

# ACLU

AMERICAN CIVIL LIBERTIES UNION

Hawai'i

## *Stewardship at Stake:* Legal Considerations for Protecting Hawai'i Lands from Government Overreach



American Civil Liberties Union of Hawai'i

June 25, 2026

P.O. Box 3410, Honolulu, HI 96801 | (808) 522-5900 | [office@acluhawaii.org](mailto:office@acluhawaii.org)

## **Table of Contents**

|  |           |
|--|-----------|
| <b>Table of Contents</b> .....   | <b>ii</b> |
| <b>Executive Summary</b> .....   | <b>1</b>  |
| <b>I. Introduction and Background</b> .....  | <b>7</b>  |
| <b>A. Purpose</b> .....  | <b>7</b>  |
| <b>B. ACLU of Hawaii’s Mission and Position on Indigenous Justice</b> .....  | <b>7</b>  |
| <b>C. Brief History of Military Leases in Hawai‘i</b> .....  | <b>8</b>  |
| <b>D. Timeline of the Current Land Lease Renewals</b> .....  | <b>9</b>  |
| <b>E. What Makes Hawaii’s Lands Unique</b> .....   | <b>10</b> |
| <b>II. Analysis</b> .....  | <b>12</b> |
| <b>A. Terminology</b> .....  | <b>12</b> |
| <b>B. Federal Law Limits on the Military’s Power to Condemn Hawai‘i State Land</b> .....                                 | <b>14</b> |
| 1. The Military Cannot Exercise Eminent Domain Without Restriction .....   | <b>14</b> |
| 2. The Exercise of Eminent Domain Can Be Challenged .....  | <b>25</b> |
| <b>C. State Law Puts Limits on State Actors During Lease Negotiations</b> ...  | <b>27</b> |
| 1. The Public Trust Doctrine Requires the State to Conserve and Protect Natural Resources.....                           | <b>28</b> |
| 2. The Hawai‘i Constitution Protects the Right to a Clean and Healthful Environment .....                                | <b>30</b> |
| 3. The Public Land Trust Requires the State to Protect Its Land for the Benefit of Native Hawaiians and the Public ..... | <b>30</b> |
| 4. The Hawai‘i Constitution Protects Native Hawaiian Customary and Traditional Rights.....                               | <b>31</b> |
| 5. The State Has Procedural Requirements to Fulfill Before Making a Deal .....   | <b>32</b> |
| <b>III. Conclusion</b> .....   | <b>36</b> |

## Executive Summary

This paper responds to community requests for the American Civil Liberties Union of Hawai‘i to outline the statutory and constitutional limits on the United States (“U.S.”) military and State of Hawai‘i with respect to decision making over Public Land Trust lands currently under military lease. This includes, but is not limited to, duties related to the unrelinquished claims of Native Hawaiians with respect to the Hawaiian Kingdom lands currently recognized as the Public Land Trust under state and U.S. federal law.

Between 2028 and 2031, various United States military leases of Hawai‘i state lands, which have been held by the military at almost no cost since Hawai‘i became a state in 1959, will expire.<sup>1</sup> The military considers the leased land “vital” to its operations,<sup>2</sup> leading to intense pressure for Hawai‘i to renew the leases and an implied (or possibly explicit) threat that the military will take the land through eminent domain if Hawai‘i does not agree to renewal. *See below* § II.B. Meanwhile, advocates continue to raise concerns about military use of state land, as well as its impact on the environment and Native Hawaiian cultural practices.

Currently, the United States Army (“Army”) leases for land on O‘ahu and the Island of Hawai‘i hold particular concern, as they expire in 2029.<sup>3</sup> These leases include: the Kahuku Training Area, Mākua Military Reservation, and the Kawailoa-Poamoho Training Area on O‘ahu; and the Pōhakuloa Training Area on the Island of Hawai‘i.<sup>4</sup> In 2025, the Army released its Final Environmental Impact Statements (“EIS”) for the

---

<sup>1</sup> *Military Leased Lands*, OFFICE OF HAWAIIAN AFFAIRS, <https://www.oha.org/aloha-aina/> [<https://perma.cc/NE3Q-MV7W>] (last visited June 23, 2026).

<sup>2</sup> *See* Letter from Dan Driscoll, Secretary of the Army, to Josh Green, Governor of Hawai‘i (Aug. 20, 2025) [hereinafter Letter from Secretary of the Army], [https://www.usarpac.army.mil/Portals/113/PDF%20Files/Letter%20to%20Hawai‘i%20Governor%20Green.pdf](https://www.usarpac.army.mil/Portals/113/PDF%20Files/Letter%20to%20Hawai'i%20Governor%20Green.pdf) [<https://perma.cc/ULD3-7ZHH>].

<sup>3</sup> *Military Leased Lands*, *supra* note 1.

<sup>4</sup> U.S. ARMY, ARMY TRAINING LAND RETENTION OF STATE LANDS AT KAHUKU TRAINING AREA, KAWAILOA-POAMOHU TRAINING AREA, AND MAKUA MILITARY RESERVATION: ISLAND OF O‘AHU: FINAL ENVIRONMENTAL IMPACT STATEMENT (2025) [hereinafter O‘AHU EIS], available at [https://d34w7g4gy10iej.cloudfront.net/pubs/pdf\\_73161.pdf](https://d34w7g4gy10iej.cloudfront.net/pubs/pdf_73161.pdf) [<https://perma.cc/K3LS-X9E4>]; U.S. ARMY, ARMY TRAINING LAND RETENTION AT PŌHAKULOA TRAINING AREA: FINAL ENVIRONMENTAL IMPACT STATEMENT, (2025) [hereinafter PŌHAKULOA EIS], available at [https://d34w7g4gy10iej.cloudfront.net/pubs/pdf\\_73028.pdf](https://d34w7g4gy10iej.cloudfront.net/pubs/pdf_73028.pdf) [<https://perma.cc/RVX4-JR82>].

retention of the O‘ahu training lands and Pōhakuloa.<sup>5</sup> Both EISs were rejected by the Hawai‘i Board of Land and Natural Resources (“BLNR”) in the Summer of 2025,<sup>6</sup> which could have implications for potential lease terms and even the State’s ability to legally renew the leases. *See below* § II.C.

Since August 2025, the Army has engaged in negotiations with Hawai‘i State Governor, Josh Green, seeking to reach a resolution on the lease renewals.<sup>7</sup> Both the Army and Governor Green have acknowledged the potential for various outcomes, including a renewal of the leases, a land exchange, the return of lands, and the cleanup of training areas.<sup>8</sup>

Shortly after beginning negotiations, Governor Green sent out a news release stating that federal leaders had “made clear they could act through eminent domain” if negotiations were not successful.<sup>9</sup> Though neither the Department of Defense nor the Army have publicly stated an intent to exercise eminent domain,<sup>10</sup> Army Secretary Dan Driscoll has emphasized the importance of the lands for national security on multiple occasions—comments that may be laying the groundwork for future use of eminent domain powers.<sup>11</sup>

Advocates have raised several concerns relating to the military leases and negotiations, including: (1) environmental damage, (2) continued militarization of

---

<sup>5</sup> *See O‘ahu Training Lands: Timeline to Date*, STATE OF HAWAII‘I: ENGAGE HAWAII‘I, <https://engage.hawaii.gov/wp-content/uploads/2025/08/Oahu-ATL-Timeline-v4.pdf> [<https://perma.cc/Q3NP-8LJ2>] (last visited June 23, 2026); *Pōhakuloa Training Area: Timeline to Date*, STATE OF HAWAII‘I: ENGAGE HAWAII‘I, <https://engage.hawaii.gov/wp-content/uploads/2025/08/PTA-timeline-fr-RD-v4.pdf> [<https://perma.cc/P8AK-BG2D>] (last visited June 23, 2026).

<sup>6</sup> *See O‘ahu Training Lands: Timeline to Date*, *supra* note 5; *Pōhakuloa Training Area: Timeline to Date*, *supra* note 5.

<sup>7</sup> *See* Press Release, Josh Green, Governor of Hawai‘i, Gov. Green Acknowledges Receipt of U.S. Army Letter on Military Land Leases in Hawai‘i (Aug. 21, 2025), <https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-gov-green-acknowledges-receipt-of-u-s-army-letter-on-military-land-leases-in-hawaii%CA%BBi/> [<https://perma.cc/2HL8-QQ24>].

<sup>8</sup> *See id.*; Letter from Josh Green, Governor of Hawai‘i, to Dan Driscoll, Secretary of the Army (Oct. 29, 2025) [hereinafter Letter from Josh Green], [https://governor.hawaii.gov/wp-content/uploads/2025/11/2510100-GOV\\_Letter-to-Hon.-Dan-Driscoll-Secretary-of-the-Army.pdf](https://governor.hawaii.gov/wp-content/uploads/2025/11/2510100-GOV_Letter-to-Hon.-Dan-Driscoll-Secretary-of-the-Army.pdf) [<https://perma.cc/FWH5-K6XU>].

<sup>9</sup> Press Release, Josh Green, *supra* note 7.

<sup>10</sup> Eminent domain refers to the federal government’s power to take private property for public use without the consent of the property owner. *See below* § II.B.

<sup>11</sup> *See e.g.*, Letter from Secretary of the Army, *supra* note 2.

Hawai‘i, (3) Governor Green’s fast-track, and (4) a lack of meaningfully solicited input and consultation from Native Hawaiians and community members.<sup>12</sup> Since beginning the negotiations, Governor Green has launched Engage Hawai‘i, a website created to encourage public participation on pressing state issues such as the military leases.<sup>13</sup> Additionally, Governor Green has appointed an Advisory Committee, which is composed of mostly Native Hawaiian members, to provide guidance during the negotiations.<sup>14</sup> Despite these actions, the sufficiency of consideration being given to community concerns continues to be debated.<sup>15</sup>

Furthermore, there are significant legal restrictions around how both the military and Governor Green can approach this process. First, the military’s ability to take Hawaii’s land is not unfettered. Since eminent domain is the presumed worst-case-scenario should negotiations fail, advocates and policymakers must consider how any action to take Hawai‘i state lands could play out—including limitations on the military’s authority to exercise eminent domain in Hawai‘i, possible defenses the State could assert, and avenues for community involvement in the proceeding.

The United States Constitution imposes limits on the exercise of eminent domain, requiring due process, a showing of a public purpose use for the land, and just

---

<sup>12</sup> See Audrey McAvoy, *Army Wants Faster Movement on Deal for Hawai‘i Live-Fire Training Lands*, HONOLULU CIVIL BEAT (July 23, 2025), <https://www.civilbeat.org/2025/07/army-wants-faster-movement-on-deal-for-hawai%CA%BBi-live-fire-training-lands/> [<https://perma.cc/P9K2-K48D>].

<sup>13</sup> Press Release, Josh Green, Governor of Hawai‘i, Gov. Green Launches Engage Hawai‘i Website, Giving Residents a Voice on Army Land Leases and Other Pressing Issues (Sept. 2, 2025), <https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-gov-green-launches-engage-hawaii-website-giving-residents-a-voice-on-land-leases-and-other-issues/> [<https://perma.cc/F75U-X7AA>].

<sup>14</sup> See Press Release, Josh Green, Governor of Hawai‘i, Gov. Green Names Advisory Committee for Leased Military Lands (Nov. 13, 2025), <https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-gov-green-names-advisory-committee-for-leased-military-lands/> [<https://perma.cc/VWY3-ZEEX>].

