

## Is Ecotourism Greenwashed? The Intersection of Ecotourism Regulations, Greenwashing and Indigenous Communities

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Due to increasing concerns about climate change, ecotourism is touted as an ideal solution for balancing economic growth with environmental preservation.<sup>1</sup> While there is no definitive legal definition, ecotourism is generally considered to be responsible travel to natural areas which benefits the environment and local community.<sup>2</sup> Ideally, ecotourism should provide economic opportunities for local people, equitably distribute socio-economic benefits among all involved parties, conserve both biological and cultural diversity, and offer the traveler an educational and enjoyable experience in order to connect the traveler with biocultural diversity.<sup>3</sup> However, the intersection of ecotourism with host communities is simultaneously the most fraught and least developed aspect of ecotourism.<sup>4</sup>

While there has been a robust international discussion concerning the need for ecotourism regulations, there has been a paucity of research discussing nationwide application in the United States.<sup>5</sup> Hawaii, with its tourism-dependent economy and its historically marginalized native community,<sup>6</sup> serves as an apt case study for the potential negative effects of ecotourism. Prior to

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<sup>1</sup> Rosaleen Duffy, *The Politics of Ecotourism and the Developing World*, 5 J. ECOTOURISM 1, 3-5 (2006).

<sup>2</sup> Françoise Simon, *Regulating Ecotourism: Legal Frameworks and Market Guidelines*, 99 YALE SCH. FORESTRY ENV'T STUD. BULL. 192, 192 (1996).

<sup>3</sup> Ricardo Rozzi *et al.*, *Galápagos and Cape Horn: Ecotourism or Greenwashing in Two Iconic Latin American Archipelagoes?*, 7 ENV'T PHIL. 1, 2 (2010). For more information about the general history of ecotourism, see generally Ross Dowling, *The History of Ecotourism*, in INTERNATIONAL HANDBOOK ON ECOTOURISM 15, 19 (Roy Ballantyne & Jan Packer eds., 2013).

<sup>4</sup> See generally MARTHA HONEY, ECOTOURISM AND SUSTAINABLE DEVELOPMENT, WHO OWNS PARADISE? (2d ed. 2008).

<sup>5</sup> Instead of federal oversight, ecotourism is governed by a patchwork of state and local regulations governing land use. However, national laws such as the Clean Water Act, Clean Air Act and Endangered Species Act have broad authorities that affect all activities, including ecotourism operations, on public and private lands and waters of the U.S. For more information on state and local ecotourism regulations, see generally U.S. DEP'T OF STATE, OVERVIEW OF SUSTAINABLE TOURISM IN THE U.S. (2003), <https://2001-2009.state.gov/g/oes/rls/or/19412.htm>.

<sup>6</sup> Linda Cox *et al.*, *Achieving Sustainable Tourism in Hawai'i Using a Sustainability Evaluation System*, 17 RES. MGMT. 2, 2 (2008).

the Covid-19 pandemic, Hawaii's annual number of tourists regularly exceeded the islands' total population.<sup>7</sup> Many tourists are drawn to Hawaii's unique natural wonders, but traveling to Hawaii, which requires extensive greenhouse gas usage, disrupts preexisting native communities.<sup>8</sup>

Using Hawaii as a framework, this paper explores the lack of regulation of the ecotourism industry in the United States, the intersection of ecotourism and greenwashing, and the effects of ecotourism on indigenous communities. These subjects are discussed using case studies, international ecotourism regulations, and case law. Ultimately, this paper offers proscriptive ideas to improve culturally sensitive ecotourism regulation both in Hawaii and beyond.

## **I. Criticisms of Ecotourism, and the Issue of Greenwashing**

Genuine ecotourism should be more than conventional tourism with an environmental façade.<sup>9</sup> However, that is not always the case. For example, companies will often extend their use of the term "ecotourism" in advertising experiences which do not fulfill the actual ecotourism model by characterizing any outdoor experience as an act of ecotourism.<sup>10</sup> Nowhere is this exaggerated claim of environmental commitment clearer than with the issue of greenwashing in both corporate and ecotourism settings.

