciplining discourses. See Povinelli, *Governance*, *supra* note 38.

²⁵⁸. Morgensen, *supra* note 31, at 67.

²⁵⁹. See POVINELLI, *supra* note 36 and Day & Sadik, *supra* note 154.

²⁶⁰. See Povinelli, *Governance*, *supra* note 38. This distinction resonates at the level of subjectivity as well; the “autological” settler subject is claimed to be self-determining over and against indigenous persons presumably tethered to history and tradition. See also POVINELLI, “EMPIRE,” *supra* note 37.

²⁶¹. Povinelli, *Governance*, *supra* note 38, at 25.

may be foregrounded.²⁶² This paper suggests lawai`a stewardship proposals create such a new space of governance.²⁶³

A. LEGAL MANEUVERS AND LIBERAL MULTICULTURALISM

We are tracking “strategic manoeuvres”²⁶⁴ through which the *liberal* state subordinates, by affirming, Hawaiian priority in Hawai`i.²⁶⁵ One move is to limit Hawaiian claims to distinctiveness to liberal predicates of political legibility.²⁶⁶ Respectfully conducted, historically-established, and not repugnant,²⁶⁷ Hawaiian traditional and customary practices are cabined within legal parameters that ensure that they will not unreasonably interfere with settler society.²⁶⁸ On the other side of

²⁶². *Id.* at 22.

²⁶³. *See infra*, Part III.

²⁶⁴. Povinelli, *Governance*, *supra* note 38, at 16.

²⁶⁵. Liberalism is not a political tool unique to Australia or a U.S.-Hawai`i; “[i]t is a moving target developed in the European empire and used to secure power in the contemporary world. It is located nowhere but in its continual citation as the motivating logic and aspiration of dispersed and competing social and cultural experiments.” POVINELLI, “EMPIRE,” *supra* note 37, at 13. *See also infra* Part III, A.

²⁶⁶. *See generally* BROWN, *supra* note 239; JACQUES RANCIÈRE, *HATRED OF DEMOCRACY* (2006); and Elizabeth A. Povinelli, *The Part That Has No Part: Enjoyment, Law, and Loss*, 17 GLQ 287 (2011).

²⁶⁷. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 11, 656 P.2d 745, 751 (1982) (Hawai`i Revised Statute section 1-1 insures the continuance of Native Hawaiian traditional and customary practices that “have, without harm to anyone, been continued . . . so long as no actual harm is done thereby.”) *See also Oni v. Meek*, 2 Haw. 87, 90, 1858 Haw. LEXIS 4, at 8 (1858) (judicial authority ought not sustain customary practices if they are unreasonable, so uncertain, and so repugnant to the spirit of the present laws[.]”).

²⁶⁸. Under *State v. Hanapi*, 89 Hawai`i 177, 970 P.2d 485 (1998), a claimant of Native Hawaiian traditional and customary rights must show: 1) she is a descendant of inhabitants of Hawai`i prior to 1778; 2) the practices are constitutionally or statutorily protected under HAW. CONST. art. XII, § 7, HRS § 1-1 (LEXIS through 2011 Reg. Session), or § 7-1 (LEXIS through 2011 Reg. Session); and 3) were exercised on less than fully developed property. In *State v. Pratt*, 124 Hawai`i 329, 243 P.3d 289 (App. 2010), expert witness Davianna McGregor, Ph.D. elaborated a six-part standard she developed for recognizing a traditional and customary practice: 1) the practice must be

this move, the settler state achieves an identity with a “truer, deeper multiculturalism” through its formal legal recognition of Hawaiian distinctive histories, laws, and traditional cultures.²⁶⁹

Povinelli’s research in Australia sheds light on certain limitations of Hawai’i’s jurisprudence.²⁷⁰ Australian courts have recognized a kind of equivalence between the Australian and British “worlds” from which aboriginal Native title and Australian common law proceed, respectively.²⁷¹ This equivalence is not equal, however, because, as Australian Justice Kirby writes, “self evidently . . . the High Court is not an institution of customary law.”²⁷² These restricted overtures towards aboriginal peoples, according to Povinelli, merely impose a “reassuring form of liberal capitalist democracy” that perpetuates the life of a supposedly more multicultural settler nation.²⁷³ This multiculturalist paradigm is reassuring to a settler society that seeks the survival of a “subtending liberal formation” (capitalist democracy) more so than to

related to subsistence, religious, or cultural needs of one’s family; 2) the practitioner must have been trained by an elder learned in the particular customary practice; 3) the practitioner must have a traditional connection to the area of their practice; 4) the practitioner must be enacting a responsibility for that area given to him by her family or kumu; 5) the practice cannot be for commercial purposes; and 6) the practice must be consistent and conducted in a respectful manner. *Id.* at 337-38.

²⁶⁹. See Elizabeth A. Povinelli, *The Cunning of Recognition: Real Being and Aboriginal Recognition in Settler Australia*, 14 AUSTL. FEMINIST L.J. 3 (1998) [hereinafter “Povinelli (1998)”]. Okamura analyzes the disrepairs of multiculturalism’s application to Hawai’i, but does not engage a critique of the liberal settler state; see Jonathan Okamura, *The Illusion of Paradise: Privileging Multiculturalism in Hawai’i*, in MAKING MAJORITIES: COMPOSING THE NATION IN JAPAN, CHINA, KOREA, FIJI, MALAYSIA, TURKEY AND THE UNITED STATES (D.C. Gladney ed., 1994).

²⁷⁰. Povinelli, an anthropologist, has lived, worked, and researched at Belyuen, a small indigenous community on the Cox Peninsula in the Northern Territory of Australia since 1984 (seventeen-years). POVINELLI, *supra* note 36, at 30.

²⁷¹. Povinelli (1998), *supra* note 269, at 22.

²⁷². *Id.* quoting *Wik Peoples v. State of Queensland* 141 A.L.R. 129, 255-56 (1996) (Austl.).

²⁷³. Povinelli (1998), *supra* note 269, at 22.

realize “the actual content of traditional law (or native title).”²⁷⁴ This is the state’s “cunning of recognition.”²⁷⁵

The State of Hawai‘i also recognizes its continuities with Hawaiian Kingdom law in state statutes,²⁷⁶ the state constitution,²⁷⁷ and Hawai‘i’s common law.²⁷⁸ As in Australia, the common law of England and of Hawaiian Kingdom customary law are unequal and articulated.²⁷⁹ The rights and duties owed to Hawaiians, consequent to these legal authorities, have had material and beneficial impacts on Hawai‘i’s communities, ecologies, and political structure.²⁸⁰ This paper, however, views the state’s recognition of Hawaiian rights as a strategy for holding together a U.S. polity—the people of Hawai‘i—over foundational settler colonial contradictions.²⁸¹

Hawai‘i’s Supreme Court and legislature have affirmed the interests of “the people of Hawai‘i” in a horizon of “lasting reconciliation” with Hawaiians.²⁸² This affirmation rightly registers an

²⁷⁴. *Id.* at 9.

²⁷⁵. *See* Povinelli (1998), *supra* note 269.

²⁷⁶. HAW. REV. STAT. § 1-1 (LEXIS through 2011 Reg. Session) (establishing Hawaiian judicial precedent and Hawaiian usage as exceptions to the applicability of English common law in Hawai‘i) and 7-1 (1955) (securing the gathering and water rights of kuleana land owners).

²⁷⁷. HAW. CONST. art. XII, § 7 (1978) (reaffirming state’s duty to protect Native Hawaiian rights exercised for subsistence, cultural, and religious purposes).

²⁷⁸. *See, e.g.* *Ka Pa‘akai O Ka ‘Āina v. Land Use Commission*, 94 Hawai‘i 31, 7 P.3d 1068 (2000); *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*; 79 Hawai‘i 425, 903 P.2d 1246 (1995), *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992); and *State v. Pratt*, 124 Hawai‘i 329, 243 P.3d 289 (App. 2010).

²⁷⁹. *See supra* note 276.

²⁸⁰. *See* Melody Kapilialoha MacKenzie, *Tribute: Chief Justice William S. Richardson (1919-2010): Ka Lama O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3 (2010).

²⁸¹. *See* Wolfe, *supra* note 3.