<sup>15</sup> See e.g., Daryl Huff, *Office of Hawaiian Affairs Says Governor Rushing Deal Over Military Training Lands*, HAWAII NEWS NOW (Nov. 11, 2025, at 20:12 CST), <https://www.hawaiinewsnow.com/2025/11/12/office-hawaiian-affairs-says-governor-rushing-deal-over-military-training-lands/> [<https://perma.cc/A55Z-6QG9>]; Mahealani Richardson, *Native Hawaiian Groups Warn Against Fast-Tracking Land Leases as Army Secretary Expected to Return*, HAWAII NEWS NOW (Sept. 2, 2025), <https://www.hawaiinewsnow.com/2025/09/03/native-hawaiian-groups-warn-against-fast-tracking-land-leases-army-secretary-expected-return-hawaii/> [<https://perma.cc/AA4R-TD4V>].

compensation.<sup>16</sup> In order for land to be taken, the United States would have to initiate a court case (a.k.a. “condemnation action”) against the State of Hawai‘i in federal district court. And as part of that proceeding, the State (or potentially community members who intervene) could litigate whether the requirements for eminent domain are met, how much the military must pay Hawai‘i in just compensation, and any defenses to eminent domain.

But before the military can even start condemnation proceedings, it needs Congress to give it the authority to do so. All military land acquisitions, including acquisitions through eminent domain, that will cost more than \$9 million must be specifically authorized by Congress, and Congress must appropriate sufficient funding for the acquisition.<sup>17</sup> Typically, Congress approves military land acquisitions through the National Defense Authorization Act (“NDAA”)—an annual legislative act that authorizes the establishment, or continuance of, existing projects, policies, defense programs, and activities of federal agencies such as the Department of Defense and the Department of Energy for the fiscal year.<sup>18</sup> If acquisition through eminent domain is not authorized by the NDAA, there would have to be separate Congressional approval by some other means (which would be unlikely). Without specific Congressional approval of a Hawai‘i land acquisition, condemnation by the military would be illegal.<sup>19</sup>

The NDAA for Fiscal Year 2026 does not currently authorize condemnation (or even purchase) of Hawaii’s lands.<sup>20</sup> The earliest the military could obtain this authorization is in Fiscal Year 2027, if Congress agrees to enact such a provision, and it passes in both the House and Senate—but as discussed below, none of the existing drafts of the NDAA for 2027 authorize condemnation. *See below* § II.B.1.b. So, there is room for federal legislative advocacy on this issue. If authorization for condemnation is

---

<sup>16</sup> U.S. CONST. amend. V.

<sup>17</sup> *See* 10 U.S.C. § 2664; 10 U.S.C. §§ 2802, 2805(a)(2); ANDREW TILGHMAN, CONG. RSCH. SERV., R44710, MILITARY CONSTRUCTION: AUTHORITIES AND PROCESSES (2024), available at <https://www.congress.gov/crs-product/R44710> [<https://perma.cc/ARY4-M2V3>].

<sup>18</sup> DANIEL M. GETTINGER & VALERIE HEITSHUSEN, CONG. RSCH. SERV., IF10516, DEFENSE PRIMER: NAVIGATING THE NDAA (2025), available at <https://www.congress.gov/crs-product/IF10516> [<https://perma.cc/588S-GVL5>].

<sup>19</sup> *See* 10 U.S.C. § 2664 (“No military department may acquire real property not owned by the United States unless the acquisition is expressly authorized by law.”).

<sup>20</sup> National Defense Authorization Act for Fiscal Year 2026, Pub. L. No. 119-60 (2025), available at <https://www.congress.gov/119/plaws/publ60/PLAW-119publ60.pdf> [<https://perma.cc/EZ84-V2GH>].

not added to the NDAA in the future, then taking Hawaii’s lands through condemnation is not likely to be an option for the military.

Further, because military land acquisition must be expressly authorized by Congress, the Hawai‘i Admission Act—which Congress enacted to protect Hawai‘i lands—provides an additional limitation on the exercise of eminent domain by the federal government. When Hawai‘i was admitted as a state, lands previously taken by the United States were transferred from the federal government to the State to be held in trust “for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, . . . for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.”<sup>21</sup> This trust formed the Public Land Trust later outlined in the Hawai‘i Constitution.<sup>22</sup> The lands currently leased to the military are part of the Public Land Trust.<sup>23</sup> Therefore, because these lands were explicitly set aside by Congress to be held in trust, the Admission act would need to be repealed (explicitly or implicitly) to authorize the federal government to take those lands for a non-trust purpose.<sup>24</sup>

Furthermore, the Tenth Amendment, which protects against federal intrusion into state sovereignty, could also be asserted as a defense against eminent domain.<sup>25</sup> While the Tenth Amendment is traditionally not an obstacle to eminent domain, the amount of land that would be at issue in a condemnation action would also be unprecedented. Given the importance of the leased lands to the State and the sheer quantity of land at issue, a court could find that the exercise of eminent domain in this context unconstitutionally intrudes into state sovereignty in violation of the Tenth Amendment.<sup>26</sup> *See below* § II.B.1.b.

---

<sup>21</sup> Hawai‘i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959).

<sup>22</sup> *See* HAW. CONST. art. XII, § 4; *Pele Def. Fund v. Paty*, 73 Haw. 578, 586, 837 P.2d 1247, 1254 (1992); NATIVE HAWAIIAN LAW: A TREATISE 86 (Melody Kapilialoha MacKenzie et al. eds., 2015).

<sup>23</sup> *Military Leased Lands*, *supra* note 1.

<sup>24</sup> *See* U.S. CONST. art. I, § 1; *Posadas v. Nat’l City Bank of New York*, 296 U.S. 497, 503 (1936).

<sup>25</sup> “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

<sup>26</sup> *See id.*; Hawai‘i Admission Act § 5(f); *New York v. United States*, 505 U.S. 144, 155-56 (1992).

In short, the State is not powerless against the exercise of eminent domain. The State may challenge the exercise of eminent domain in federal court in the District of Hawai‘i,<sup>27</sup> and the military may not take Hawaii’s land at any time without restriction.

Additionally, under the National Historic Preservation Act, federal agencies must consult with Native Hawaiian organizations when projects, activities, or programs may affect historic properties, such as the archeological sites on some of the leased lands.<sup>28</sup> *See below* § II.B.1.d. This obligation is echoed in the United Nations Declaration on the Rights of Indigenous Peoples, which recommends countries engage in consultations with Indigenous peoples before engaging in military activities on their land.<sup>29</sup> Therefore, the military should heed the concerns of Native Hawaiians and endeavor to address these concerns through consultation with Native Hawaiian organizations.<sup>30</sup>

Second, at the state-law level, the military lease renewals and negotiations implicate a wide variety of laws which provide guardrails for the disposition of Hawaii’s lands. Under the Hawai‘i Constitution, the “Public Trust Doctrine” obligates the State to protect and conserve Hawaii’s natural resources, including Hawaii’s water resources, for the benefit of the people.<sup>31</sup> *See below* § II.C.1. Meanwhile, the “Public Land Trust” requires that lands granted to the State by the Admission Act be held in trust by the State for Native Hawaiians and the public.<sup>32</sup> *See below* § II.C.3. Lastly, the Hawai‘i Constitution grants all people the substantive right to a clean and healthful environment<sup>33</sup> and protects Native Hawaiian customary and traditional rights,<sup>34</sup> requiring a thorough analysis any time an agency, like the Hawai‘i Department of Land and Natural Resources (“DLNR”), considers proposals that may impact Native Hawaiian rights.<sup>35</sup> *See below* §§ II.C.2, II.C.4.

---

<sup>27</sup> *See* 28 U.S.C. § 1403.

<sup>28</sup> 54 U.S.C.A. § 300101 (West); 36 C.F.R. §§ 800.1, 800.2(c)(2)(ii).

<sup>29</sup> G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, art. 30(2) (Sep. 13, 2007) [hereinafter UNDRIP]; *see* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 22, at 395-401.

<sup>30</sup> *See* 36 C.F.R. § 800.2(c)(2)(ii); UNDRIP, *supra* note 29, art. 30(2).

<sup>31</sup> HAW. CONST. art. XI, §§ 1, 7; *see* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 22, at 538-39.

<sup>32</sup> HAW. CONST. art. XII, § 4.

<sup>33</sup> HAW. CONST. art. XI, § 9; *In re Application of Maui Elec. Co.*, 141 Hawai‘i 249, 264-65, 408 P.3d 1, 16-17 (2017).

<sup>34</sup> HAW. CONST. art. XII, § 7; *see* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 22, at 786-87.

<sup>35</sup> The Hawai‘i Supreme Court “in seeking to maintain a careful balance between native Hawaiian rights and private interests—has made clear that the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.”

And while Governor Green has the authority to negotiate with the Army, his unilateral power to enter into a binding agreement for the renewal of the leases, or an exchange or sale of the lands, is limited. The DLNR, headed by the BLNR, is responsible for the management, administration, and control of Hawaii’s public lands.<sup>36</sup> The BLNR holds the authority to auction Hawaii’s lands through fee simple or lease.<sup>37</sup> While Governor Green has statutory authority to set aside public lands, prior approval from the BLNR is still required.<sup>38</sup> Any exchange of Hawaii’s land must also be approved by the BLNR.<sup>39</sup> The participation of the Hawai‘i State Legislature is also required in the event of an exchange or sale of Hawaii’s lands.<sup>40</sup> Thus, statutory restrictions limit Governor Green’s authority to unilaterally enter into a binding agreement for the sale, exchange, or lease of Hawaii’s lands.

## **I. Introduction and Background**

### **A. Purpose**

The purpose of this paper is to articulate legal limitations on the State and federal government’s authority, during negotiations about the Public Land Trust lands currently leased to the U.S. military by the State.

### **B. ACLU of Hawaii’s Mission and Position on Indigenous Justice**

The American Civil Liberties Union (“ACLU”) is a federated organization with 54 affiliates across the United States of America. The ACLU of Hawai‘i (“ACLU-HI”) is one affiliate, located in Honolulu, Hawai‘i. As the ACLU-HI, we work locally within federal and Hawai‘i state courts and legislatures to defend the civil rights and civil liberties of the Hawai‘i community.

In December 2025, the ACLU-HI formed an Indigenous Justice Committee comprised of local scholars, leaders, activists, and legal experts on Indigenous Justice.

---

*Ka Pa‘akai o Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 35, 7 P.3d 1068, 1072 (2000); see NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 22, at 804-06.

<sup>36</sup> Hawai‘i Revised Statutes (HRS) § 171-3(a).

<sup>37</sup> HRS § 171-13(1).

<sup>38</sup> HRS § 171-11.

<sup>39</sup> HRS § 171-50(c).

<sup>40</sup> *Id.*; HRS § 171-64.7(b).

The formation of the ACLU-HI's Indigenous Justice Committee followed the adoption of the ACLU National's Policy 313 on Indigenous justice.

Policy 313 specifically addresses Native Hawaiian rights and recognizes Native Hawaiians as a distinct, Indigenous people whose ancestors were the original inhabitants of Hawai'i. The Policy acknowledges the international treaty relationship that existed between the Hawaiian Kingdom and the United States and describes how these treaties were violated when the United States assisted in the illegal overthrow of the Hawaiian Kingdom in 1893. In 1993, the United States passed Public Law 103-150, admitting wrongdoing, apologizing to the Native Hawaiian people, and committing to a policy of reconciliation.