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<sup>7</sup> *Id.*

<sup>8</sup> See Luisa Cristini *et al.*, *Climate Change and the Visitor Industry: People, Place, Culture, and the Hawai'i Experience*, UNIV. OF HAW. SEA GRANT COLL. PROGRAM CTR. FOR SUSTAINABLE COASTAL TOURISM 1, 2 (2013) [http://manoa.hawaii.edu/ihlrc/sites/default/files/publications/web-hta-climatechange-visitorindustry\\_0.pdf](http://manoa.hawaii.edu/ihlrc/sites/default/files/publications/web-hta-climatechange-visitorindustry_0.pdf); see also Shannon McDonagh, *Hawaiian Overtourism Residents Beg Tourists to Stop Visiting Amid Post-pandemic Boom*, EURONEWS.TRAVEL (Aug. 15, 2021), <https://www.euronews.com/travel/amp/2021/08/15/hawaiian-overtourism-residents-beg-tourists-to-stop-visiting-amid-post-pandemic-boom>.

<sup>9</sup> Rozzi, *supra* note 3, at 4.

<sup>10</sup> Anja Tuohino and Anna Hynonen, *Ecotourism – Imagery and Reality. Reflections on Concepts and Practices in Finnish Rural Tourism*, 2ND INT'L CONF. NEW DIRECTIONS MANAGING RURAL TOURISM LEISURE, 1, 6-7 (2001) [https://www.academia.edu/40011915/Ecotourism\\_imagery\\_and\\_reality.\\_Reflections\\_on\\_Concepts\\_and\\_Practises\\_in\\_Finnish\\_Rural\\_Tourism](https://www.academia.edu/40011915/Ecotourism_imagery_and_reality._Reflections_on_Concepts_and_Practises_in_Finnish_Rural_Tourism).

Greenwashing is the overstatement of environmental benefit in advertising products or services.<sup>11</sup> Corporate greenwashing is endemic, as corporations often benefit from a “halo effect” due to their perceived environmental efforts.<sup>12</sup> In the past, corporations suffered little even when overt greenwashing was exposed.<sup>13</sup> However, a 2020 study examined consumers’ hypothetical reactions to an ad that featured environmental initiatives, then the participants’ reactions to discovering the initiatives were merely greenwashing tactics.<sup>14</sup> Although it was hypothesized that overt greenwashing would elicit more negative reactions than subtle greenwashing, both received negative feedback.<sup>15</sup> Among consumers, even half-truths were considered as egregious as outright lies, which indicated increasing resistance to greenwashing tactics.<sup>16</sup>

A major concern for environmentalists is the issue of carrying (or ecological) capacity, which is the maximum number of tourists and their cumulative impacts on the environment within the tourist area.<sup>17</sup> If tourist sites operate within this value, it ensures the ecosystem can function in a stable manner and biodiversity will be preserved.<sup>18</sup> However if the environmental burden in the tourist area exceeds the area’s natural ability to mitigate the sheer impact of increased human activity, the delicate ecological balance may be harmed.<sup>19</sup>

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<sup>11</sup> Richard Dahl, *Green Washing: Do You Know What You’re Buying?*, 118 ENV’T HEALTH PERSP. 247, 247 (2010).

<sup>12</sup> Menno D. T. de Jong *et al.*, *Different Shades of Greenwashing: Consumers’ Reactions to Environmental Lies, Half-Lies, and Organizations Taking Credit for Following Legal Obligations*, 34 J. BUS. TECH. COMM’N 38, 67 (2020).

<sup>13</sup> *Id.* Scholars previously identified the “Seven Sins” of greenwashing including: (1) vagueness, (2) reporting environmentally friendly behaviors in such a way that they cannot be verified, (3) false labeling, (4) using unauthorized but seemingly objective green labels, and (5) telling complete lies about environmental performance. For more information, *see id.* at 40.

<sup>14</sup> *Id.* at 51.

<sup>15</sup> *Id.* at 63.

<sup>16</sup> *Id.* at 66.

<sup>17</sup> Cox, *supra* note 6, at 2.

<sup>18</sup> Yuri Bakov *et al.*, *Legal Restrictions on Ecotourism*, 191 ADVANCES ENG’G RSCH. 46, 47 (2019).

<sup>19</sup> Mark D. Needham *et al.*, *Recreation Carrying Capacity and Management at Kailua Beach Park on Oahu, Hawaii*, HAW. CORAL REEF INITIATIVE RSCH. PROGRAM I, III (2008)  
<https://nature.forestry.oregonstate.edu/sites/default/files/2007-2b%20HCRI%20-%20Kailua%20Beach%20Park%20-%20Final%20Project%20Report%20-%20Needham%20-%20Final.pdf>.