²⁸². *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp.*, 117 Hawai‘i 174, 194, 177 P.3d 884, 904 (2008) (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956-58. Act 329).

ongoing “ethical or political bind inherent in [the people of Hawai`i’s] being and relation.”²⁸³ Hawai`i’s “multiculturalist faith in time” is that a juridical framework in which Hawaiians hold a protected legal status will eventually lead to reconciliation of ongoing colonial injustices.²⁸⁴ This “interval” between a colonized present and a horizon of justice, Povinelli argues, provides a temporal “tense” of social belonging that emerges out of the specific historical formation of the governance of the prior.²⁸⁵

B. LIBERAL TOLERANCE AND CAMPING PERMITS AT KA`ENA

The “people of Hawai`i” is cohered as settler polity by assigning value to indigenous difference within a liberal multiculturalism that neutralizes indigenous priority as a political claim.²⁸⁶ Liberal settler multiculturalism, that is, offers itself as a solution to the problem of how all can fit within a settler society while foreclosing interrogation of settler colonial foundations.²⁸⁷ Liberal theory thus serves as a mechanism through which modern liberal settler states *define themselves* in and through their “tolerance” of indigenous peoples.²⁸⁸ This

²⁸³. Povinelli, *Governance*, *supra* note 38, at 16.

²⁸⁴. Povinelli (1998), *supra* note 269, at 9. *See also* Monika Barbara Siebert, *Repugnant Aboriginality: LeAnne Howe’s Shell Shaker and Indigenous Representation in the Age of Multiculturalism*, 38 AM. LITERATURE 93, 97 (2011) (North American multiculturalism, enacted through a politics of recognition, led to increased minority representation. For liberal states such as the U.S. and Canada, this progressive history has honed multiculturalism into “the most effective political tool for national integration insofar as it allows these states to translate their colonial histories into uplifting narratives of national and ideological triumph.”).

²⁸⁵. Povinelli, *Governance*, *supra* note 38, at 28.

²⁸⁶. *See id.*

²⁸⁷. *See* Day & Sadik, *supra* note 154.

²⁸⁸. This assertion draws Nichol’s rendering of liberal social contract theory into Brown’s critique of liberal tolerance. *See* WENDY BROWN, *Tolerance as a Discourse of Depoliticization*, in *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE*, *supra* note 239 and Nichols, *supra* note 245.

performed-universality sustains liberal settler states' capacity to incorporate and occupy difference, including the ideally incorporated difference of native peoples.²⁸⁹

DLNR's approach to Ka`ena's "user conflicts" is a cluster of "strategic manoeuvres"²⁹⁰ through which the State of Hawai'i asserts itself as a benign, even enlightened, authority over Hawai'i's public trust resources.²⁹¹ Public trust rationales undergird DLNR's anxieties about homeless tent-cities, and are linked to biopolitical concerns for public safety, maintaining natural resources for tourist-ready use, and endangered species conservation.²⁹² Against lawai'a who argued that the "camping paraphernalia" regulation²⁹³ should make allowances for overnight fishing at Ka`ena, former-DLNR chair Thielen cited the states' interests in liberal equality.²⁹⁴

The problem is the law does not allow the state to discriminate between different people. We can't allow tents only for fishers— we have to allow them for anyone. If we allow an unlimited number of tents, like we've seen elsewhere in Hawai'i, parks quickly become tent cities that crowd out the general public, including fishers. In order to manage parks so they remain safe and open to the public, we either have to prohibit tents overnight or only allow a specific number of tents at a given time without discriminating between applicants.²⁹⁵

Lawai'a strategically invoked the state's legal protections for rights to cultural practices in response to Thielen's arguments.²⁹⁶ Ka`ena

²⁸⁹. Morgensen, *supra* note 31, at 67.

²⁹⁰. Povinelli, *Governance*, *supra* note 38, at 16.

²⁹¹. See DLNR *Mission Statement*, *supra* note 18.

²⁹². Isaki, *supra* note 104, at 2.

²⁹³. HAW. CODE R. § 13-146(2) (2008) ("Hawai'i State Park System").

²⁹⁴. Thielen, *supra* note 103, at 23.

²⁹⁵. *Id.*

²⁹⁶. When local fishers identify as Hawaiian, and even when they do not, they generally cite the Hawai'i State Constitution. See *Fishermen Speak Up!*, *supra* note 23. The state constitution harbors provisions for Hawaiians and non-Hawaiians; providing protections for "rights, customarily and traditionally exercised for

fisher, Keith Sienkiewicz, offers this critique of camping paraphernalia regulation with language of the state constitution and DLNR's mission:²⁹⁷ "we are no longer able to enjoy or practice our traditions, culture, fish at night or to pass this knowledge on to the next generation . . . of our unique island lifestyle."²⁹⁸ "Most of the [DOCARE] officers shouldn't be officers because they do not follow the constitution[;]" another fisherman suggested, "Thielen has no clue what the constitution of Hawaii [*sic*]. I like see her resign and go back from where she came from—the mainland."²⁹⁹

Liberalism provides a term "intolerance," to counter the fishers' arguments.³⁰⁰ Wendy Brown argues that 'tolerance' subordinates indigenous difference while installing the liberal settler order as normative.³⁰¹ The state's liberal culture escapes scrutiny by trading on a discourse of tolerance as a *political value*, as against others' partisan interests.³⁰² "[W]e have culture while culture has 'them,' or we *have* culture while they *are* a culture. Or, we are a democracy while they are a culture."³⁰³ Where lawai'a claim Ka'ena for cultural traditions, they

subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778" (HAWAII CONST. art. XII, § 7), and "the cultural, creative and traditional arts of the various ethnic groups [of Hawai'i]." HAWAII CONST. art. IX, § 9.

²⁹⁷. See DLNR *Mission Statement*, *supra* note 18.

²⁹⁸. *Fishermen Speak Up!*, *supra* note 23.

²⁹⁹. *Id.*

³⁰⁰. See BROWN, *supra* note 239; Byrd, *supra* note 160; Nandita Sharma, *Canadian Multiculturalism and its Nationalisms*, in HOME AND NATIVE LAND: UNSETTLING MULTICULTURALISM: LANDS, LABOURS, BODIES (May Chazan, Lisa Helps, Anna Stanley & Sonali Thakkar eds. 2011); and Day & Sadik, *supra* note 154.

³⁰¹. See BROWN, *supra* note 239.

³⁰². See *id.* at 215 n. 5 (The valorization of tolerance has a genealogy in international relations principles about the best way to achieve international peace).

³⁰³. *Id.* at 151.

risk violating liberal *principles* of tolerance, which are *not* seen as cultural practices.³⁰⁴

The Ka`ena situation thus raises questions that Brown has put to liberal tolerance: “[w]hat makes groups cohere in the first place, that is, what binds them within and makes them hostile without; and what makes group identity based on culture, religion, or ethnicity, as opposed to other kinds of differences, an inherent site of intolerance?”³⁰⁵ Brown’s answers track histories of political philosophy, but we are here concerned with liberalism’s relationship to land- and ocean-based communities that the LAN proposals envision.³⁰⁶ When we delve into questions about what *binds* a community, we see that the “noncultural, nonethnic, or secular place” from which tolerance is imagined to emanate *is* the settler state.³⁰⁷

Crucially, LAN’s claim is *not* that *nature* can be that binding.³⁰⁸ Brent Lisemeyer, the O`ahu Natural Area Reserve System (NARS) manager, asserted that cultural impacts on Ka`ena affect not only Native Hawaiians, but “anyone who appreciates creation and any Oahu [*sic*] resident who appreciates nature. Everybody recognizes how culturally important it is to the Native Hawaiian culture and to our culture today that it’s important to connect with creation.”³⁰⁹ In Hawai`i’s settler colony, the many and disparate values that “[e]verybody” imparts to nature are never out of the orbit of claims to land and power.³¹⁰ In his insistence that nature be the object of everyone’s “appreciat[ion of]

³⁰⁴. *Id.* at 6.

³⁰⁵. *Id.* at 151.

³⁰⁶. *See* Final Lawai`a Proposal, *supra* note 1.

³⁰⁷. BROWN, *supra* note 239, at 152.

³⁰⁸. *See* Final Lawai`a Proposal, *supra* note 1.

³⁰⁹. BLNR Minutes, (Jan. 8, 2010), *supra* note 133, at 26.