The ACLU and ACLU-HI support and defend the rights of Native Hawaiians and acknowledge that those rights are based not on race, but on the rights of Native Hawaiians as a unique, Indigenous people who have never relinquished their sovereignty or settled their claims with the United States. This paper reflects our own understanding and analysis of the law at this time, and in no way speaks on behalf of the Native Hawaiian community.

### **C. Brief History of Military Leases in Hawai'i**

In 1964, the DLNR leased nearly 30,000 acres of land for a term of 65 years to the U.S. Department of Defense for just \$1.<sup>41</sup> Many of these leases were executed by the State to prevent the U.S. from taking the land outright.<sup>42</sup> The execution of these leases ultimately led to the U.S. military's acquisition of additional leases for the Pōhakuloa Training Area, Kahuku Training Area, Kawaihoa-Poamoho Training Area, and Mākua Military Reservation.<sup>43</sup> These are the leases at issue today.

---

<sup>41</sup> Russell Subiono & Sophia McCullough, *Military Leaders Say 30K Acres of Land Vital to National Security, Others Want it Returned to State*, HAWAII PUBLIC RADIO (Aug. 25, 2021), <https://www.hawaiipublicradio.org/the-conversation/2021-08-25/military-leaders-30k-acres-of-land-national-security-state-training-diplomacy> [<https://perma.cc/XC8X-ZD6W>]; Thomas Heaton, *The Days of the Army Leasing Land in Hawaii for \$1 Are Likely Over. But What's Next?*, HONOLULU CIVIL BEAT (Apr. 18, 2024), <https://www.civilbeat.org/2024/04/the-days-of-the-army-leasing-land-in-hawaii-for-1-are-likely-over-but-whats-next/> [<https://perma.cc/ZHE5-39JC>].

<sup>42</sup> See *Military Leased Lands*, *supra* note 1.

<sup>43</sup> See *id.*

The Pōhakuloa Training Area spans 133,000 acres on the (Big) Island of Hawai‘i.<sup>44</sup> Most of these acres are owned by the federal government in fee simple.<sup>45</sup> 23,000 of those acres, however, have been leased by the State through a lease expiring in 2029.<sup>46</sup> On O‘ahu, 6,322 acres are subject to renewal: 1,150 acres at Kahuku Training Area, 4,390 acres at Kawaihoa-Poamoho Training Area, and 782 acres at Mākua Military Reservation.<sup>47</sup> Currently, Pōhakuloa is the only training area at issue that is used for live-fire training—a practice that inherently carries the risk of fatality due to the use of live ammunition, as well as hazardous fires and degradation of the land.<sup>48</sup> Mākua Military Reservation was previously used for live-fire training until 2004, when the military halted its live-fire activities.<sup>49</sup> It was not until 2023 that the military committed to ending live-fire training at Mākua permanently.<sup>50</sup>

#### **D. Timeline of the Current Land Lease Renewals**

The leases for Pōhakuloa and the O‘ahu training lands (Kahuku, Kawaihoa-Poamoho, and Mākua) will expire in 2029.<sup>51</sup> The Army first published its Draft Environmental Impact Statements (“EIS”) in 2022 for the proposed retention of Pōhakuloa and the O‘ahu training lands.<sup>52</sup> In May and June of 2025, the BLNR rejected the Army’s Final EISs.<sup>53</sup> Then, in August 2025, notwithstanding the BLNR’s rejection, the Army released its Record of Decisions for Pōhakuloa and the O‘ahu training lands, indicating that it would still “pursue retention” of only 19,700 acres at Pōhakuloa and

---

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

<sup>45</sup> *Id.*

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

<sup>47</sup> *Id.*

<sup>48</sup> See Puanani Fernandez-Akamine, *Pōhakuloa: A Land Besieged*, KA WAI OLA (Sept. 1, 2024), <https://kawaiola.news/cover/pohakuloa-a-land-besieged/> [https://perma.cc/V4FY-L23F]; O‘AHU EIS, *supra* note 4.

<sup>49</sup> See Christina Jedra, *Army Says Makua Valley No Longer Needed for Live-Fire Training*, HONOLULU CIVIL BEAT (Dec. 1, 2023), <https://www.civilbeat.org/2023/12/army-says-makua-valley-no-longer-needed-for-live-fire-training/> [https://perma.cc/ED99-7L46].

<sup>50</sup> *See id.*

<sup>51</sup> *Military Leased Lands*, *supra* note 1.

<sup>52</sup> *See O‘ahu Training Lands: Timeline to Date*, *supra* note 5; *Pōhakuloa Training Area: Timeline to Date*, *supra* note 5.

<sup>53</sup> *See O‘ahu Training Lands: Timeline to Date*, *supra* note 5; *Pōhakuloa Training Area: Timeline to Date*, *supra* note 5.

450 acres at Kahuku.<sup>54</sup> Thereafter, Army Secretary Driscoll issued a letter to Governor Green highlighting the desire to reach an agreement with the State by the end of 2025 and negotiations began.<sup>55</sup>

**Summary of Leases Expiring in 2029<sup>56</sup>**

|   | <b>Currently Leased</b> | <b>Military Wants to “Retain”<br/>(through lease or otherwise)</b> |
|---|-------------------------|--|
| <b>Pōhakuloa Training Area<br/>(Hawai‘i)</b>      | 23,000 acres            | 19,700 acres   |
| <b>Kahuku Training Area<br/>(O‘ahu)</b>           | 1,150 acres             | 450 acres  |
| <b>Kawailoa-Poamoho<br/>Training Area (O‘ahu)</b> | 4,390 acres             | 0 acres  |
| <b>Mākua Military<br/>Reservation (O‘ahu)</b>     | 782 acres               | 0 acres  |
| <b>Total</b>                                      | 29,322 acres            | 20,150 acres   |

**E. What Makes Hawaii’s Lands Unique**

The leased lands at issue are part of Hawaii’s Public Land Trust, which requires that lands transferred by the federal government to the State at the time of the Admission Act (when Hawai‘i was admitted as a state of America) be held in trust by the

---

<sup>54</sup> U.S. ARMY, ARMY TRAINING LAND RETENTION AT PŌHAKULOA TRAINING AREA RECORD OF DECISION 1 (2025) [hereinafter PŌHAKULOA RECORD OF DECISION], [https://home.army.mil/hawaii/9617/5451/3776/Signed\\_PTA\\_ROD\\_31JUL25.pdf](https://home.army.mil/hawaii/9617/5451/3776/Signed_PTA_ROD_31JUL25.pdf) [<https://perma.cc/PT9N-YAP2>]; U.S. ARMY, ARMY TRAINING LAND RETENTION OF STATE LANDS AT KAHUKU TRAINING AREA, KAWAIILOA-POAMOHO TRAINING AREA, AND MAKUA MILITARY RESERVATION, ISLAND OF O‘AHU RECORD OF DECISION 1 (2025) [hereinafter O‘AHU AREAS RECORD OF DECISION], [https://home.army.mil/hawaii/5917/5451/3775/ATLR\\_Oahu\\_ROD\\_Signed\\_by\\_ASA-GC.pdf](https://home.army.mil/hawaii/5917/5451/3775/ATLR_Oahu_ROD_Signed_by_ASA-GC.pdf) [<https://perma.cc/M8G4-6C2F>].

<sup>55</sup> Letter from Secretary of the Army, *supra* note 2.

<sup>56</sup> See PŌHAKULOA RECORD OF DECISION, *supra* note 54; O‘AHU AREAS RECORD OF DECISION, *supra* note 54.

State of Hawai‘i for Native Hawaiians and the public.<sup>57</sup> See below §II.C.3. The Public Land Trust is comprised of former government<sup>58</sup> and crown lands that were taken by the U.S. following the contested annexation of Hawai‘i.<sup>59</sup> These lands are commonly referred to as the “ceded lands,”<sup>60</sup> though these lands were never ceded by the Hawaiian Kingdom or Native Hawaiians, nor were Native Hawaiian claims to the lands relinquished.

Pursuant to the Admission Act, these lands are to “be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians<sup>[61]</sup> . . . for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.”<sup>62</sup> Thus,

---

<sup>57</sup> See *Background on the Public Land Trust, the Hawai‘i Admissions Act, and the Federal-Native Hawaiian Trust Relationship*, OFFICE OF HAWAIIAN AFFAIRS, <https://www.oha.org/wp-content/uploads/Enclosure-A-Background-on-the-Public-Land-Trust-the-Hawai%CA%BBi-Admissions-Act-and-the-Federal%E2%80%93Native-Hawaiian-Trust-Relationship.pdf> [<https://perma.cc/H2FA-ACDA>]; see *Military Leased Lands*, *supra* note 1.

<sup>58</sup> During the Great Māhele, King Kamehameha III set aside 1.5 million acres of Hawai‘i lands “as the lands of the Hawaiian government,” which became known as “Government Land.” NATIVE HAWAIIAN LAW: A TREATISE 14 (Melody Kapilialoha MacKenzie et al. eds., 2015). Kamehameha III also retained lands for himself and his heirs or successors, which were designated as “Crown Lands.” *Id.* at 14, 18.

<sup>59</sup> Act of Dec. 23, 1963, Pub. L. No. 88-233, 73 Stat. 4 (revising the procedures established by the Hawai‘i Statehood Act, Public Law 86-3, for the conveyance of certain lands to the State of Hawai‘i, and for other purposes); see *Frankel v. Bd. of Land & Nat. Res.*, 155 Hawai‘i 358, 360, 564 P.3d 1157, 1160 (Ct. App. 2025); *Pele Def. Fund v. Paty*, 73 Haw. 578, 585-86, 837 P.2d 1247, 1254 (1992); Kyle Kajihiro, *Situating U.S. Militarization and Imperialism in Hawai‘i*, in *THE TRUE COST OF THE U.S. MILITARY IN HAWAII* 14, 20 (2026).

<sup>60</sup> See Kajihiro, *supra* note 59, at 20; see, e.g., *Frankel*, 155 Hawai‘i at 360, 564 P.3d at 1160 (referring to “the returned crown and government lands (or ceded lands) the State holds in trust”); *Pele Def. Fund*, 73 Haw. at 585, 837 P.2d at 1254 (“Hawaii’s ceded lands are lands which were classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1893.”).

<sup>61</sup> As scholars and experts of Native Hawaiian law explain, “statutes that use the fifty-percent blood quantum definition use a lower case ‘n’ in native Hawaiian. This is an important distinction, because statutes that use the capital ‘N’ Native Hawaiians utilize a definition based on descent from a pre-1778 native of Hawai‘i, whereas lower case ‘n’ native Hawaiians are defined in terms of blood quantum.” Melody Kapilialoha MacKenzie & D. Kapua‘ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai‘i’s Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 528 (2017).