## II. Ecotourism's Limitations in Practice: The Galapagos Islands

Ecological tourism can be "good" only in the presence of certain conditions such as a high degree of ecological consciousness among tourists, strong legal regulation, and tourists' self-regulation.<sup>20</sup> It is difficult, however, to put this into practice. The Ecuadorian government attempted to bring these principles to the Galápagos Islands in the 1960s, which represented an unprecedented change in the ecotourism movement.<sup>21</sup> A 2007 study on the islands determined that ecotourism efforts were often performative, with companies offering limited interactions with the indigenous population and non-eco-friendly accommodations.<sup>22</sup> Despite laws promoting small-scale industry, most tourism on the Galápagos ran exclusively through large-scale operators.<sup>23</sup> Researchers believe that this influx of ecotourists was driven by ambiguity in green marketing that conflates ecotourism with exposure to nature, wildlife, and adventure tourism, which can be seen in marketing efforts for kayaking and zip-lining.<sup>24</sup> Although the Galápagos are known for pioneering ecotourism, the study determined that the island residents shouldered the brunt of the biological, cultural, and economic growing pains of ecotourism at the local-level but rarely reaped the socio-economic benefits of the industry.<sup>25</sup>

## III. Ecotourism and Greenwashing in Law

International governments have tried to address ecotourism and by extension greenwashing through legislation that sets forth tourism standards.<sup>26</sup> In an attempt to mitigate the increasingly negative effects of tourism on the Galápagos' native species, the Ecuadorian government enacted

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<sup>20</sup> Bakov *supra* note 18, at 46.

<sup>21</sup> Rozzi, *supra* note 3, at 10.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 12-13. Only 8% of tourists patronize locally run tours that benefit the island's inhabitants. Moreover, these large-scale operations became unsustainable for the islands' ecosystem, putting tortoises and other endemic flora and fauna at risk

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 12.

<sup>26</sup> Bakov, *supra* note 18, at 46.

the Special Law for the Conservation and Sustainable Development of the Galapagos (hereafter known as the “Special Law”). The Special Law dictated that tourism is allowed only if tourists are accompanied by naturalists and may only take place in 70 land and 62 marine sites throughout Galápagos National Park.<sup>27</sup> In order to stimulate the local economy and promote the cross-cultural exchange favored by ecotourism, all guides must be residents of the islands and have scientific knowledge of the environment.<sup>28</sup> Although Galapagos community leaders are generally supportive of the “intention and goals” of the Special Law, some are less confident in the policy’s effectiveness.<sup>29</sup>

Ecuador is not the only country to enact legislation that is sensitive to the socio-economic and cultural needs of residents in ecotourism destinations. Through the Manila Declaration, the Philippines asserted that tourist resources are the property of mankind.<sup>30</sup> However, the Declaration also stated that the satisfaction of tourists’ needs may not harm the social and economic interests of the local population.<sup>31</sup> The Declaration goes further than the Special Law, indicating that historical, cultural, and environmental sites will receive special protection in all circumstances, even if this creates a conflict with other groups.<sup>32</sup> Unlike the Special Law, the Declaration’s explicit prioritization of the environment over corporate interests more directly addresses the conflict between ecotourism and host communities.

While the United States lacks federal legislation dedicated to ecotourism, lawsuits have arisen concerning greenwashing in the corporate sphere. In *Massachusetts v. Exxon Mobil Corp*,

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<sup>27</sup> Rozzi, *supra* note 3, at 12.

<sup>28</sup> *Id.*

<sup>29</sup> See Michele Matis Hoyman & Jamie Randall McCall, *Is there trouble in paradise? The perspectives of Galapagos community leaders on managing economic development and environmental conservation through ecotourism policies and the Special Law of 1998*, J. ECOTOURISM 1, 7-8 (2012).

<sup>30</sup> Bakov, *supra* note, 18 at 47.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

the Commonwealth alleged that Exxon deceived Massachusetts consumers by promoting false and misleading greenwashing campaigns, thereby misrepresenting the company's role in contributing to greenhouse gas emissions.<sup>33</sup> Although Exxon argued that its campaign was "truthful at best and mere puffery at worst," the court determined that a reasonable consumer could be induced by Exxon's false representations.<sup>34</sup> Therefore, the greenwashing was indeed a deceitful marketing campaign.<sup>35</sup> This case signals a recognition of greenwashing in the United States and the potential for future federal.