³¹⁰. Bianca Isaki, Postdoctoral Fellow, Univ. Illinois, Urbana-Champaign, Begging the Question of Asian Settlers in a Decolonizing Hawai`i, Presentation at Native Amer. & Indigenous Studies Conf. at the Univ. of Minn., Minneapolis (May 21, 2009).

creation[.]”³¹¹ Lisemeyer misses the ways that the emergence of a mode of private reverie as a public attitude naturalizes a kind of public subject.³¹² “Nature” is not an abstract value of sustainable harmony, but an instrument of liberal governance that advances a way of viewing Ka`ena abstracted from the settler colonial administration that overlies its landscape.³¹³

Lawai`a claim elevated rights to these coastal lands through traditions that define them as a community.³¹⁴ This emphasis on community membership structured by land-based histories crucially contrasts with the settler state’s ideal space of a liberal multicultural polity, where the state endeavors to maintain spheres of freedom for individuals and groups.³¹⁵ Thielen indicates this liberal space in her assertion, “the law does not allow the state to discriminate” between camping permit applicants.³¹⁶ By contrast, LAN invokes the specificity of the literal ground at issue; a lawai`a ‘applicant’ might have heightened access based on her knowledge and ability to care for Ka`ena.³¹⁷ The liberal lens that disallows the state from “discriminat[ing]” also renders it unable to affirm land-based practices that can be organizing principles for decolonizing the “we”³¹⁸ of a settler colonial polity.³¹⁹

³¹¹. Karen K. Kosasa, *Critical sights/sites: Art pedagogy and settler colonialism in Hawai`i*, 47 (2002) (Ph.D., Univ. of Rochester) (discussing “colonial amnesia” in aesthetic renderings of Hawai`i’s landscapes).

³¹². *Paraphrasing* David Bunn, “*Our Wattled Cot*”: *Mercantile and Domestic Space in Thomas Pringle’s African Landscapes*, in *LANDSCAPE AND POWER* 127, 141 (W.J.T. Mitchell ed., 2002).

³¹³. *See id.* at 141.

³¹⁴. *See* Final Lawai`a Proposal, *supra* note 1.

³¹⁵. *See supra* text accompanying note 154.

³¹⁶. *See supra* Part III, B.

³¹⁷. Draft Lawai`a Proposal, *supra* note 99, at 6-9.

³¹⁸. Indigenous scholars emphasize that settler colonialism is not only a concern about the subjugation of Native peoples. Morgensen, *supra* note 31, at 67. Povinelli points toward two imperial projects accomplished through settler state discourses of prior-ness: indigeneity is made to “model” the status of the incorporated exception “for

C. THE “PENUMBRA” OF HAWAIIAN CULTURAL KNOWLEDGE

One critical potential of settler colonial *critique* vis-à-vis the disrepairs of liberal state governance concerns the misfit between liberal ideality and indigenous peoples’ specific formulations³²⁰ of their claims to land.³²¹ Focusing on this misfit may call attention to incommensurability between liberal citizenship and indigenous political traditions of belonging, thus “escap[ing] the governance of the prior by

others who come under Western law’s global reach[;]” and, Western law achieves a “mode of governance, liberated from attachment to place[.]” See *supra* Part III.B. Jodi Byrd has similarly proposed that Indian difference, as incorporated in the U.S. Constitution’s commerce clause addressing trade “with Indian tribes,” has been “the ghost in the constituting machine of empire . . . a sui generis presence that enables the founding of U.S. empire by creating a *with* that facilitates the colonialist administration of foreign nations and Indian tribes alike.” BYRD, *supra* note 255, at xxii-xxiii. While beyond the scope of the present writing, interrogating settler colonialism within state conservation projects necessarily references a broader critique of settler state governance of other people and places. See Byrd & Rothberg, *supra* note 159, at 3 (comparing theoretical historical formations of indigenous studies and postcolonial studies of colonialism and imperialism).

³¹⁹. See e.g., Noelani Goodyear-Ka’ōpua, *Rebuilding the `Auwai: Connecting Ecology, Economy, and Education in Hawaiian Schools*, 5 ALTERNATIVE: INT’L J. INDIGENOUS PEOPLES 46 (2009).

³²⁰. *Paraphrasing* Nichols, *supra* note 245, at 17 (Jan. 4, 2011) (instead of requiring reference to the specific formulations given by indigenous peoples, intellectual traditions of liberal social contract theory generate normative content for indigenous claims).

³²¹. Robert Nichols locates liberalism’s capacity to incorporate difference in Rawlsian social contract theory, which “imagines . . . an ‘original position’, behind a ‘veil of ignorance’ (i.e., without knowledge of one’s race, gender, culture, social location, etc.), [from which] it is possible to determine what first principles would be generally acceptable to all (regardless of the above qualifiers).” *Id.* at 4 *quoting* JOHN RAWLS, *A THEORY OF JUSTICE* (1971). In other words, Rawls’ social contract usurps the ground of the sovereign in the course of creating space for “differences.” Nichols explains that this sets the terms of a “settler contract”—the strategic fiction of a settler society’s consensual founding that is used to “displace the question of that society’s actual formation in acts of conquest, genocide and land appropriation.” Nichols, *supra* note 245, at 6. The politically interesting question about the settler contract is not whether it is founded on empirical truths (it is not) but its “*strategic function in relieving the burden of the historical inheritance of conquest.*” *Id.* at 8 (*emphasis in the original*).

making a new spacing.”³²² Making such a space, in other words, would entail acknowledging differences that ramify across a range of epistemological and ontological grounds: “techniques of knowing who has a sovereign claim and how that claim is or is not restricted; the theories and practices of being that subtend human-human and human-non-human relations . . . and the ethical obligations these ways of knowing and being entail.”³²³

Instead of working towards this new spacing, liberal settler states rather displace indigenous epistemes and ontologies into a different temporality.³²⁴ For example, Australian courts evade the challenge aboriginal genealogical connections to lands³²⁵ pose to Australia’s political priority by distinguishing land-based genealogies as myth, as opposed to evidence of an other measure of history.³²⁶ The situation is one in which state interactions with indigenous histories and cultures—because of the ways that those histories and cultures are formulated—disenable indigenous articulations of sovereignty.³²⁷

DLNR’s responses to Hawaiian cultural practitioners’ criticisms of the fence illustrate inability to address the specific content of cultural claims that proceed, partly, from indigenous epistemes and ontologies.³²⁸ Practitioners’ CCH petitions explained that the fence project is “culturally inappropriate” to Ka’ena’s spiritual landscape.³²⁹

³²². Povinelli, *Governance*, *supra* note 38, at 22.

³²³. Povinelli (1998), *supra* note 269, at 15.

³²⁴. Povinelli, *Governance*, *supra* note 38, at 16.

³²⁵. Hawaiian traditional histories also establish a genealogical connection to Hawai’i lands. See *THE KUMULIPO: A HAWAIIAN CREATION CHANT* (Martha Warren Beckwith ed. & trans., 1951).

³²⁶. Povinelli, *Governance*, *supra* note 38, at 22 n.3 (“Critical legal scholars believe that this ruling [in the Kennewick Man controversy] established a precedent by which the epistemologies of western science would trump the epistemologies of indigenous knowledge—the former truth-based, the latter mythologically based ways of knowing the world”).

³²⁷. See *infra* Part IV.

³²⁸. See *supra* Part I.E.

³²⁹. Dawson, *supra* note 136, at 9-10.

In response, DLNR determined that CCHs are inappropriate to “internal management,” such as their decisions to permit the fence.³³⁰ Settler colonialism does not appear as outright rejection of Hawaiian culture-based claims, but rather in DLNR’s use of legal frameworks and liberal concepts of culture.³³¹ BLNR’s CCH denials presume matters of “internal management” are not constitutive of a settler state *culture*.³³² How does the state’s framework for shielding internal management come to *not be seen* as a product of a liberal culture?³³³ Why is liberal culture given greater footing than Hawaiian practitioner claims to culture-based land stewardship?³³⁴

DLNR’s refusal to address Hawaiian culture-based claims illuminates more general issues in the state’s attempts to control the kinds of people and processes that give rise to those cultural claims.³³⁵ On January 8, 2010, then-BLNR Chair Thielen raised concerns about the agency’s role in assessing the fence’s impacts on Ka`ena’s cultural landscape.³³⁶ Citing KPAG, and without noting its controversial

³³⁰. These matters were BLNR’s decision to grant a right of entry for the fence (Conry Letter (Aug. 12, 2010), *supra* note 138) and to engage a Memorandum of Understanding with other agencies. *See* BLNR Minutes (May 22, 2009), *supra* note 132, at 16.