<sup>62</sup> Hawai‘i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959).

these leased lands at issue are unique since they were explicitly set aside by Congress to be held in trust by the State of Hawai‘i for specific non-military purposes.<sup>63</sup>

Additionally, Hawaii’s unique culture and history further impact the issue of the land negotiations. Historically, Native Hawaiian culture and Kingdom law recognized that natural resources should be held in trust for the people.<sup>64</sup> Native Hawaiian culture recognizes that the ‘āina (land, that which feeds) is sacred, not just because it provides sustenance, but because it is also an “ancestor, an extension of the family, and the physical embodiment of different akua (gods or ancestors).”<sup>65</sup> This unique history and culture are codified in the State’s Constitution, which expressly outlines the Public Trust Doctrine:<sup>66</sup> that the State shall hold all public natural resources in trust for the “benefit of [Hawaii’s] people.”<sup>67</sup> The unique history and culture of Hawai‘i therefore inform the legal and social ramifications of the lease negotiations at the state level.

## II. Analysis

This paper addresses three overarching issues: (1) the federal limits on the exercise of eminent domain over Hawaii’s lands, (2) alternative solutions grounded in state law that may be sought if the threat of eminent domain appears imminent, and (3) the state law limits on state actors during the lease negotiations.

### A. Terminology

In this analysis, we use the following terminology:

- **Eminent Domain** = The U.S. Government’s power to acquire property for public use without the consent of the property owner. The exercise of the eminent domain power is also referred to as “condemnation.”

---

<sup>63</sup> See *id.*; Kajihiro, *supra* note 59, at 22.

<sup>64</sup> See HAW. KINGDOM CONST. of 1840, EXPOSITION OF THE PRINCIPLES ON WHICH THE PRESENT DYNASTY IS FOUNDED, available at <https://ags.hawaii.gov/wp-content/uploads/2012/09/1840E.pdf> [<https://perma.cc/R8RN-HKTV>]; D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 147-48 (2011).

<sup>65</sup> D. Kapua‘ala Sproat & MJ Palau-McDonald, *The Duty to Aloha ‘Āina: Indigenous Values as a Legal Foundation for Hawaii’s Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525, 526 (2022); see Kajihiro, *supra* note 59, at 19.

<sup>66</sup> HAW. CONST. art. XI, §§ 1, 7; *id.* art. XII, §§ 4.

<sup>67</sup> *Id.* art. XI, § 1.

- **Lease** = The right to use and possess land for a specified term, in exchange for money or other compensation; a temporary conveyance.
- **Leased Lands** = The lands currently leased to the U.S. military that are ripe for renewal in 2029 (Pōhakuloa Training Area, Kahuku Training Area, Kawaihoa-Poamoho Training Area, and Mākua Military Reservation).
- **Sale or Sale of Land** = A voluntary real estate transaction where land is sold between the parties to the transaction, in this case, between the military and the State. Title to the land (*i.e.*, ownership) transfers in fee simple, meaning the State would have no ongoing oversight or control over how the land is used.
- **Land Exchange** = A voluntary real estate transaction where land is traded between the parties to the transaction, in this case, between the military and the State. As with a sale, title to the land transfers in fee simple.
- **Gift or Gift of Land** = A voluntary real estate donation (*i.e.*, a gift) where land ownership transfers from the donor to the gift recipient.
- **Military** = The U.S. Department of Defense, including all departments (*i.e.*, Army, Navy, etc.) acting under the authority of federal law.
- **State** = The State of Hawai‘i, including official actions taken by state actors such as the Governor or administrative agencies (DLNR/BLNR) on behalf of the State. “State” is capitalized when it is used as a noun and refers to the State of Hawai‘i as an actor; but when the word “state” is used as an adjective, it is not capitalized. For example, “a voluntary agreement made by the State for the sale, exchange, or lease of Hawaii’s land is subject to state law.”
- **Interested Party** = any organization or member of the public with a particular and concrete interest in the land at issue. For example, environmental rights organizations, Native Hawaiian cultural practitioners, people who use the land or resources at issue, or Native Hawaiian beneficiaries of the Public Land Trust discussed below in § II.C.3. In certain scenarios, an “interested party” has the ability (*i.e.*, “standing”) to challenge an administrative decision or file a court case against the government.

## **B. Federal Law Limits on the Military’s Power to Condemn Hawai‘i State Land**

The power to exercise eminent domain is an inherent right of the federal government.<sup>68</sup> It constitutes the federal government’s power to take private property for public use without the consent of the property owner.<sup>69</sup> While this power is inherent, the United States (“U.S.”) Constitution places limits on it,<sup>70</sup> and its exercise can be challenged in federal court by the landowner (in this case, the State of Hawai‘i).<sup>71</sup> **The military does not have carte blanche to take land through eminent domain—**instead, it would need to follow prescribed procedures, and the State of Hawai‘i could oppose the taking. Ultimately, while an implied threat that the military will seek to condemn state lands should be taken seriously, such a conclusion is not inevitable.

### **1. The Military Cannot Exercise Eminent Domain Without Restriction**

Eminent domain cannot be exercised by the military, or the federal government, without restriction. The U.S. Constitution requires due process of law, just compensation, and that the land be taken only to serve a public purpose.<sup>72</sup> Accordingly, an exercise of eminent domain may be challenged in court for violating any of these requirements.<sup>73</sup>

Generally, the power of eminent domain is a legislative power, meaning that land cannot be condemned “in the absence of direct authority from the legislature.”<sup>74</sup> Furthermore, under the U.S. Constitution, Congress—not the Executive branch—controls government spending by appropriating funds for use by government agencies, including the military.<sup>75</sup> As such, Congress must authorize not only use of the eminent domain power but also the appropriations needed to exercise eminent domain, which involves payment of “just compensation” for the taking of land.<sup>76</sup>

---

<sup>68</sup> See *United States v. Jones*, 109 U.S. 513, 518 (1883).

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*; U.S. CONST. amend. V.

<sup>71</sup> See *Jones*, 109 U.S. at 519; see, e.g., *Kelo v. City of New London*, 545 U.S. 469, 475-76 (2005).

<sup>72</sup> See *Jones*, 109 U.S. at 518-19.

<sup>73</sup> See 28 U.S.C. § 1403; *Kelo*, 545 U.S. at 477; *Knick v. Twp. of Scott*, 588 U.S. 180, 189-90 (2019).

<sup>74</sup> 1 NICHOLS, THE LAW OF EMINENT DOMAIN 63 (1917).

<sup>75</sup> See U.S. CONST. art. I, § 9, cl. 7.

<sup>76</sup> 10 U.S.C. § 2664(c); see, e.g., *Kohl v. United States*, 91 U.S. 367, 374 (1875).

Congress has given the military the authority to acquire land (including acquisition through a condemnation proceeding), but only for projects “expressly authorized by law”<sup>77</sup>—that is, projects that Congress has specifically approved. For a land acquisition of this magnitude (*i.e.*, over \$9 million dollars), Congressional approval would typically occur by including a specific land acquisition project in the National Defense Authorization Act (“NDAA”).<sup>78</sup> Furthermore, the Admission Act may impose additional requirements on both the military and the federal government before eminent domain can be exercised over Hawaii’s lands.<sup>79</sup>

a. The Legal Requirements of Eminent Domain

Two requirements must be fulfilled for the proper exercise of eminent domain: (1) a showing of a public purpose and (2) just compensation.<sup>80</sup> Further, the Fifth Amendment of the U.S. Constitution protects against the deprivation of property without due process of the law.<sup>81</sup> In the context of eminent domain proceedings, due process requires that the owner of the land be afforded the opportunity to be heard and to offer evidence of the value of the land.<sup>82</sup>

The Fifth Amendment requires that just compensation be paid when private property is taken by the government for public use.<sup>83</sup> In determining just compensation, the Supreme Court has held that in most cases, “just compensation” means the fair market value of the property on the date seized.<sup>84</sup> In other words, the property owner is entitled to “what a willing buyer would pay in cash to a willing seller” at the time of the seizure.<sup>85</sup> In this context, Governor Green has asserted that the land at issue is worth

---

<sup>77</sup> 10 U.S.C. § 2664(a).

<sup>78</sup> See, e.g., National Defense Authorization Act for Fiscal Year 2026, Pub. L. No. 119-60, § 2101 (2025), available at <https://www.congress.gov/119/plaws/publ60/PLAW-119publ60.pdf> [<https://perma.cc/E29N-GJFC>]; see also 10 U.S.C. §§ 2802 & 2805(a)(2).

<sup>79</sup> See Hawai‘i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959); *infra* § II.B.1.c.

<sup>80</sup> U.S. CONST. amend. V; *United States v. Carmack*, 329 U.S. 230, 241 (1946).

<sup>81</sup> U.S. CONST. amend. V; *United States v. Jones*, 109 U.S. 513, 518 (1883).

<sup>82</sup> See *Bailey v. Anderson*, 326 U.S. 203, 205 (1945).

<sup>83</sup> U.S. CONST. amend. V.

<sup>84</sup> See *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10 (1984).

<sup>85</sup> *Id.* at 10 (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979)).

more than \$10 billion dollars.<sup>86</sup> Others have valued the land at around \$32 billion dollars.<sup>87</sup>

To satisfy the public purpose requirement, the government need only show that the seizure of land is rationally related to a conceivable public purpose.<sup>88</sup> Here, United States Army (“Army”) Secretary Driscoll has stated that “[t]o lose access to critical training lands [Hawaii’s leased lands] would be detrimental to U.S. national security and create a vulnerability that we, as a Nation, cannot afford.”<sup>89</sup> Therefore, the military is likely to argue that national security is the public purpose fulfilled by an exercise of eminent domain over Hawaii’s lands<sup>90</sup>—an argument that is likely sufficient for the eminent domain analysis.<sup>91</sup> While the State could theoretically challenge the military’s assertion that Hawai‘i land is necessary for national security, courts often defer to the government where national security is concerned.<sup>92</sup> Further, the State may not decide to make such a challenge, as Governor Green has conceded that “[c]ontinued Army access to critical training areas is essential to Indo-Pacific mission readiness.”<sup>93</sup>

That said, if a condemnation proceeding was contested, questions could arise around the extent of Congressional authorization and whether it applies to *all* the currently-leased lands, including lands that are not actively used by the military. Whether arguments in this vein are successful will depend on the extent of such land acquisition authorized by Congress, *see below* § II.B.1.b, the evidence presented, and the

---

<sup>86</sup> See Letter from Josh Green, *supra* note 8.

<sup>87</sup> See David Vine, *The Value of Military-Leased Land in Hawai‘i*, in *THE TRUE COST OF THE U.S. MILITARY IN HAWAI‘I*, *supra* note 59, at 149, 155, 163 (valuing the land at \$1.6 million per acre, which is \$32 billion dollars for 20,000 acres). Depending on the method used, the rental value of the land may be between \$11,807 and \$48,155 in annual rent per acre, which would value one year’s rent at between \$236.1 million and \$936.1 million for the 20,000 acres at issue here. *See id.* at 153. This would also mean that the total amount of unpaid rent due for 65 years across all the military-leased land is between \$32.8 billion and \$133.7 billion. *See id.* These numbers also don’t account for the likely “billions of dollars in additional costs to clean up environment damage caused by the military over decades.” *Id.* at 162.

<sup>88</sup> See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

<sup>89</sup> Letter from Secretary of the Army, *supra* note 2.

<sup>90</sup> *Cf. id.*

<sup>91</sup> See 10 U.S.C. § 2663 (authorizing military use of eminent domain for military training camps and national security purposes).

<sup>92</sup> See, e.g., *Trump v. Hawaii*, 585 U.S. 667, 686-87 (2018); *cf. United States v. Caltex*, 344 U.S. 149, 155 (1952); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922).