#### **IV. Hawaii Marginalization, Land Usage, and Present Concerns**

Since the arrival of James Cook in 1778, Native Hawaiians have been at odds with the Western concept of land ownership.<sup>36</sup> Previously a self-governing kingdom, President William McKinley chose to annex the islands following an uprising by American planters which overthrew Queen Lili'uokalani.<sup>37</sup> Unlike the Western emphasis on private property, the Hawaiian land tenure system did not place importance on the tenets of privacy and exclusivity but emphasized spiritual integration with the land.<sup>38</sup> Prior to colonization, Native Hawaiians lived on an *ahupua'a*, an economically self-sufficient, pie-shaped unit of land where tenants were free to gather all necessities for food, medicine, and religious practices.<sup>39</sup> Native Hawaiians'

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<sup>33</sup> *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 37 (D. Mass. 2020).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Samuel J. Panarella, *Not in My Backyard Pash v. HPC: The Clash Between Native Hawaiian Gathering Rights and Western Concepts of Property in Hawaii*, 28.2 ENV'T L. 466, 472 (1998).

<sup>37</sup> J. Kehaulani Kauanui, *Colonialism in Equality: Hawaiian Sovereignty and the Question of US Civil Rights*, SOUTH ATL. Q. 635, 642 (2008). Despite indigenous opposition, the United States annexed the archipelago through internal domestic law and the Newlands Resolution, rather than the more legally recognized method by treaty. For more information about the annexation of Hawaii, see generally Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. INT'L L. 407 (1989-1990).

<sup>38</sup> Panarella, *supra* note 36, at 468.

<sup>39</sup> *Id.* at 471.

traditional system of integrated land tenure and subsistence was irreparably harmed by the introduction of Western private property following Hawaii's annexation.<sup>40</sup>

While the transfer of power marked a loss of autonomy for Native Hawaiians, the state constitution tried to restore some land rights to its native citizens. According to article XII, section 7 of the Hawaii constitution,

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a* tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.<sup>41</sup>

Activists see this article as an explicit guarantee of the rights of several religious, cultural, and subsistence practices relied on by Native Hawaiians.<sup>42</sup> However, these rights are not respected in practice. Private property owners are reluctant to allow Native Hawaiians to continue these traditional practices, as the owners believe it encroaches on their exclusive rights to use and occupy their land.<sup>43</sup> Therefore, despite these expressed statutory protections, Native Hawaiian gathering rights have mostly taken a back seat to non-native land-owning individuals.<sup>44</sup>

Native Hawaiian land claims are further complicated by the conflation of race and indigeneity, which makes sovereignty claims more difficult to articulate.<sup>45</sup> Diverse migratory patterns in Hawaii, including waves of Chinese, Filipino, and Portuguese immigrants, led to many Native Hawaiians becoming multiracial, complicating an ethnocentric claim for sovereignty.<sup>46</sup> This leaves Native Hawaiians without the rights to sovereignty and land

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<sup>40</sup> *Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Haw.*, 94 Haw. 31, 46, 7 P.3d 1068, 1083 (2000), as amended (Jan. 18, 2001).

<sup>41</sup> HAW. CONST. ART. XII, § 7

<sup>42</sup> Panarella, *supra* note 36, at 468.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Kauanui, *supra* note 37, at 637.

<sup>46</sup> *Id.*

ownership given to other indigenous groups throughout the United States.<sup>47</sup> Beginning in 2005, U.S. Senator Daniel Akaka introduced legislation, known as the Native Hawaiian Government Reorganization Act, to give Native Hawaiians the same federal recognition as other indigenous groups.<sup>48</sup> However, conservatives in the U.S. Senate repeatedly defeated the bill, arguing that it encourages a “race-based government.”<sup>49</sup>

A major concern in Hawaii is the carrying capacity among Hawaii’s popular tourist sites. Estimating the environments’ carrying capacity is difficult, especially with the recent return of tourists who add extra social and cultural pressure to already strained resources.<sup>50</sup> For instance, Hanauma Bay reached its carrying capacity in 1975 and by 1999 was operating at over five times its upper limit.<sup>51</sup> To better account for the beach’s carrying capacity, the State implemented an educational program requiring tourists view a four-minute video; the State also closed the beach once a week so the environment could “rest.”<sup>52</sup> However, the study indicated that any effort to restrict supply to achieve a sustainable carrying capacity causes a price increase, which is passed on to businesses serving tourists.<sup>53</sup> Therefore, in order to survive the higher prices caused by carrying capacity restrictions, businesses pursue higher-income customers.<sup>54</sup> Often these customers are more environmentally conscious.<sup>55</sup> As a result, the move to become more

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<sup>47</sup> See generally Jon Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. POL’Y REV. 95 (1998).