³³¹. *See* Conry Letter (Aug. 12, 2010), *supra* note 138 (denying CCH petitions because they concerned matters of internal management).

³³². *Id.*

³³³. *See* KATHY E. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* (1985) (discussing the relationship between liberalism and a bureaucratization that suppresses the processes of open conflict and compromise with a “sterile interchange of procedural information”).

³³⁴. *See supra* Part III, A.

³³⁵. For example, three lineal descendants of Ka`ena came forward in response to Fence installation: William Ailā, Jr. (DLNR chairperson), Thomas J. Shirai, and Fred Mullins. *See* Mullins Interview, *supra* note 77. Only Shirai was selected as a cultural consultant on KPERP plans and only Ailā was selected as the KPAG cultural representative. *See Ka`ena Point Website*, *supra* note 14. In so doing, this paper argues that DLNR evaded conflicting interpretations of the cultural appropriateness of its projects at Ka`ena.

³³⁶. BLNR Minutes, (Jan. 8, 2010), *supra* note 133, at 29.

aspects, Thielen asserted DLNR has made overtures toward creating fora in which Hawaiian communities can make those assessments.³³⁷ Addressing the two OHA representatives present at the meeting, Thielen said, “[Hawaiian] groups need to have a different, safer environment—not the DNLN [*sic*] to resolve things . . . We need help. We’re not the appropriate party . . . We need to move beyond this head-butting.”³³⁸ When Nemeth opined that OHA is not the appropriate agency for mediating amongst Hawaiian claims, Thielen rejoined, “The problem is, we [DLNR] certainly aren’t.”³³⁹ Because DLNR cannot drive Hawaiians to consensus on cultural impacts, she surmised, a consensus should be worked out elsewhere and *then* brought back to BLNR.³⁴⁰

Thielen correctly recognizes that DLNR cannot determine Hawaiian traditional cultural claims.³⁴¹ This paper does not propose a way for *DLNR* to adjudicate Hawaiian claims about Hawaiian culture, but emphasizes that settler colonialism disenables the systems and institutions through which such adjudication might have been carried out.³⁴² The settler state’s assertion of authority over land and natural resources puts DLNR in the contradictory role of adjudicating Hawaiian cultural claims to that land.³⁴³ And, DLNR’s incapacity to do so does not excuse its duty to protect Hawaiians’ “rights, customarily and traditionally exercised for subsistence, cultural and religious

³³⁷. *Id.*

³³⁸. Dawson, *supra* note 136, at 9-10.

³³⁹. *Id.*

³⁴⁰. BLNR Minutes, (Jan. 8, 2010), *supra* note 133, at 29.

³⁴¹. Each indigenous group must work out their own conception of self-determination, see Taiaiake Alfred & Jeff Corntassel, *Being Indigenous: Resurgences Against Contemporary Colonialism*, 9 GOV’T & OPPOSITION 597, 614 (2005).

³⁴². The U.S. National Park Service has published materials advising methods of cultural assessment where traditional groups have conflicting claims; see Patricia L. Parker & Thomas F. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, NAT’L REGISTER BULLETIN (U.S. Dept. Interior, Nat’l Park Service), 1998, at 9-10.

³⁴³. See *supra* Part II.A.

purposes[.]”³⁴⁴ Agencies exhort Hawaiians to cohere their culture as a “claim” to enable such agencies to fulfill their functions (and constitutional duties).³⁴⁵ Such exhortations not only contextualizes the field upon which lawai`a place their claims to Ka`ena, they *are* exercises of settler colonial power.³⁴⁶ Recognizing strategies of colonial governance in such specific sites offers a critical vantage on seemingly recalcitrant problems, such as Hawaiians’ tendency to disagree about culture.³⁴⁷ In Thielen’s construction of the problem, DLNR cannot ascertain a Hawaiian consensus on cultural impacts “in the absence of a resolution from the Hawaiian sovereignty movement.”³⁴⁸ Yet, she leaves unexamined the ways that achieving a consensus on culture *would* require a sovereign voice.³⁴⁹ Mervyn Tano, President of the International Institute for Indigenous Resource Management argues for closer examination of cultural consensus as a product of a capacity-building infrastructure—systems and institutions for debating, traveling, translating, training, consulting, researching, and other collective processes of cultural determination.³⁵⁰

³⁴⁴. HAW. CONST. art. XII, § 7 (1978); *see also* *Ka Pa`akai o ka `Āina v. Land Use Comm’n*, 94 Haw. 31, 7 P.3d 1068 (2000) (holding that an administrative agency failed to make findings to ensure that Native Hawaiian petitioners’ traditional and customary rights were protected to the extent feasible).

³⁴⁵. *See* HAW. CONST. art. XII, § 7 (1978) (reaffirming state’s duty to protect Native Hawaiian rights exercised for subsistence, cultural, and religious purposes).

³⁴⁶. Povinelli (1998), *supra* note 269, at 23 (Povinelli articulates the nearly impossible scope of this demand; “As the nation stretched out its hands to ancient aboriginal laws, indigenous subjects are called upon to perform a complex set of sign functions in exchange for the good feelings of the nation and the reparative legislation of the state. Aboriginal persons must transport to the present ancient pre-national meanings and practices in *whatever* language and moral framework prevails *at the time of enunciation*.”) (emphasis in the original).

³⁴⁷. Disagreement is not necessarily a “roadblock to Hawaiian self-determination[.]” *Goodyear-Ka`ōpua*, *supra* note 16, at 131.

³⁴⁸. BLNR Minutes, (Jan. 8, 2010), *supra* note 133, at 29.

³⁴⁹. *Interpreting Tano Lecture*, *supra* note 228.

³⁵⁰. *See id.*

One response to Thielen's plea for help is to query why "work[ing] out" conflicts between cultural knowledge and practices must be accomplished in a space beyond where the conflict is brought to crisis—or why a consensus must be reached at all.³⁵¹ Put otherwise, if decisions to impose the Fence on Ka`ena are made in the space of BLNR meetings then why should people *not* raise their concerns there? Another way of responding is to inventory what is needed to provide the kind of "help" Thielen requested.³⁵² These are the "penumbral elements" of cohering a cultural claim: community discussion forums, infrastructural support, scholarly research, training, curriculum development, and a variety of outreach processes that may include cultural protocols.³⁵³ Attending to this penumbra means identifying, supporting, and, perhaps creating culture-based systems and institutions.³⁵⁴ To demand that a community needs to come to a consensus about cultural knowledge before opposing a government agency action undervalues the resources, time, and courage that is needed to achieve a consensus, knowledge of culture, or to even cohere an analysis that would bring them to that agency at all.³⁵⁵

Compounding the problem Thielen identifies as a *lack* of cultural consensus, decision makers may fail to recognize articulations of cultural sovereignty in direct action land struggles, such as lawai`a proposals for stewarding Ka`ena.³⁵⁶ In part, this is because lawai`a

³⁵¹. Dawson, *supra* note 136, at 9-10.

³⁵². *Id.*

³⁵³. Tano Lecture, *supra* note 228.

³⁵⁴. *Id.*

³⁵⁵. *Paraphrasing id.*

³⁵⁶. This paper recognizes Goodyear-Ka`ōpua's insight that Hawaiian political sovereignty proceeds from multiple terrains. She writes, "What concerns me is the way sovereignty discourse has contributed to shifting emphasis and energy away from direct action land struggles—confrontations on the `āina . . . over its usage—towards court battles, state and federal legislation, and research about historically-appropriate legal strategies. Moving back and forth between these various terrains is important, and all these aspects of the movement have been valuable in some way. However, each terrain brings its own source of mana (power)." Goodyear-Ka`ōpua, *supra* note 16, at 134.

efforts to decolonize Ka`ena work at fundamental fractures between liberal paradigms of settler multiculturalism and traditional Hawaiian principles of land stewardship.³⁵⁷ State decision makers and lawai`a speak over fractures that settler colonialism “ramifies across epistemological, ontological and deontological grounds[.]”³⁵⁸ Put otherwise, to meaningfully inform DLNR policy, LAN’s proposals require a global interrogation of the ways we, as a settler colonial society determine what we consider knowledge, what we believe exists, and how these bring about our obligations to the world.³⁵⁹

IV. LAWAI`A GOVERNANCE

“The legitimate government is the people. Period.”