<sup>93</sup> See Letter from Josh Green, *supra* note 8.

court’s willingness to question the military’s “national security” assessment, as that is an issue area where courts have traditionally deferred to the government.<sup>94</sup>

b. The Military’s Restricted Authority to Exercise Eminent Domain

All military land acquisitions—including acquisitions through eminent domain—that will cost more than \$9 million must be specifically authorized by Congress (usually within the latest iteration of the NDAA), and Congress must also appropriate funding to complete the acquisition.<sup>95</sup>

In Hawai‘i, the military is seeking to “retain” roughly 20,000 acres of land,<sup>96</sup> which would likely be valued at considerably more than \$9 million (Governor Green estimated their value would be over \$10 billion)—meaning that under 10 U.S.C. § 2802 and § 2805, there must be a specific Congressional authorization (typically in the NDAA) for the military to acquire the leased lands at issue. However, the current version of the NDAA does not authorize the military to acquire lands in Hawai‘i, through eminent domain or otherwise.<sup>97</sup>

The earliest the military could obtain Congressional authorization to acquire (e.g., condemn) Hawai‘i lands would be for Fiscal Year 2027, if Congress agrees to add such provision to the NDAA (or enacts a separate authorization), and it passes in both the House and Senate.<sup>98</sup> However, the draft of the 2027 NDAA passed by the house

---

<sup>94</sup> See, e.g., *Trump v. Hawaii*, 585 U.S. at 686-87; cf. *Caltex*, 344 U.S. at 155; *Portsmouth Harbor Land & Hotel Co.*, 260 U.S. at 330.

<sup>95</sup> See 10 U.S.C. § 2664(a) (“No military department may acquire real property not owned by the United States unless the acquisition is expressly authorized by law.”); 10 U.S.C. § 2664(c) (“[T]he cost authorized for a land acquisition project may be increased by not more than 25 percent of the amount appropriated for the project by Congress”); 10 U.S.C. §§ 2802 & 2805(a)(2) (discussing “minor” land acquisitions of less than \$9 million); TILGHMAN, *supra* note 17.

<sup>96</sup> This number comes from the land the military has announced that it will be seeking to re-lease. See PŌHAKULOĀ RECORD OF DECISION, *supra* note 54 (19,700 acres); O‘AHU AREAS RECORD OF DECISION, *supra* note 54 (450 acres). If lease negotiations fail, it is not clear whether the military would try to condemn all of this land, since it has not made any public statements about condemnation. That said, in the decisions to “pursue retention” of Hawai‘i land—which did not distinguish between retention via lease versus condemnation—the military concluded that the option of retaining less land would “negatively impact both DoD mission readiness and local agency training requirements,” suggesting that it may believe condemnation is necessary to national security if lease negotiations fall through. See *id.*

<sup>97</sup> See National Defense Authorization Act for Fiscal Year 2026, Pub. L. No. 119-60 (2025), available at <https://www.congress.gov/119/plaws/publ60/PLAW-119publ60.pdf> [<https://perma.cc/HT55-U6ZJ>].

<sup>98</sup> See GETTINGER & HEITSHUSEN, *supra* note 18.

contains *no* authorization for the military to acquire land,<sup>99</sup> and the draft passed by the Senate only authorizes the military to “seek from the State of Hawaii on terms acceptable to both the Department of the Army and the State of Hawaii a renewal of the relevant leases.”<sup>100</sup> In other words, while the NDAA for Fiscal Year 2027 is not yet final, none of the current drafts authorize the military to condemn Hawai‘i lands.

Essentially, these are three scenarios concerning eminent domain:

- (1) Congress could decide *not* to authorize any acquisition of Hawai‘i lands (the current status quo), in which case, the military should not be able to use eminent domain to take the currently leased lands over the State’s objection;<sup>101</sup>
- (2) Congress could grant the military broad authority to acquire *any* lands in Hawai‘i that it deems necessary, through any means, in which case the due process requirements discussed above would serve as guardrails on an eminent domain taking (this appears to be the least-likely option given prevailing norms),<sup>102</sup> or
- (3) Congress could grant the military limited authorization to acquire Hawai‘i lands, for example by only allowing a lease, land purchase, or exchange (not condemnation); only allowing condemnation of particular identified

---

<sup>99</sup> H.R. 8800, 119th Congress (2026) (as reported by H. Comm. on Armed Servs., June 15, 2026).

<sup>100</sup> S. 4784, 119th Congress § 2864 (2026) (as reported by S. Comm. on Armed Servs., June 15, 2026).

<sup>101</sup> See, e.g., JOINT EXPLANATORY STATEMENT TO ACCOMPANY THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2026, at 425-26, [hereinafter NDAA JOINT EXPLANATORY STATEMENT] available at [https://armedservices.house.gov/uploadedfiles/fy26\\_ndaa\\_joint\\_explanatory\\_statement.pdf](https://armedservices.house.gov/uploadedfiles/fy26_ndaa_joint_explanatory_statement.pdf) [<https://perma.cc/3ARY-GHP4>]. While legally, the military must have specific congressional approval to condemn Hawai‘i lands as discussed above, in this time of unprecedented democratic backsliding, it is always possible the military may attempt to take Hawai‘i lands notwithstanding the legal requirements. In that instance, it would be up to the courts to apply the law as written and disapprove of any illegal taking.

<sup>102</sup> For example, in 1888, Congress granted a railroad company broad powers to use eminent domain “to construct and operate a railway through the Indian Territory.” See *Noble v. Oklahoma City*, 297 U.S. 481, 489–90 (1936). This kind of broad grant of authority appears to be the least likely to occur in the context of military projects, as current authorizations for military land acquisitions specify the specific locations of proposed projects and the amounts authorized for each project—they do not include broad authorizations to acquire any land the military deems necessary. See, e.g., National Defense Authorization Act for Fiscal Year 2026, Pub. L. No. 119-60, § 2101 (2025), available at <https://www.congress.gov/119/plaws/publ60/PLAW-119publ60.pdf> [<https://perma.cc/OY4U-9FH3>].

parcels; or imposing procedural requirements that must be exhausted prior to condemnation, such as requiring good faith negotiations and a new environmental impact statement that responds to concerns raised by the Hawai‘i DLNR.<sup>103</sup>

Accordingly, legal activists and concerned citizens have an opportunity to engage in federal legislative advocacy on this issue. If Congress does not authorize condemnation of the leased lands (either through the NDAA or otherwise), then taking Hawaii’s lands by force will not be a legal option for the military.<sup>104</sup>

Additionally, while the NDAA authorizes military construction projects and provides guidance for the use of appropriated funds, the NDAA does not appropriate money for military use.<sup>105</sup> Any authorization to acquire Hawai‘i land must also be followed by a specific appropriation (typically in the related military appropriations bill) in order to provide the military with the money to pay the just compensation<sup>106</sup>—

---

<sup>103</sup> See, e.g., NDAA JOINT EXPLANATORY STATEMENT, *supra* note 101, at 425-26 (discussing and rejecting proposed authorization for acquisition through exchange or lease only); *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (affirming regulation that Indian Tribe must consent before railroad can acquire right-of-way pursuant to statutory grant); S. 4784, 119th Congress § 2864 (2026) (as reported by S. Comm. on Armed Servs., June 15, 2026) (proposing to condition new leases on the military “resubmit[ing] a new environmental impact statement for additional review by the Hawaii Department of Land and Natural Resources that responds to and addresses any deficiencies identified by the Hawaii Department of Land and Natural Resources”).

<sup>104</sup> In certain emergency situations, Congress has authorized the military to condemn land when national security requires the taking and “considerations of urgency do not permit the delay necessary to include the required acquisition in an annual Military Construction Authorization Act [a component of the NDAA].” 10 U.S.C. § 2663. However, the impending expiration of the military leases—which is still several years out—is not an emergency in which there is no time to seek congressional approval. Moreover, if Congress refuses to authorize military acquisition of land in Hawai‘i (as happened in fiscal year 2026), there would be grave separation-of-powers concerns if the military subsequently tried to move forward with an “emergency” condemnation under 10 U.S.C. § 2663; *cf. United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 684 (1896) (“If it appeared by proof that the appropriation for the purpose indicated had been exhausted before the proceedings had been commenced to take the land in controversy . . . then the provision in the joint resolution directing that no obligation or liability upon the part of the government should be incurred, or any expenditure made, except out of the appropriations already made, and to be made during the then session of congress, would give rise to a very serious question.”).

<sup>105</sup> See *id.*

<sup>106</sup> See DANIEL M. GETTINGER & VALERIE HEITSHUSEN, CONG. RSCH. SERV., IF10515, DEFENSE PRIMER: THE NDAA Process (2025), available at <https://www.congress.gov/crs-product/IF10515> [<https://perma.cc/O7PA-VSVX>].

again, a required component for any eminent domain taking.<sup>107</sup> This point would remain true even if Congress broke with recent tradition and approved military acquisition of Hawai‘i lands through a separate (non-NDAA) bill; Congress would still need to include both authorization for the specific land acquisition<sup>108</sup>, and an appropriation to pay the “just compensation” required by due process.

Furthermore, even assuming a future Congressional act authorizes acquisition of Hawai‘i lands, and the military seeks to use its eminent domain authority, before the military can proceed with condemnation under federal law, it must first “pursue, to the maximum extent practicable, all other available options.”<sup>109</sup> Yet, the military has not made a formal, public attempt to pursue all other available options, including a land exchange; as of yet, it has exclusively expressed its desire to retain the lands.<sup>110</sup> Therefore, the Army has not yet satisfied the federal requirements for eminent domain, which it must do even if it receives authorization in the NDAA in the future.

Lastly, the Tenth Amendment of the U.S. Constitution provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>111</sup> The Tenth Amendment protects states from federal government intrusion on state sovereignty.<sup>112</sup> While traditionally the Tenth Amendment does not prohibit federal use of eminent domain against state lands, the sheer magnitude of the land at issue (tens of thousands of acres), and the land’s status as “ceded” land held in a trust is unique—raising potential state sovereignty concerns if the Military sought to condemn the land.<sup>113</sup>

---

<sup>107</sup> See TILGHMAN, *supra* note 17; U.S. CONST. amend. V.

<sup>108</sup> 10 U.S.C. § 2802(a).

<sup>109</sup> 10 U.S.C. § 2663(f)(1)(A).

<sup>110</sup> Letter from Secretary of the Army, *supra* note 2.

<sup>111</sup> U.S. CONST. amend. X.

<sup>112</sup> See *New York v. United States*, 505 U.S. 144, 157 (1992).