<sup>48</sup> Kauanui, *supra* note 37, at 641.

<sup>49</sup> *Id.* For further information about who may be considered a Native Hawaiian, see generally *Arakaki v. Lingle*, 477 F.3d 1048, 1053 (9th Cir. 2007); see also *Rice v. Cayetano*, 528 U.S. 495, 495 (2000).

<sup>50</sup> Cox, *supra* note 6, at 3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



sustainable causes businesses to explicitly target environmentally conscious visitors, which opens the door for greenwashing.<sup>56</sup>

## V. Ecotourism Regulations in Hawaii

Hawaii is no stranger to greenwashing. In the past, companies like Verizon have been accused of capitalizing on Hawaii's commitment to renewable energy by overstating their personal contributions to renewable energy.<sup>57</sup> Yet, there is little regulation explicitly mentioning greenwashing. Legislation instead focuses on the role of tourism holistically.

Recently, however, regulations have attempted to demystify the intention of tourist companies for consumers by certifying tourism sustainability. The Hawaiian Ecotourism Authority (HEA) as well as the Department of Business, Economic Development, and Tourism (DEBDT) established programs which create an ecotourism operator review process to certify that the operator conforms to the definition of ecotourism and identifies a level of performance for sustainable business practices.<sup>58</sup> To qualify as a HEA/DEBDT certified "green" operation, businesses must monitor, record, and publicly post their energy usage and waste creation, participate in ongoing sustainability training, inform customers about how they meet sustainability standards, and recruit other businesses to the program.<sup>59</sup> Despite these benchmark metrics, there are limitations: both initiatives are voluntary, require self-assessment, and have limited participation since they are not "official" or state sanctioned with the backing of legal enforcement.<sup>60</sup> The lack of an independent third-party who can verify these assessments calls

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<sup>56</sup> *Id.*

<sup>57</sup> Stewart Yerton, *Is Wireless Phone Giant Using Hawaii To Greenwash Its Image?*, HONOLULU CIV. BEAT (July 10, 2018), <https://www.civilbeat.org/2018/07/is-wireless-phone-giant-using-hawaii-to-green-wash-its-image/>.

<sup>58</sup> Cox, *supra* note 6, at 4. Approximately 100 programs worldwide certify tourism sustainability, with about 78 percent of these programs being based in Europe and 68 percent focusing on the role hotels play in tourism sustainability.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

into question the validity of the businesses' claims and leaves the consumer vulnerable to creative interpretation of ecotourism standards.<sup>61</sup>

A legally enforceable solution may come through the passage of SB1320, a state senate bill that aims to reinvigorate the struggling tourism industry through ecotourism. Although its main goal is to encourage tourism, the bill intends to do so only if tourism benefits the “social, economic, and physical needs, and aspirations” of the Hawaiian people.<sup>62</sup> The bill expressly mentions supporting Hawaii's people, “their efforts to *malama aina* (care for the land) and the cultural and natural resources of the *aina*, oceans, streams, and skies.”<sup>63</sup> For example, it calls for “a shift to a regenerative visitor industry that has a smaller footprint” on the environment, including “beaches, reefs, and ocean life.”<sup>64</sup> Furthermore, the bill requires a commitment to employ Hawaii residents<sup>65</sup> and protect Hawaiian “intellectual property, traditional knowledge, and traditional cultural expressions[.]”<sup>66</sup> While the bill is currently dead in committee, it may be addressed in the 2022 legislative session.<sup>67</sup>

SB1320 may offer a solution to the issues of ecotourism and greenwashing. The bill does not address greenwashing by name but appears to put safeguards in place to address loopholes which can lead to corporate greenwashing behaviors.<sup>68</sup> SB1320 closely mirrors the community-centric aspects of the Galápagos' Special Law and the Philippines' Manila Declaration. Like the Special Law, SB1320 proposes that tourism companies champion the local knowledge base,

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<sup>61</sup> *Id.* at 5.

<sup>62</sup> SB1320(b)(2), 31<sup>st</sup> Leg. (Haw. 2021).

<sup>63</sup> *Id.* at (b)(9)(A).

<sup>64</sup> *Id.* at (b)(11).

<sup>65</sup> *Id.* at (b)(10).

<sup>66</sup> *Id.* at (b)(9)(F).