– *Laulani Teale.*³⁶⁰

To approach settler colonialism in the realm of state conservation requires reconsidering what we recognize as Hawaiian sovereignty, and more specifically, how traditional land uses are resources for decolonizing resistance.³⁶¹ This section sees Hawaiian cultural stewardship as a solution to contests between resource management and restoring indigenous self-determination.

The Lawai`a Action Network (LAN) worked with Laulani Teale, a Peacemaker employed by the Native Hawaiian Legal Corporation of Hawai`i, to produce a remarkable document of Ka`ena community governance.³⁶² “Lawai`a,” LAN explains, comes from the Hawaiian words “lawa” (enough) and “i`a”(fish) and thus “reflects the

³⁵⁷. See Byrd, *supra* note 160 at 16 (“notions of liberalism, democracy, and humanism . . . have all too often depended on the eradication of indigeneity however such a concept might function legally, epistemically or philosophically.”).

³⁵⁸. Povinelli, *Governance*, *supra* note 38, at 15.

³⁵⁹. See *id.*

³⁶⁰. Laulani Teale, Protest statement, (Feb. 8, 2012 1:24 PM HST) available at <http://www.youtube.com/watch?v=RUGW-LMtdQw&feature=share>.

³⁶¹. See Goodyear-Ka`ōpua, *supra* note 16.

³⁶². Teale Interview, *supra* note 23.

caretakership nature of traditional fishing culture . . . to ensure that there is always enough fish for all.”³⁶³ Lawai`a are distinguished by their knowledge of traditional values, practices specific to Ka`ena, respect for Hawaiian spirituality and other lawai`a, and capacity to participate and pass on their place-based, cultural knowledges.³⁶⁴ Not all fishers are lawai`a; and lawai`a are not exclusively Hawaiian by blood.³⁶⁵

LAN’s articulation of a place-based system of governance at an intersection between Hawaiian traditional cultures and ecological sustainability has been underread.³⁶⁶ This section attends to LAN’s substantive proposals and situates its potential for reimagining settler colonial governance of Hawai`i’s lands and peoples.³⁶⁷

A. FORTRESS CONSERVATION

LAN’s proposals attend to specific, concrete events with an awareness of the settler colonial context of conflicts at Ka`ena.³⁶⁸ What is needed at Ka`ena Point, according to LAN, is increased cultural competency of scientists, researchers, and decision makers, broadened oral information collection methods, more collaboration between lawai`a and DOCARE enforcement personnel, better integration of lawai`a into resource management plans,³⁶⁹ and *not* to introduce

³⁶³. Final Lawai`a Proposal, *supra* note 1, at 3.

³⁶⁴. Draft Lawai`a Proposal, *supra* note 99.

³⁶⁵. Draft Lawai`a Proposal, *supra* note 99.

³⁶⁶. This assertion is based on the difficulty of obtaining LAN Proposals, the lack of any mention of the proposals in BLNR minutes, and Teale’s observations. *See* Draft Lawai`a Proposal, *supra* note 99, Final Lawai`a Proposal, *supra* note 1, at 1, and Teale Interview, *supra* note 23.

³⁶⁷. *See infra* Part IV.C.

³⁶⁸. *See* Draft Lawai`a Proposal, *supra* note 99 and Final Lawai`a Proposal, *supra* note 1, at 1.

³⁶⁹. The State has published many plans for Ka`ena, including the Hawai`i Ocean Resources Management Plan, the Integrated Ka`ena Point Action Plan, the 1978 Ka`ena Point State Park Conceptual Plan, the 1997-1998 Sustainability Hotspot initiative, 1992 NARS management plan, and a 2006-2007 interdepartmental and community partnership led by DLNR Deputy Director Bob Masuda. *KPAG Plan*, *supra* note 12, at

permitting programs for access to Ka`ena.³⁷⁰ LAN opposed permitting programs at Ka`ena because they are culturally inappropriate—they potentially force disclosure of cultural secrets, are difficult to enforce, are ineffective against off-roaders, encourage excessive access by outsiders who may damage the `āina (land), and induce outsiders to compete with practitioners, lawai`a, and other local people.³⁷¹ Permits, LAN notes, are a problem for indigenous peoples worldwide.³⁷²

The proposals also describe the state’s approach to Hawaiians at Ka`ena as a “pendulum” swinging from place-based, community resource management towards “fortress conservation.”³⁷³ Fortress conservation has an extensive imperial history that originates in colonized Africa.³⁷⁴ The U.S. created its own version of fortress conservation, beginning with Yosemite National Park in 1864 and Yellowstone National Park in 1872.³⁷⁵ These American versions of fortress conservation share with other imperially imposed protected areas presumptions about the value of wilderness *for* civilization; “wild

9. For information on the Sustainability Hotspot Initiative, see MICHAEL WILSON, CHAIR, STATE OF HAWAII, DEP’T LAND & NAT. RES., CHAIRMAN’S MESSAGE: ‘HAWAII THE OCEAN STATE,’ REPORT TO THE GOVERNOR 1996-97 AND 1997-98, 7 available at http://www.state.hi.us/dlnr/reports/rtg/pubs/rtgch/rtg96_98_02.pdf.

³⁷⁰. See Draft Lawai`a Proposal, *supra* note 99.

³⁷¹. *Id.*

³⁷². *See id.*

³⁷³. Final Lawai`a Proposal, *supra* note 1, at 1.

³⁷⁴. In the 1890s, African peoples were displaced in the course of creating game reserves in sub-Saharan Africa and, in the Belgian Congo, through the creation of a Parc Nationale. See Jon Hutton, William M. Adams, & James C. Murombedzi, *Back to the Barriers? Changing Narratives in Biodiversity Conservation*, 32 FORUM FOR DEVELOPMENT STUD. 341, 342 (2005). In Kenya, the Kikuyu people found their social spaces converted into game reserves by imperial fiat, “the domain of beasts, a tourists’ pleasuring ground.” William M. Adams, *Nature and the colonial mind*, in *DECOLONIZING NATURE: STRATEGIES FOR CONSERVATION IN A POST-COLONIAL ERA*, 36 (William M. Adams & Martin Mulligan eds. 2003).

³⁷⁵. At their origins, these national parks were born of cultural nationalism, a means of showcasing America’s natural monuments. See Adams, *supra* note 374, at 37.

land was not a site for productive labor and not a permanent home; rather, it was a place of recreation.”³⁷⁶

The term, “fortress conservation” has advanced its initial imperial context into many “fences and fines” approaches, whereby interests of local people are often made to make way for conservation management.³⁷⁷ LAN critiques the state’s vision of Ka`ena as a wilderness park because it fails to see people as an “integral part of the landscape.”³⁷⁸ The title of the final LAN proposal, “mālama Ka`ena, a mālama Ka`ena ia `oe,” (reciprocal caretaking between the people and lands of Ka`ena) suggests this integral reciprocity between people and Ka`ena.³⁷⁹ “Permit systems, park closures and enclosures, and entrance fees[.]” LAN argues, continue an archaic approach to conservation that means kicking people out such that only “wilderness . . . remains.”³⁸⁰ Ollie Lunasco, a Ka`ena fisherman puts the strategy simply, “I think they [DLNR] think, the less people there, the less they have to worry.”³⁸¹

Fortress conservation is expensive, unpopular, and unfavorably compared to community-based environmental management approaches in international civil society fora.³⁸² In the 1990s, fortress conservation gave way to community-based conservation narratives that stressed the needs of local people and challenged presumptions that state experts

³⁷⁶. Cronon, *supra* note 198, at 77.

³⁷⁷. Bram Büscher & Webster Whande, *Whims of the Winds of Time? Emerging Trends in Biodiversity Conservation and Protected Area Management*, 5:1 CONSERVATION & SOCIETY 23, 27 (2007).

³⁷⁸. Final Lawai`a Proposal, *supra* note 1, at 2.

³⁷⁹. *Id.*

³⁸⁰. *Id.* at 1.

³⁸¹. *Fishermen Speak Up!*, *supra* note 23.