<sup>113</sup> See 1 NICHOLS, *supra* note 74, at 110. The amount of land at issue in Hawai‘i is greater than the size of the island of Manhattan. See *Manhattan Borough, New York County, New York*, U.S. CENSUS BUREAU, [https://data.census.gov/profile/Manhattan\\_borough,\\_New\\_York\\_County,\\_New\\_York](https://data.census.gov/profile/Manhattan_borough,_New_York_County,_New_York) [<https://perma.cc/92S6-V4B4>] (“New York has a land area of 22.7 square miles,” or about 14,500 acres.). This is orders of magnitude larger than the amount of land involved in most other eminent domain cases. For example, the Ninth Circuit has held that the Navy’s use of eminent domain to seek 32.42 acres of land in fee simple, free of any California state law public trust obligations, did not violate state sovereignty. See *United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cnty., Cal.*, 683 F.3d 1030, 1034, 1039 (9th Cir. 2012). However, the amount of land in that case was so much less than 20,000

c. The Admission Act as a Barrier to Eminent Domain

When the United States annexed Hawai‘i, it took thousands of acres of government and crown lands, which had previously belonged to the Hawaiian Kingdom.<sup>114</sup> These lands called the “ceded lands” (though they were never legally ceded by the Hawaiian Kingdom<sup>115</sup>) were later transferred from the U.S. federal government to the State of Hawai‘i when Hawai‘i was admitted as a state through the Hawai‘i Admission Act (“Admission Act”).<sup>116</sup>

Pursuant to the Admission Act, these lands “shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, . . . for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.”<sup>117</sup> This trust is formally known as Hawaii’s Public Land Trust.<sup>118</sup> The lands currently leased to the military are all part of that Public Land Trust.<sup>119</sup>

Therefore, an exercise of eminent domain by the U.S. would first require that Congress repeal that section of the Admission Act, because taking the land for military purposes would conflict with Congress’s directives for the Public Land Trust (namely, that land be held in trust “for the betterment of the conditions of [N]ative Hawaiians”).<sup>120</sup> A repeal of a federal legislative act, such as the Admission Act, can be accomplished only if Congress’s intent to repeal the act is “clear and manifest.”<sup>121</sup> Yet, Congress has expressed the opposite, stating that any attempt by the military to

---

acres at issue here. *Compare id.* at 1032, with PŌHAKULOA RECORD OF DECISION, *supra* note 54 (19,700 acres), and O‘AHU AREAS RECORD OF DECISION, *supra* note 54 (450 acres). And, unlike the California trust, the public trust in Hawai‘i is a matter of federal law. *See 32.42 Acres of Land*, 683 F.3d at 1038. *Compare* California Admission Act, Pub. L. No. 31-49, 9 Stat. 452 (1850) (making no mention of the California public trust), with Hawai‘i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959).

<sup>114</sup> *See Ching v. Case*, 145 Hawai‘i 148, 176-77, 449 P.3d 1146, 1174-75 (2019); *Pele Def. Fund v. Paty*, 73 Haw. 578, 585, 837 P.2d 1247, 1254 (1992).

<sup>115</sup> *See Pele Def. Fund*, 73 Haw. at 585, 837 P.2d at 1254.

<sup>116</sup> Hawai‘i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959).

<sup>117</sup> *Id.*

<sup>118</sup> *See* HAW. CONST. art. XII, § 4; *see, e.g., Trs. of Off. of Hawaiian Affs. v. Yamasaki*, 69 Haw. 154, 164, 737 P.2d 446, 452 (1987).

<sup>119</sup> *See Military Leased Lands*, *supra* note 1.

<sup>120</sup> *See* Hawai‘i Admission Act § 5(f).

<sup>121</sup> *See Posadas v. Nat’l City Bank of New York*, 296 U.S. 497, 503 (1936).

condemn Hawai‘i land without exhausting opportunities for negotiation would be “contrary to congressional intent.”<sup>122</sup>

Though this argument in the context of Hawaii’s Public Land Trust is unprecedented, the concept of Congress designating land for specific purposes and uses is not. For example, the Admission Act’s conversion of ceded lands into a Public Land Trust for the benefit of Native Hawaiians parallels the practice—at around the same time—of Native American tribes “ceding” lands to the United States by treaty, on the condition that the lands be held in trust for members of the tribe.<sup>123</sup> In the case of the latter, before the ceded land could be used for non-trust purposes, the Executive branch had to get Congressional approval (historically, by having Congress ratify a new treaty).<sup>124</sup>

More recently, Congress has created other land-use designations, such as the National Park System for the purpose of “conserv[ing] the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>125</sup> Because this land use was designated by Congress, the other branches of government (in particular, the Executive branch which controls the U.S. military) cannot override that designation without congressional approval.<sup>126</sup>

Similarly, the Antiquities Act authorized the President “to declare by public proclamation historic landmarks, historic and pre-historic structures, and other objects of historic or scientific interest . . . to be national monuments.”<sup>127</sup> However, while the President has the power to create such landmarks, many believe that the Executive

---

<sup>122</sup> See NDAA JOINT EXPLANATORY STATEMENT, *supra* note 101, at 425-26.

<sup>123</sup> See *e.g.*, *Noble v. Oklahoma City*, 297 U.S. 481, 482-83 (1936).

<sup>124</sup> See, *e.g.*, *id.* at 483; *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 686 (9th Cir. 1976) (“Abrogation of Indian treaty rights is not lightly inferred from congressional acts”); *cf.* *Minnesota Canal & Power Co. v. Pratt*, 112 N.W. 395, 405-06 (1907) (holding congressional grant of eminent domain did not abrogate federal treaty because grant of authority could be reconciled with treaty provisions).

<sup>125</sup> 54 U.S.C. § 100101(a).

<sup>126</sup> See Ryan A. Semerad, *The Political Question of Public Lands*, 25 WYO. L. REV. 271, 272 (2025).

<sup>127</sup> The Antiquities Act, Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified as amended at 54 U.S.C. §§ 320301-320303).

branch does not have the authority to abolish them once they're established.<sup>128</sup> As the Justice Department said in 1938, prior to the establishment of Hawaii's Public Land Trust, "if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation."<sup>129</sup>

Arguably, the Public Land Trust of the Admission Act must be treated like any other federal legislation that designates specific purposes or uses of land, such as the National Park System or National Monuments. Because Congress established the terms of the land use (*i.e.* the trust's purpose), Congress must repeal (either specifically or impliedly) the Public Land Trust before trust land can be condemned.

d. The Military Must Consult with Native Hawaiian Organizations Before Taking Land

Even assuming the military seeks to move forward on a path to eminent domain, the National Historic Preservation Act requires federal agencies to consult with Native Hawaiian organizations when its projects, activities, or programs may affect historic properties.<sup>130</sup> There is strong reason to believe the National Historic Preservation Act applies to at least some of the land at issue here: the military's Environmental Impact Statement (EIS) for O'ahu identified "22 historic and cultural resources" located within the Kahuku Training Area (KTA),<sup>131</sup> and the EIS for Pōhakuloa Training Area (PTA) noted that archeological excavations had uncovered traditional Hawaiian use of the region dating back to 1000-2000 AD.<sup>132</sup> The term "Native Hawaiian organization" has

---

<sup>128</sup> See *Proposed Abolishment of Castle Pinckney Nat'l Monument*, 39 U.S. Op. Atty. Gen. 185 (1938); Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017).

<sup>129</sup> *Proposed Abolishment of Castle Pinckney Nat'l Monument*, 39 U.S. Op. Atty. Gen. at 186-87.

<sup>130</sup> See National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 54 U.S.C.A. § 300101); 36 C.F.R. §§ 800.1, 800.2.

<sup>131</sup> O'AHU EIS, *supra* note 4, at 3-180; see also, Kyle Kajihiro, *Case Study: Mākua Valley*, in THE TRUE COST OF THE U.S. MILITARY IN HAWAII, *supra* note 59, at 184, 184 (describing Mākua Military Reservation as home to "sacred cultural sites including heiau (Hawaiian temples), burials, and petroglyphs").

<sup>132</sup> PŌHAKULOA EIS, *supra* note 4, at 3-74. The military asserted in the PTA EIS that its "administrative action" would not "cause an effect on historic properties," and so it declined to consult with Native Hawaiian Organizations. *Id.* at 3-73. This EIS was ultimately rejected of the Hawai'i Board of Land and Natural Resources (BLNR) for, among other reasons, failing to "adequately account[] for known and likely archaeological sites." Dep't of Land and Nat'l Resources, *Land Board Votes Not to Accept Environmental Impact Statement for Army Leases on O'ahu* (June 27, 2025), <https://governor.hawaii.gov/newsroom/dlnr-news-release-land-board-votes-not-to-accept->

been defined as any organization that “(1) serves and represents the interests of Native Hawaiians; (2) has [] a primary and stated purpose [of] the provision of services to Native Hawaiians; and (3) has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians.”<sup>133</sup> The U.S. Department of the Interior maintains a non-exhaustive list of almost two hundred organizations for notification, including for example, the Office of Hawaiian Affairs, Native Hawaiian Legal Corporation, and Pele Defense Fund.<sup>134</sup>

Native Hawaiian organizations that attach “religious and cultural significance to historic properties that may be affected by an undertaking” must be given a reasonable opportunity to identify concerns relating to the historic properties at issue.<sup>135</sup> Furthermore, the organizations must be provided with a “reasonable opportunity to . . . advise [the federal agency] on the identification and evaluation of historic properties, . . . articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.”<sup>136</sup> Therefore, while the National Historic Preservation Act does not provide a defense against eminent domain, the consultation process ensures the realization of Native Hawaiian rights and obligates federal agencies to consider Native Hawaiian perspectives. Failure to do so could result in potential liability for the federal government.<sup>137</sup>

Furthermore, the responsibility to consult with Native Hawaiian organizations is in line with obligations imposed by international human rights law.<sup>138</sup> The Declaration on the Rights of Indigenous Peoples, which was passed by the UN General Assembly through an overwhelming vote of support in 2007 and was later endorsed by the U.S.,<sup>139</sup>

---

[environmental-impact-statement-for-army-leases-on-o%CA%BBahu-june-27-2025/](https://perma.cc/5EXG-KZKM)  
[<https://perma.cc/5EXG-KZKM>].

<sup>133</sup> 54 U.S.C.A. § 300314(a).

<sup>134</sup> 54 U.S.C.A. § 300314(b); OFFICE OF NATIVE HAWAIIAN RELATIONS, U.S. DEPARTMENT OF THE INTERIOR: NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST (2025), available at <https://www.doi.gov/sites/default/files/documents/2025-04/nhol-complete-list-final-web.pdf>.  
[<https://perma.cc/2CY7-OKZO>]

<sup>135</sup> See 36 C.F.R. § 800.2(c)(2)(ii).

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).

<sup>138</sup> See UNDRIP, *supra* note 29, arts. 18, 19, & 30.

<sup>139</sup> See *Historical Overview*, UNITED NATIONS: DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, <https://social.desa.un.org/issues/indigenous-peoples/historical-overview> [<https://perma.cc/X8HT-GPPD>] (last visited June 23, 2026).

states that “[m]ilitary activities shall not take place in the lands or territories of [I]ndigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the [I]ndigenous peoples concerned.”<sup>140</sup> Per the Declaration, if lands or territories belonging to Indigenous peoples are used for military activities, countries must engage in “consultations with the [I]ndigenous peoples concerned.”<sup>141</sup> The Declaration further establishes that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights.”<sup>142</sup> Additionally, countries are obligated to “consult and cooperate in good faith” with Indigenous peoples when adopting or implementing measures that may affect them.<sup>143</sup> Thus, the U.S. military must consult with Native Hawaiian organizations to comply with both federal and international human rights law.

## **2. The Exercise of Eminent Domain Can Be Challenged**

If eminent domain is exercised by the military over Hawaii’s lands, it can be challenged in court by the State and members of the public. In accordance with the Fifth Amendment, the State of Hawai‘i must be afforded the opportunity to be heard and provide evidence of the value of any land taken through the exercise of eminent domain.<sup>144</sup> As such, the State may challenge both the public purpose asserted and the just compensation provided.<sup>145</sup> Furthermore, members of the public may challenge the exercise of eminent domain by intervening in the case or participating in the case by filing amicus briefs.<sup>146</sup>

### **a. The State Can Challenge Eminent Domain in Federal Court**

For the military to take Hawaii’s land without the consent of the State, it would have to file a case in federal court in the District of Hawai‘i.<sup>147</sup> The federal court would

---

<sup>140</sup> UNDRIP, *supra* note 29, art. 30.