<sup>67</sup> HAW. SENATE BILL 1320 (PRIOR SESSION LEGIS.) LEGISCAN (March 11 2021), <https://legiscan.com/HI/bill/SB1320/2021>. It is unclear whether the bill will ultimately be passed, as it sat in committee for months after minimal amendments, despite the Democratic majority in the Hawaiian state legislature.

<sup>68</sup> See SB1320(b)(2) 31<sup>st</sup> Leg. (Haw. 2021) (listing one of Hawaii's policies as the need to “[e]nsure that visitor industry activities are in keeping with the social, economic, and physical needs and aspirations of Hawaii's people.”)

providing opportunities for Native Hawaiians who have historically been excluded from the economic benefits of the tourism.<sup>69</sup> Furthermore, it prioritizes the needs of the Native Hawaiian population to restrict access to environmentally and culturally important sites over the freedom of movement for tourists, like the Manila Declaration.<sup>70</sup> Arguably, however, SB1320's goals lack specific benchmarks to address current tourism-based concerns in Hawaii. The bill does not expressly address issues of carrying capacity or greenwashing, which is especially pressing with the recent resurgence in tourism following pandemic restrictions. While the bill's all-encompassing platitudes establish ideal goals, it fails to set quantifiable parameters for land usage and guides, as the Galápagos Special Law attempted.<sup>71</sup> If SB1320 ultimately passes, greater specificity may be necessary to actively address the potential issues of greenwashing within Hawaii's ecotourism industry.

## **VI. Hawaiian Litigation**

Judges are at a loss as to how they can incorporate Native Hawaiian conceptions of land ownership into current American jurisprudence; this struggle stems from the inability to reconcile the Native Hawaiian with the Western concepts of land.<sup>72</sup> For Native Hawaiian rights to be enforceable, "an appropriate analytical framework for enforcement is needed. Such an analytical framework must endeavor to accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other."<sup>73</sup> Without reconciliation, the Western ideal will continue to dominate legislation.

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<sup>69</sup> *See id.* at (b)(10).

<sup>70</sup> *See id.* at (b)(2).

<sup>71</sup> *See generally* SB1320 31<sup>st</sup> Leg. (Haw. 2021).

<sup>72</sup> *Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Haw.*, 94 Haw. 31, 46, 7 P.3d 1068, 1083 (2000), as amended (Jan. 18, 2001).

<sup>73</sup> *Id.*

Additionally, there needs to be a codified means for activist groups to enforce environmental regulations involving greenwashing. These limitations were apparent in *Sierra Club v. Hawaii Tourism Authority*, where the Sierra Club alleged that there should be environmental assessment of tourism activities prior to commissioning of ecotourism marketing campaigns.<sup>74</sup> The Sierra Club characterized the Hawaii Tourism Authority's misleading process as an informational injury, meaning that it would suffer an actual or threatened injury because of the marketing services proposed in the contract.<sup>75</sup> While the court was sympathetic to the Sierra Club's concerns of misleading environmental information, they failed to see how an informational injury can rise to the burden of proof seen in the more traditional torts context.<sup>76</sup>

Until a codified and consistently enforced framework integrating the Native Hawaiian conceptualization of land with Western land ownership exists, it is unlikely that Native Hawaiians can argue against the negative effects of ecotourism and greenwashing in court. Furthermore, litigants need to determine the most effective way to bring claims of greenwashing. Rather than alleging injury, if activists present the issue of greenwashing in a consumer protection or reasonable consumer argument, they, like the Commonwealth of Massachusetts in *Exxon*, may find more success in future litigation.<sup>77</sup>

## **VII. Conclusion**

The increasing corporatization of Hawaii's ecotourism industry divorces it from the state's native communities and the ecological needs of the land. Currently, there is no easy solution to reconcile Native Hawaiian and corporate goals. Ultimately legislation, rather than litigation, may

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<sup>74</sup> *Sierra Club v. Haw. Tourism Auth. ex rel. Bd. of Dirs.*, 100 Haw. 242, 245, 59 P.3d 877, 878 (2002).

<sup>75</sup> *Id.*, at 880.

<sup>76</sup> *Id.*

<sup>77</sup> For a possible federal solution, *see generally* Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122 (Oct. 11, 2012).

offer Hawaiians a path forward. Although flawed, SB1320 could refocus the tourism industry on something more localized, thereby avoiding the pitfalls of large-scale corporate greenwashing.