³⁸². See Hutton, Adams, & Murombedzi, *supra* note 374, at 345 (citing the Brundtland Report (1987) and the UN Conference on Environment and Development in Rio (1992)).

know better how to care for lands than the people who lived closest to them.³⁸³

LAN finds the “pendulum” at Ka`ena is swinging back towards fortress conservation,³⁸⁴ a trend that Hawai`i holds in common with the rest of the world.³⁸⁵ This renewed protectionist paradigm³⁸⁶ reflects a “US-led vision of conservation . . . stress[ing] the great urgency of conservation action, the need for science-based conservation planning and the completion of global scientific analysis of areas of greatest biodiversity[.]”³⁸⁷ Biodiversity conservation is also integral to Hawaiian cultural sovereignty.³⁸⁸ When a native species is lost, so are the

³⁸³. Hawai`i, for instance, passed a community-based subsistence fisheries statute in 1994. HAW. REV. STAT. §188-22.6 (1994) (“Designation of community-based subsistence fishing area”). See also Jodi Higuchi, Propagating Cultural Kīpuka: The Obstacles and Opportunities of Establishing a Community-Based Subsistence Fishing Area, 31 U. HAW. L. REV. 193 (2008), Büscher & Whande, *supra* note 377, at 27, and Wayne Tanaka, Ho`ohana aku, Ho`ola aku: First Steps to Averting the Tragedy of the Commons in Hawai`i’s Nearshore Fisheries, 10 ASIAN-PAC. L. & POL’Y. J. 235 (2010) (arguing fishers who have a direct stake in the productivity of fisheries should be more involved in resource management).

³⁸⁴. More recently, conservationists have advocated a biodiversity “protected areas” instead of community-based conservation methods. Hutton, Adams, & Murombedzi, *supra* note 374, at 345.

³⁸⁵. In Hawai`i, the development of a National Historical Park at Kaloko-Honokōhau occasioned the eviction of Hawaiian (and non-Hawaiian) families living within Park borders. One of those families, the Pai `Ohana, unsuccessfully attempted to sue for recognition of their superior rights to the contested lands. See *Pai `Ohana v. United States*, 76 F.3d 280, 1996 U.S. App. LEXIS 1460 (9th Cir. 1996), *aff’g* 875 F. Supp. 680, 1995 U.S. Dist. LEXIS 849 (D. Haw. 1995).

³⁸⁶. Stan Stevens cogently reminds us that science-based conservation holds no monopoly on the concept of ‘protected areas.’ He writes, “Indigenous peoples created the world’s first protected areas centuries ago. Their sacred places – sacred forests and mountains, sacred springs, rivers, lakes, caves, and countless other hallowed sites and areas – were regions removed from everyday access and resource use, the abodes of nature spirits and powers with which people communed but did not interfere...[.]” Stevens, *supra* note 169, at 9.

³⁸⁷. Hutton, Adams, & Murombedzi, *supra* note 374, at 347 (citations omitted).

³⁸⁸. See *Goodyear-Ka`ōpua*, *supra* note 16.

practices associated with it.³⁸⁹ In LAN's proposals, by contrast, culture and not science is the basis for biodiversity conservation.³⁹⁰

B. SUSTAINABLE SELF-DETERMINATION

The back and forth of the state's overtures and recalcitrance towards Hawaiian conceptions of place has been happening on grounds given by colonialism.³⁹¹ We must recognize these given grounds so as not to miss enunciations of indigenous sovereignty that fall outside of conventional political forms of participation.³⁹² Liberal forms of recognition for indigenous groups and individuals³⁹³ risk installing a concept of self-determination that merely "mimicks state-centric rights discourses" and a preoccupation with identifying owners of those rights.³⁹⁴

³⁸⁹. Paraphrasing Kawika Winter, Director of Limahuli Garden & Preserve, Ha'ena, Hawai'i, Culturally-Based Forest Restoration in Hawai'i – Forest as 'Ohana, Hawai'i Conservation Conference, Honolulu, Hawai'i (Aug. 2, 2011).

³⁹⁰. Draft Lawai'a Proposal, *supra* note 99.

³⁹¹. See *supra* text accompanying note 268.

³⁹². See e.g., DLNR's "community-based" process at Ka'ena. See Press Release, Dep't Land & Nat. Res., State of Hawai'i, DLNR Seeks Public Input on Designation of Roads at Ka'ena Point State Park Reserve (Oct. 31, 2011) available at <http://hawaii.gov/dlnr/chair/pio/nr/2011/NR10-305.pdf>. This paper suggests that DLNR-structured processes here invoke community to make them easier to control. See *supra* Part I.C.

³⁹³. Debates over state-based political recognition overlap with those concerning whether "sovereignty" is an appropriate vehicle for realizing indigenous peoples' autonomy. Both debates involve tensions between political exigencies of indigenous rights under siege and cautions against uncritically adopting political forms that are inappropriate to indigenous ontologies, epistemes, and communities. See ALFRED, *supra* note 233; Glen S. Coulthard, *Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada*, 6 CONTEMP. POL. THEORY 437 (2007); and Goodyear-Ka'ōpua, *supra* note 16.

³⁹⁴. Corntassel, *supra* note 3, at 115-16.

Instead of foregrounding rules for identifying rights,³⁹⁵ LAN's proposals describe "concepts": 1) recognizing our kuleana (responsibility) to "mālama Ka`ena, a mālama Ka`ena ia `oe[;]" 2) "building a common understanding of the inter-relationships between the land, the sea, and the people who depend upon them[;]" 3) "recognizing place-based knowledge through oral traditions and cultural practice[;]" and 4) "implementing new methods to mālama `āina [care for the land], to mālama i ke kai [care for the ocean], and to mālama pono [take care in a righteous way] in order to better address modern issues impacting Ka`ena."³⁹⁶ LAN's proposals advocate management of Ka`ena land that would reserve the area for people who will care for it, foremost and including lawai`a—cultural practitioners qualified by their knowledge of and respect for Hawaiian traditions, values, ecologies, site-specific histories, and for other lawai`a.³⁹⁷

Guiding principles of kuleana (an imposed responsibility) and reciprocal stewardship make lawai`a authority inextricable from practical knowledge of natural resources.³⁹⁸ This vision of governance operates at multiple levels, "interrelat[ing] issues of regenerating sustainable livelihoods, food security, and renewal of community relationships with the natural world."³⁹⁹ Such a multidimensional approach avoids the risk of seeking political/legal solutions for "contemporary challenges that require sustainable, spiritual foundations."⁴⁰⁰ LAN articulates metrics of good governance that have

³⁹⁵. In 2011, the Native Hawaiian Roll Commission was created to maintain a list of Native Hawaiians "qualified," as determined by the Commission, by their: 1) relation to an descendant of the aboriginal peoples who inhabited the Hawaiian islands prior to 1778; 2) "significant, social, or civic connection to the Native Hawaiian community and wis[h] to participate in the organization of the Native Hawaiian governing entity;" and 3) age of eighteen years or more. Act 195, 26th Leg. Sess. (Haw. 2011).

³⁹⁶. Final Lawai`a Proposal, *supra* note 1, at 10.

³⁹⁷. Draft Lawai`a Proposal, *supra* note 99, at 6-9.

³⁹⁸. See Final Lawai`a Proposal, *supra* note 1, at 4.

³⁹⁹. See Cornassel, *supra* note 3, at 107.

⁴⁰⁰. See *id.* at 115-16. Such a principled approach functions differently, and outside of, for example, newly promulgated legal frameworks for state recognition of a Native Hawaiian governing entity. See HAW. REV. STAT. §§ 10H-1 to -9 (LEXIS through 2011 Reg. Session) (Native Hawaiian Recognition).

currency across other Hawaiian communities.⁴⁰¹ Indigenous critical theory scholar, Jeff Corntassel, suggests that such land-based governing principles, a “sustainable self-determination,” are alternatives to rights-based benchmarks for autonomy in other indigenous homelands as well.⁴⁰²

Noelani Goodyear-Ka`opua applies “sustainable self-determination” to Hawaiian communities.⁴⁰³ She finds Hawaiian sovereignty not in courtrooms, but in place-based indigenous epistemologies enacted in lo`i and `auwai construction at `Aihualama, a Hawaiian language immersion school.⁴⁰⁴ Goodyear-Ka`opua argues that cultural practices of kuleana and lāhui, which are also central to LAN’s proposals, are resources for a “liberatory praxis, . . . forms of belonging, collective authority and social organization.”⁴⁰⁵ Understanding Hawaiian relationships to land as resources for *political liberation* is crucially distinct from a view that *Hawaiians* are bound only to a single

⁴⁰¹. For example, at Kea`au settlement, located on public land mere miles away from Ka`ena, a Hawaiian resident criticized the State Department of Planning and Permitting (DPP) for authorizing the removal of resident’s belongings pursuant to an ordinance prohibiting personal property on public property. See HONOLULU, HAW., REV. ORDINANCES 11-29 (2011) (excepting motor vehicles, the City and County of Honolulu is authorized to remove any personal property stored on public property for more than twenty-four hours, whether attended or unattended). He stated:

How long has DPP had its lease? What have they done with it? Have they taken care of the `āina? The people who live here [at Kea`au], we’ve tried to come together to stewardship [*sic*] the `āina, the fisheries, maintain the limu roots. The DPP hold the lease, but they never do nothing.