<sup>141</sup> *See id.*

<sup>142</sup> *Id.* at art. 18.

<sup>143</sup> *Id.* at art. 19.

<sup>144</sup> *See* U.S. CONST. amend. V; *Bailey v. Anderson*, 326 U.S. 203, 205 (1945).

<sup>145</sup> *See Kelo v. City of New London*, 545 U.S. 469, 478 (2005); *United States v. Jones*, 109 U.S. 513, 518 (1883).

<sup>146</sup> *See* FED. R. CIV. P. 24; FED. R. APP. P. 29.

<sup>147</sup> *See* 28 U.S.C. § 1403.

then decide whether the exercise of eminent domain is appropriate, based on the procedural limits discussed above.<sup>148</sup>

As noted above, the State could raise defenses to a condemnation proceeding, including the arguments that a taking of this volume violates state sovereignty under the Tenth Amendment to the U.S. Constitution and that a military exercise of eminent domain is unlawful because Congress did not authorize a taking that conflicts with the Public Land Trust created by the Admission Act. *See above* §§ II.B.1.b–c.

b. Members of the Public Can Challenge the Exercise of Eminent Domain

Under the Federal Rules of Civil Procedure, a court must permit a person to intervene in a case (i.e., join the lawsuit) if (1) a federal statute gives the party an unconditional right to intervene *or* (2) the person claims to have an interest concerning the property or transaction at issue, the existing parties to the matter do not adequately represent the person’s claims, and disposing of the case would impair or impede the person’s ability to protect their interest.<sup>149</sup>

Here, the leased lands are part of the Public Land Trust,<sup>150</sup> which requires that the lands be held in trust for the benefit of the public and the betterment of the conditions of Native Hawaiians.<sup>151</sup> Thus, members of the public—particularly Native Hawaiians who are beneficiaries of the Public Land Trust—have an interest in the leased lands and may be permitted to intervene in any case brought to exercise eminent domain over Hawaii’s lands.<sup>152</sup> Furthermore, organizations and community members may have the opportunity to provide the court with additional perspectives by filing an *amicus curiae* (Latin for “friend of the court”) legal brief that highlights particular issues

---

<sup>148</sup> *See supra* § II.B.1.a.

<sup>149</sup> FED. R. CIV. P. 24(a).

<sup>150</sup> *See Military Leased Lands, supra* note 1.

<sup>151</sup> *See* Hawai‘i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959); HAW. CONST. art. XII, § 4.

<sup>152</sup> *See Day v. Apoliona*, 496 F.3d 1027, 1039 (9th Cir. 2007) (“[E]ach Native Hawaiian plaintiff, as a beneficiary of the trust created by [the Admission Act] § 5(f), has an individual right to have the trust terms complied with, and therefore can sue under § 1983 for violation of that right.”); *Pele Def. Fund v. Paty*, 73 Haw. 578, 592-94, 837 P.2d 1247, 1257-58 (1992) (holding Pele Defense Fund had standing to “challenge the disposition of [Admission Act] § 5(f) lands”); *see generally, Berger v. N. Carolina State Conf. of the NAACP*, 597 U.S. 179, 190 (2022).

that might echo or depart from the federal government or the State’s concerns (e.g., unique land concerns held by Native Hawaiian cultural practitioners).<sup>153</sup>

### **C. State Law Puts Limits on State Actors During Lease Negotiations**

An exercise of eminent domain would allow the federal government to take possession of Hawaii’s land in fee simple—meaning it would hold permanent and absolute title to the land.<sup>154</sup> And if it owned the land in fee simple, with some limited exceptions,<sup>155</sup> the military could choose not to follow most Hawai‘i state environmental law and land-use regulations (including prohibitions on live-fire training).<sup>156</sup> However, if the State voluntarily agrees to a sale, exchange, or lease of the lands, it could have more control over the terms of the agreement—as compared to a condemnation proceeding—but it would also retain its own rights and responsibilities under state law in the negotiation process.<sup>157</sup> Any voluntary agreement could still be challenged in court—although the remedy may not necessarily “undo” the agreement—if the State fails to follow state law.<sup>158</sup>

A voluntary sale or exchange of the land would allow the State to negotiate the terms of any agreement reached—in particular, the State could include land-use restrictions or other federal benefits that could not be imposed in an eminent domain proceeding, where the court would only calculate a dollar amount for “just compensation.”<sup>159</sup> Alternatively, the State may choose to renew the leases with the military, which would again allow it to negotiate the duration of the leases and

---

<sup>153</sup> See FED. R. APP. P. 29.

<sup>154</sup> See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 651 (1981).

<sup>155</sup> Some federal laws require federal actors to abide by state laws in certain circumstances. See, e.g., Clean Water Act, 33 U.S.C. § 1323 (“Each department, agency, or instrumentality of the executive . . . branch[] of the Federal Government . . . shall be subject to, and comply with, all Federal, state, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution.”).

<sup>156</sup> See U.S. CONST. art. 6, cl. 2 (Supremacy Clause).

<sup>157</sup> See HRS §§ 171-13(1), 171-50, 171-64.7.

<sup>158</sup> See *Pele Def. Fund v. Paty*, 73 Haw. 578, 601-06, 837 P.2d 1247, 1262-64 (1992).

<sup>159</sup> *Compare Ching v. Case*, 145 Hawai‘i 148, 152, 449 P.3d 1146, 1150 (2019) (The ceded land, held in public trust, on the Island of Hawai‘i was leased to the federal government, “subject to a number of lease conditions designed to protect the land from long-term damage or contamination.”), with U.S. CONST. amend. V.

conditions on the military's use of the lands.<sup>160</sup> This is starkly different to a condemnation proceeding, which would give the State virtually no bargaining power.

During any negotiation process, state actors must comply with state law. Even if the Governor were to negotiate alone, he would still be subject to all the laws discussed below. First, the Hawai'i Constitution formally establishes the State's Public Trust Doctrine, which requires that Hawaii's natural resources be protected and held in trust by the State for the benefit of all people.<sup>161</sup> Second, the Hawai'i Constitution codifies the Public Land Trust, which requires that the "ceded lands" be held in trust for the benefit of the general public and the betterment of the conditions of Native Hawaiians.<sup>162</sup> Third, the Hawai'i Constitution protects customary and traditional Native Hawaiian rights, requiring state agencies to undergo a detailed analysis when projects may impact these rights.<sup>163</sup> Lastly, the Hawai'i Constitution protects the public's right to a clean and healthful environment.<sup>164</sup> Furthermore, Hawaii's statutes impose procedural requirements that must be fulfilled before a deal for the lease, sale, or exchange of Hawaii's lands may be finalized.<sup>165</sup>

### **1. The Public Trust Doctrine Requires the State to Conserve and Protect Natural Resources**

The Public Trust Doctrine can be found in the Hawai'i Constitution, Article XI, Sections 1 & 7. Section 1 states that "[a]ll public natural resources are held in trust by the State for the benefit of the people,"<sup>166</sup> while Section 7 addresses Hawaii's water resources, obligating the State to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people."<sup>167</sup> The Hawai'i Supreme Court has held that the Public Trust Doctrine applies to ceded lands,<sup>168</sup> which includes the leased lands at issue here.<sup>169</sup>

---

<sup>160</sup> See, e.g., *Ching*, 145 Hawai'i at 152, 449 P.3d at 1150.

<sup>161</sup> See HAW. CONST. art. XI, §§ 1 & 7.

<sup>162</sup> See HAW. CONST. art. XII, § 4.

<sup>163</sup> See HAW. CONST. art. XII, § 7; *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 45-46, 7 P.3d 1068, 1082-83 (2000).

<sup>164</sup> See HAW. CONST. art. XI, § 9.

<sup>165</sup> See HRS §§ 171-11, 171-13(1), 171-50(c), 171-64.7(b).

<sup>166</sup> HAW. CONST. art. XI, § 1.

<sup>167</sup> HAW. CONST. art. XI, § 7.

<sup>168</sup> See *Ching v. Case*, 145 Hawai'i 148, 176, 449 P.3d 1146, 1174 (2019).

<sup>169</sup> *Military Leased Lands*, *supra* note 1.

As the trustee of the Public Trust, the State has a general duty to preserve trust property.<sup>170</sup> Encompassed within this general duty is an obligation to ensure the trust property is not harmed through reasonable monitoring and investigating any potential damage to the land.<sup>171</sup>

The military's land leases are known, however, to result in damage to the leased lands, as well as harm to the wildlife living on these lands.<sup>172</sup> In 2019, the Hawai'i Supreme Court affirmed findings about damage to Hawai'i land, noting "[r]emnants of military trash is everywhere," "spent ammunition is scattered across the landscape," and unexploded ordinance "is carelessly discarded" and "left behind after training," without any cleanup plan in place.<sup>173</sup> As a result, the Hawai'i Supreme Court held that the State breached its trust duties in relation to the leased land at Pōhakuloa because it (1) failed to regularly monitor and inspect the condition of the land; (2) failed to ensure the U.S.'s compliance with the terms of the lease intended to protect the condition of the land; and (3) failed to take appropriate and prompt action after being made aware of evidence that the terms of the lease intended to protect the condition of the land had been violated.<sup>174</sup> In light of these past failings, renegotiation of military leases raises questions about whether and how the State will be fulfilling its duties under the Public Trust Doctrine.

Thus, if the State renews the leases, it would be obligated to ensure the continuous preservation of the land—an obligation that may be exceedingly difficult to fulfill given the destructive nature of the military's actions on the leased lands.<sup>175</sup> If the

---

<sup>170</sup> See *Ching*, 145 Hawai'i at 177, 449 P.3d at 1175.

<sup>171</sup> See *id.*

<sup>172</sup> See Puanani Fernandez-Akamine, *The Army and Pōhakuloa*, KA WAI OLA (Sept. 1, 2024), <https://kawaiola.news/aina/the-army-and-pohakuloa/> [https://perma.cc/568Y-CLXK]; Rick Warshauer, *It's Time for the Military to Stop Training at Pōhakuloa*, HONOLULU CIVIL BEAT (Oct. 1, 2025), <https://www.civilbeat.org/2025/10/its-time-for-the-military-to-stop-training-at-pohakuloa/> [https://perma.cc/KKP8-2EAT]; O'AHU EIS, *supra* note 4, at 3-22 (2025); STATE OF HAWAII: DEPARTMENT OF LAND AND NATURAL RESOURCES: LAND DIVISION, BLNR ITEM D-11, at 7 [hereinafter BLNR ITEM D-11], <https://dlnr.hawaii.gov/wp-content/uploads/2023/10/D-11-1.pdf> [https://perma.cc/YS67-AZVR] ("[M]ilitary training is in direct conflict of the conservation district designation to conserve, protect, and preserve the important natural and cultural resources of the State . . . to promote their long-term sustainability and the public health, safety, and welfare.").

<sup>173</sup> *Ching*, 145 Hawai'i at 181-82, 449 P.3d at 1179-80.