AlohaRevolution. *People of Kea`au*, USTREAM (Apr. 19, 2012, 12:12 PM), http://www.ustream.tv/recorded/21922146/highlight/257659#utm_campaign=www.facebook.com&utm_source=257659&utm_medium=social. Principles of kuleana and stewardship as measures of worthiness to hold authority over land underlie this resident’s protest resonate with those affirmed in the LAN proposals. See Final Lawai`a Proposal, *supra* note 1 and Draft Lawai`a Proposal, *supra* note 99.

⁴⁰². See Corntassel, *supra* note 3, at 119.

⁴⁰³. Goodyear-Ka`opua, *supra* note 319, at 48.

⁴⁰⁴. *Id.* at 48.

⁴⁰⁵. *Id.* at 131-32.

land and way of being on that land.⁴⁰⁶ It is instead an assertion that ancestral *lands* have histories and practices bound to them.⁴⁰⁷ The difference is critical because the latter implicates settler colonial regimes imposed on those lands⁴⁰⁸ whereas the former focuses on Hawaiian identity claims.⁴⁰⁹ This paper values LAN's coastal land stewardship proposals as more fully challenging what is disrepaired about Hawai'i's settler colonial regime.⁴¹⁰

C. THE SETTLER STATE AND HAWAIIAN CULTURAL SOVEREIGNTY

LAN's place-based vision of community is oriented by "the inter-relationships between the land, the sea, and the people who depend upon them."⁴¹¹ In this view, encounters with Hawai'i's biotic environment are opportunities for *articulating relationships to land that may also*

⁴⁰⁶. For critiques of this claim, see Anna J. Willow, *Clear-Cutting and Colonialism: The Ethnopolitical Dynamics of Indigenous Environmental Activism in Northwestern Ontario*, 56 *ETHNOHISTORY* 35, 38 (2009) and Nandita Sharma, *Review: Asian Settler Colonialism: From Local Governance to the Habits of Everyday Life in Hawai'i* edited by Candace Fujikane and Jonathan Y. Okamura, 44 *Hawaiian J. History* 107 (2010).

⁴⁰⁷. See Shawn Malia Kana'iaupuni & Nolan Malone, *This Land is My Land: The Role of Place in Native Hawaiian Identity*, in *RACE, ETHNICITY, AND PLACE IN A CHANGING AMERICA* (John W. Frazier & Eugene Tetty-Fio eds., 2006); Draft Lawai'a Proposal, *supra* note 99; and Mishuana R. Goeman, *Notes Toward a Native Feminism's Spatial Practice*, 24 *WICAZO SA REVIEW* 169, 179 (2011) (describing a "sense of place as a cohesive one, not made through legal boundaries, but through communal, clan, and individual stories.").

⁴⁰⁸. See Lorenzo Veracini, *Settler Colonialism and Decolonisation*, 6 *BORDERLANDS E-JOURNAL* (2007) (describing a diversity of settler colonial processes of locating communities and national structures on colonized lands).

⁴⁰⁹. See Goodyear-Ka'ōpua, *supra* note 16, at 134 (observing, with concern, shifts in sovereignty discourses away from confrontations on the 'āina to battles for legal recognition).

⁴¹⁰. See *infra* Part II & III (elaborating biopower and political priority as constitutive discourses of Hawai'i's settler colonial regime).

⁴¹¹. Final Lawai'a Proposal, *supra* note 1, at 6.

*mediate relationships to each other.*⁴¹² “[T]he richness of interspecies relations[,]”⁴¹³ disaggregated from settler state conservation agendas, is itself a resource for re-imagining modes of affiliation that govern relationships between people and place.⁴¹⁴ And, by centralizing cultural practices of *place*, LAN’s proposed stewardship system also invites non-Hawaiians to take responsibility for Ka`ena.⁴¹⁵

Lawai`a is a Hawaiian tradition, but not all lawai`a are Hawaiian by blood. Some have learned from generations of fishing with Hawaiian families; others have merged the similar traditional practices of their own ancestors with the place specific understanding they have learned from mentorship and experience in Hawaiian practices.⁴¹⁶

LAN’s community admits practitioners who are not Hawaiian, while recognizing the importance of genealogy to a Hawaiian identity.⁴¹⁷ This configuration complicates the notion of an *only* consanguinal indigeneity and its presumed place as a counterpoint to

⁴¹² For example, Walter Ritte, a Moloka`i activist, described such an opportunity in his community’s encounter with a monk seal. In 2008, an abandoned young monk seal, named Hō`ailona by Moloka`i residents, began living near Kaunakakai wharf until NOAA removed Hō`ailona for eye-surgery in 2009. Ritte and others in Moloka`i protested NOAA’s actions; “They could have worked with this community instead of coming here and telling us what’s best for us and best for the seal. . . . This seal has taken this island by storm. This is a very special seal and we need the seal. We need to . . . get Hawaiians to see this seal as looking at themselves. You know, Hawaiians are becoming an endangered species.” Hawai`i Public Radio, Mar. 19, 2010 www.hawaiipublicradio.org/hpr/index.php?option=com_content&task=blogcategory&id=42&Itemid=166 (quoted in Goldberg-Hiller & Silva, *supra* note 25, at 442).

⁴¹³ Goldberg-Hiller & Silva, *supra* note 25, at 442.

⁴¹⁴ See Final Lawai`a Proposal, *supra* note 1 and Goldberg-Hiller & Silva, *supra* note 25.

⁴¹⁵ Draft Lawai`a Proposal, *supra* note 99, at 6-9.

⁴¹⁶ *Id.* at 10 (“Non-Hawaiian lawai`a are needed by the Hawaiian community; their families (and hanai families) may include Hawaiians who depend on them for their knowledge and abilities, and they are part of the collective knowledge base of cultural practice, including passing this knowledge on.”).

⁴¹⁷ *Id.* at 6-9.

liberal settler society.⁴¹⁸ As discussed in Part III, a “consanguinal logic” of indigenous identity is part and parcel of the settler state’s project of “performatively universali[zing] the West.”⁴¹⁹ References to blood quantum are not always and everywhere *only* instruments of settler colonialism,⁴²⁰ but here, LAN’s refusal to *centralize* consanguinity (without disavowing its relevance) rather *emphasizes* relationships between lawai`a and the coastal lands upon which they practice.⁴²¹ In LAN’s formulation, Hawaiian traditions of land stewardship, as opposed to liberal principles of multicultural tolerance, are organizing principles for its communities.⁴²² Shifting the center of community towards relationships to land importantly resists mimicking the everywhere and nowhere-ness of liberal settler authority⁴²³ and meaningfully moves toward everyday struggles of indigenous communities.⁴²⁴ To decolonize state conservation, decision makers must reconsider what they recognize as Hawaiian sovereignty, and where they look for it.⁴²⁵

⁴¹⁸. See *supra* Part III.

⁴¹⁹. Morgensen, *supra* note 31, at 67.

⁴²⁰. See Osorio, *supra* note 15.

⁴²¹. What remains non-multicultural in this scheme is the centrality of *Hawaiian* “place specific understanding[s.]” Draft Lawai`a Proposal, *supra* note 99, at 10. Because the scope of the LAN’s plan is restricted to Hawai`i, however, this paper does not address the marginalization of land stewardship governance proposals based on other cultural models as a problem. See Nandita Sharma & Cynthia Wright, *Decolonizing Resistances, Challenging Colonial States*, 35 SOCIAL JUSTICE 93, 99 (2008) (“[A]utochthony can be said to be a neoliberal mode of belonging, one whose attempts to contain contestation are based on allegations that any demand for rights and/or resources by “non-Natives,” including a radical rethinking of how rights and resources are thought of and distributed, is tantamount to a disregard for, and even colonization of, the *autochthones*”) (emphasis in the original).

⁴²². See *supra* Part III.C.

⁴²³. See Alfred & Corntassel, *supra* note 341.

⁴²⁴. LAN’s proposals acknowledge laws, regulations, and DLNR strategic objectives, but are not state-centric in the ways that Corntassel cautions because they do not define their objectives in Ka`ena only in relation to the state. See Draft Lawai`a Proposal, *supra* note 99, at 6-9.

⁴²⁵. Rebecca Tsosie, *Introduction: Symposium on Cultural Sovereignty*, 34 ARIZONA ST. L.J. 1, 6 (2002) (discussing statements by Kunani Nihipali, leader of the

Sovereignty is a process, not *only* a goal achieved in a geopolitical status.⁴²⁶ It operates at multiple levels to “evol[v]e indigenous livelihoods, food security, community governance, relationships to homelands and the natural world . . . thus enabling the transmission of these traditions and practices to future generations.”⁴²⁷ Settler colonialism manifests against this vision of Hawaiian sovereignty in attempts to control the exercise of Hawaiian traditional and customary rights and community-based claims through consultation processes⁴²⁸ *as well as* outright denials of administrative review of Hawaiian cultural practitioners’ contests to, for example, the predator-proof fence.⁴²⁹

State decision makers’ consultations with Hawaiian cultural practitioners should not be understood *only* as a response to Hawaiians’ demand for accommodation within the liberal multicultural state.⁴³⁰ These consultations are the settler *state’s demands* for an authoritative determination of project impacts on Hawaiian cultures.⁴³¹ The demand is problematic even where the state allows for differences between past and present Hawaiian traditional cultural practices;⁴³² “we should not lose sight of the fact that diversifying the content of a demand does not negate the demand itself.”⁴³³ Crucially, such a demand for knowledge

Hawaiian organization Hui Mālama, that Hawaiians’ cultural sovereignty does not pivot on whether Hawaiians are recognized as a political sovereign by the U.S. federal government).

⁴²⁶. See Kauanui, *supra* note 4 at 175-180 (describing genealogies of Hawaiian sovereignty movements and their diverse aims).

⁴²⁷. Corntassel, *supra* note 3 at 119.

⁴²⁸. See *supra* Part II.C.

⁴²⁹. See *supra* Part II.E.

⁴³⁰. See *supra* Part III.C.

⁴³¹. See POVINELLI, “EMPIRE,” *supra* note 37 at 228.

⁴³². Palama v. Sheehan, 50 Haw. 298, 303, 440 P.2d 95, 99 (1968) (rights based on Hawaiian tradition and custom are not limited to the context in which those rights were granted).

⁴³³. POVINELLI, “EMPIRE,” *supra* note 37 at 228.

of cultural impacts fails to place project-oriented cultural determinations within a fuller context of Hawaiian self-determination.⁴³⁴ In this sense, the state seeks to procure authorizations for cultural impacts by bypassing the critical decolonizing work of creating formal structural support and political sovereignty.⁴³⁵

The conundrum is not that meeting the state's demand is impossible.⁴³⁶ Without enthroning LAN as the sole authority on Ka'ena land use, this paper affirms LAN's efforts to articulate Hawaiian stewardship traditions with contemporary administrative frameworks.⁴³⁷ LAN's proposals are properly part of vigorous debates over culture and its meanings that are vital to Hawaiian sovereignty.⁴³⁸ They may also be understood as proposals for decolonizing relationships between lands and Hawai'i's communities as a whole.⁴³⁹

CONCLUSION

In his 2008 denied CCH petition, Mike Nawaikī O'Connell wrote:

I work with a large community of traditional fishermen and cultural practitioners. My daughter has been harassed by DLNR, interfering with her practice rights. I have been speaking out about the [predator-proof] fence for years, but do not feel that I have been heard. I am concerned for the cultural sites that are cared for by cultural practitioners who are the rightful caretakers of the land, and feel that the spiritual integrity needs protection.⁴⁴⁰

⁴³⁴. See *id.* at 228.

⁴³⁵. See Tano Lecture, *supra* note 228.

⁴³⁶. See Final Lawai'a Proposal, *supra* note 1 and Draft Lawai'a Proposal, *supra* note 99.

⁴³⁷. LAN's stresses that its proposals focus on "positive collaboration" between cultural practitioners, amongst others concerned about Ka'ena State Park Reserve. Final Lawai'a Proposal, *supra* note 1 at 4.

⁴³⁸. Corntassel, *supra* note 3 at 119.

⁴³⁹. Final Lawai'a Proposal, *supra* note 1 at 4 (excepting approaches to human interaction within ecosystems, indigenous conservation is similar to conventional conservation management).

⁴⁴⁰. See Kennedy Letter (May 22, 2009), *supra* note 91, at 3.

O'Connell's petition describes practical impacts of state actions at Ka'ena on his life: his family and cultural practices, the state's dereliction of its duties toward Hawaiian cultural resources, and the ways that the public process has failed him.⁴⁴¹ One necessary response to O'Connell's text would address whether Hawai'i's legal framework entitles him to a CCH.⁴⁴² Another analytical tact, which this paper pursues, is to unravel denied CCH petitions against the fence into its settler colonial context.⁴⁴³ The denial of his CCH petition raises questions about the legal system, and more specifically *how* settler colonialism operates through legal means.⁴⁴⁴

We have to examine settler colonialism this way, as present even in the moments in which the state recognizes Hawaiians.⁴⁴⁵ Because there is not a "uniform truth"⁴⁴⁶ of power, settler colonialism does not only appear as oppression, negation, or violence. It is in actions for things "we cannot not want"—liberalism's promise of modernist emancipation—that settler colonial orchestrations are less easily seen.⁴⁴⁷

⁴⁴¹. On November 3, 2008, O'Connell submitted this petition requesting a contested case hearing to challenge BLNR's Memorandum of Understanding, which the Board approved on April 24, 2009. See BLNR Minutes (May 22, 2009), *supra* note 132, at 17.

⁴⁴². Big Island Board Member Rob Pacheco expressed concern that DOFAW's recommendation to deny a contested case hearing in this instance may be inconsistent with other cases in which Hawaiian traditional cultural practitioners have been granted standing. Dawson, *supra* note 140, at 4.

⁴⁴³. See *supra* Part II & III.

⁴⁴⁴. These limits do not only predict that BLNR's denial of O'Connell's CCH. As Povinelli notes, sometimes the relationship between the courts and indigenous land claims is, and is not, about the content of their claims, but the ways that a settler public is made to feel "assure[d]" that liberal justice can address even wrongs that are foundational to the settler state. Povinelli (1998), *supra* note 269, at 9.

⁴⁴⁵. See *supra* Part III.

⁴⁴⁶. FOUCAULT (1990), *supra* note 153, at 69.

⁴⁴⁷. Gayatri Chakravorty Spivak, *Bonding in Difference*, in AN OTHER TONGUE: NATION AND ETHNICITY IN THE LINGUISTIC BORDERLANDS 273, 278 (A. Arteaga ed., 1994).

Hawai`i state conservation practices and modes of managing public access to conserved natural resources have been the case in point.

Over the three years during which she has worked with lawai`a communities regarding Ka`ena Point issues, Laulani Teale has found everyone cares about the same things: “the birds, the sacred sites, protection of the land and the ability for future generation to go there to see this place the way it should be.”⁴⁴⁸ The broad agreement over natural resource conservation at Ka`ena, however, concerns only an abstract endpoint, not the processes whereby that place can be made “the way it should be.”⁴⁴⁹ Critical questions have thus arose in regard to the political systems, processes, and institutions through which conservation protections should be accomplished *as well as* the kinds of systems, processes, and institutions that they move *toward*.⁴⁵⁰ This paper has looked toward Hawaiian stewardship traditions, and the communities that survive in them, for new organizing principles for natural resource conservation and found them to be coextensive with broader decolonizing struggles in Hawai`i.

⁴⁴⁸. Board of Land & Nat. Res., State of Hawai`i, Meeting Minutes, 11 (Aug. 12, 2010) *available at* <http://hawaii.gov/dlnr/chair/meeting/minutes/2010/100812-minutes.pdf/view>.

⁴⁴⁹. *Id.*

⁴⁵⁰. See EMMA GOLDMAN, *What I Believe*, in RED EMMA SPEAKS: SELECTED WRITINGS AND SPEECHES BY EMMA GOLDMAN, 35 (Alex Kates Shulman ed., 1972) (“What I believe is a process, not a finality. Finalities are for gods and governments, not for the human intellect.”).