<sup>174</sup> See *id.* at 182, 449 P.3d at 1180.

<sup>175</sup> See Fernandez-Akamine, *supra* note 172; Warshauer, *supra* note 172; O'AHU EIS, *supra* note 4, at 3-22; BLNR ITEM D-11, *supra* note 172, at 7.

State’s renewal of the leases does in fact result in a breach of its duties under the Public Trust Doctrine, interested parties can file a court case in the Hawai‘i state courts to stop the violation and require the State to comply with its obligations.<sup>176</sup>

## **2. The Hawai‘i Constitution Protects the Right to a Clean and Healthful Environment**

Article XI, Section 9 of the Hawai‘i Constitution also protects the public’s right to a clean and healthful environment.<sup>177</sup> A “clean and healthful environment” is defined by Hawaii’s environmental laws that regulate environmental quality and encompasses regulations on pollution, conservation, and the protection and enhancement of natural resources.<sup>178</sup> This right has also been found to be a property interest and thus, it is protected by due process.<sup>179</sup> The provision permits any person to enforce this right “against any party, public or private.”<sup>180</sup> The Hawai‘i Supreme Court has also held that an agency hearing is required when the State action being challenged “adversely affects the constitutionally protected rights’ of others.”<sup>181</sup> Therefore, if the State’s renewal of the leases results in a violation of any Hawai‘i environmental statute, rule, or ordinance, any person may assert this right in court or during the administrative process (*i.e.*, notice and comment period or contested case hearing) against the State.<sup>182</sup>

## **3. The Public Land Trust Requires the State to Protect Its Land for the Benefit of Native Hawaiians and the Public**

The Public Land Trust was initially created by Congress as a component of the Admission Act.<sup>183</sup> The Public Land Trust was then later integrated into Hawaii’s

---

<sup>176</sup> As in *Ching*, any such claim would be against the State only (not the military), since it would involve enforcing the State’s duties under the Public Trust. *See e.g.*, *Ching*, 145 Hawai‘i 148, 449 P.3d 1146.

<sup>177</sup> HAW. CONST. art. XI, § 9.

<sup>178</sup> *See In re Application of Maui Electric Company, Limited (“Maui Electric Co.”)*, 141 Hawai‘i 249, 261, 264, 408 P.3d 1, 13, 16 (2017).

<sup>179</sup> *Id.* at 261; 409 P.3d at 13.

<sup>180</sup> HAW. CONST. art. XI, § 9.

<sup>181</sup> *Maui Electric Co.*, 141 Hawai‘i at 265, 408 P.3d at 17 (quoting *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai‘i 64, 68, 881 P.2d 1210, 1214 (1994)).

<sup>182</sup> *See Maui Electric Co.*, 141 Hawai‘i at 265-66, 269-70, 408 P.3d at 17-18, 21-22.

<sup>183</sup> *See* Hawai‘i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959); STATE LAND USE COMM’N, THE PUBLIC LAND TRUST 1-2 (2022), [https://luc.hawaii.gov/wp-content/uploads/2022/06/2.-Public-Land-Trust-Summary\\_June-2022.pdf](https://luc.hawaii.gov/wp-content/uploads/2022/06/2.-Public-Land-Trust-Summary_June-2022.pdf) [<https://perma.cc/P9WJ-CWDP>].

Constitution Article XII, Section 4, which requires that the State hold ceded lands as “a public trust for native Hawaiians and the general public.”<sup>184</sup>

The duties held by the State in respect to the Public Land Trust are the same as those underlining the Public Trust Doctrine, even though the former is about a specific area of land, rather than referring to the state’s general natural and water resources.<sup>185</sup> Therefore, if the State agrees to a disposition of Public Land Trust lands in violation of its duties under the Trust, members of the public or interested organizations can similarly file a court case in the Hawai‘i state court to stop the violation and require the State to comply with its obligations.

Furthermore, because the Public Land Trust was initially created by Congress in the Admission Act, the State also has a trust obligation under federal law.<sup>186</sup> Therefore, a case may also be brought in the federal District Court, compelling the State of Hawai‘i under federal law to enforce the rights created by the Trust.<sup>187</sup>

#### **4. The Hawai‘i Constitution Protects Native Hawaiian Customary and Traditional Rights**

Article XII, Section 7 of the Hawai‘i Constitution requires the State to protect Native Hawaiian customary and traditional rights that are “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.”<sup>188</sup>

To effectuate these protections, the Hawai‘i Supreme Court has established an analytical framework called the Ka Pa‘akai analysis to ensure the enforcement of these rights, while also balancing private developmental interests.<sup>189</sup> Under the Ka Pa‘akai Analysis, an administrative agency is required to make specific findings of fact and conclusions of law when considering proposals that may impact Native Hawaiian rights.<sup>190</sup> Agencies must consider: “(1) the identity and scope of ‘valued cultural,

---

<sup>184</sup> HAW. CONST. art. XII, § 4.

<sup>185</sup> See *Ching v. Case*, 145 Hawai‘i 148, 176-77, 449 P.3d 1146, 1174-75 (2019).

<sup>186</sup> *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir. 1990); *Pele Def. Fund v. Paty*, 73 Haw. 578, 591, 837 P.2d 1247, 1256-57 (1992) (citations omitted).

<sup>187</sup> See *Price*, 928 F.2d at 828; *Pele Def. Fund*, 73 Haw. at 591, 837 P.2d at 156-57.

<sup>188</sup> HAW. CONST. art. XII, § 7.

<sup>189</sup> See *Ka Pa‘akai o Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 46-47, 7 P.3d 1068, 1083-84 (2000).

<sup>190</sup> See *id.* at 47, 7 P.3d at 1084.

historical, or natural resources’ in the petition area, including the extent to which traditional and customary [N]ative Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary [N]ative Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect [N]ative Hawaiian rights if they are found to exist.”<sup>191</sup>

Here, because the Hawai‘i Department of Land and Natural Resources (“DLNR”) is the agency that holds the authority to renew the leases<sup>192</sup> (as discussed in more detail below), it must follow the Ka Pa‘akai analysis before taking such action.<sup>193</sup> If the DLNR fails to sufficiently perform the analysis or if its analysis is flawed (or arguably flawed), its decision to renew the leases may be challenged under Article XII, Section 7.<sup>194</sup> However, if the federal government were to hold the lands in fee simple following a sale or condemnation, it would not be subject to this constitutional provision.<sup>195</sup>

## **5. The State Has Procedural Requirements to Fulfill Before Making a Deal**

The Hawai‘i Revised Statutes explicitly outline restrictions on the disposition of the lands at issue.<sup>196</sup> And there are several procedural requirements that must be fulfilled, regardless of the type of agreement reached with the Army. The Hawai‘i Board of Land and Natural Resources’s (“BLNR”) approval is required for all lease renewals, exchanges, and set asides of public lands.<sup>197</sup> Furthermore, the Legislature’s approval is required for all exchanges, gifts, and sales of public land.<sup>198</sup> The Governor has the statutory authority to set aside land to be used by the U.S. for a public purpose, but this

---

<sup>191</sup> *Id.* (footnotes omitted).

<sup>192</sup> See HRS § 171-13(1).

<sup>193</sup> See *Ka Pa‘akai o Ka ‘Āina*, 94 Hawai‘i at 47, 7 P.3d at 1084; *Matter of Conservation Dist. Use Application HA-3568*, 143 Hawai‘i 379, 395-96, 431 P.3d 752, 768-69 (2018).

<sup>194</sup> See, e.g., *Ka Pa‘akai o Ka ‘Āina*, 94 Hawai‘i at 47-49, 7 P.3d at 1084-86; *Pele Def. Fund v. Paty*, 73 Haw. 578, 613-14, 620-21, 837 P.2d 1247, 1268-69, 1272-73 (1992).

<sup>195</sup> See U.S. CONST. art. VI, cl. 2 (supremacy clause); HAW. CONST. art. XII, § 7 (“The *State* reaffirms and shall protect. . .” (emphasis added)).

<sup>196</sup> See HRS §§ 171-2, 171-50 & 171-64.7; STATE LAND USE COMM’N, *supra* note 183, at 5 (“Act 176, passed in 2009” and codified in HRS as §§ 171-50 & 171-64.7, restricted “the transfer of public land trust ‘āina.” Act 169, passed in 2011, added additional guardrails. “Now, a sale or gift of lands in the public land trust requires a two-third majority legislative approval for the permanent alienation of those lands,” while Act 146 “requires a simple majority approval for an exchange of public lands for private lands.”).

<sup>197</sup> See HRS §§ 171-11 & 171-13(1).

<sup>198</sup> See HRS §§ 171-50(c) & 171-64.7(b)

too must be approved by the BLNR and may be disapproved by the Legislature.<sup>199</sup> Therefore, while Governor Green and other state actors are free to negotiate with the Army, a final disposition of Hawaii's lands may not be made without satisfying procedural requirements under state law.

c. The BLNR's Approval Is Required for All Lease Renewals and Public Land Exchanges, and the Legislature May Disapprove

By statute, the Governor may "set aside" public lands for a public purpose, including use by the federal government.<sup>200</sup> However, the Governor may only do so *after* the Board of Land and Natural Resources ("BLNR") approves.<sup>201</sup> Additionally, while the Governor may engage in discussions and negotiations for the renewal of the land leases, the DLNR (and thus the BLNR as its executive board) holds statutory authority over Hawaii's public lands.<sup>202</sup>

Lastly, the BLNR's approval is required for any exchange of Hawaii's public lands.<sup>203</sup> Therefore, while Hawaii's statutes do not prohibit the Governor from engaging in negotiations or discussions relating to the lease, exchange, or set aside of Hawaii's public lands, the BLNR's approval is required for any final agreements made.

Moreover, the Governor's set aside of land is subject to the Legislature's disapproval and can be overturned by a two-thirds vote of *either* the senate or house of representatives, or by the majority vote of *both*.<sup>204</sup>

d. The BLNR and the Legislature's Approval is Required for All Exchanges, Gifts, and Sales, and OHA Must Be Consulted

During the negotiation process so far, the military has floated the idea of pursuing a land "exchange"—and it is possible negotiations over leases could include a combination of acquisition methods (*i.e.*, lease some lands + exchange some lands, or lease some lands + sale of some lands). As with land leases, the Governor would need the BLNR's approval before an exchange, gift, or sale of land could be finalized.<sup>205</sup>

---

<sup>199</sup> See HRS § 171-11.

<sup>200</sup> See HRS § 171-11.

<sup>201</sup> See *id.*

<sup>202</sup> See HRS § 171-3(a).

<sup>203</sup> See HRS §§ 171-11 & 171-50(c).

<sup>204</sup> See HRS § 171-11.

<sup>205</sup> See HRS §§ 171-11 & 171-13(1).

But in addition to the BLNR’s approval, any exchange of Hawaii’s public lands must also be approved by the Hawai‘i State Legislature.<sup>206</sup> A land exchange must be approved by a majority vote of both houses,<sup>207</sup> while the sale or gift of Hawaii’s lands must be approved by a two-thirds majority vote of both houses.<sup>208</sup>

Furthermore, prior to a legislative vote to approve the sale, gift, or exchange of Public Land Trust lands, a resolution must be submitted to the Office of Hawaiian Affairs (“OHA”) to allow it to make its own determination as to whether the lands being sold, gifted, or exchanged fall within the Public Land Trust.<sup>209</sup> An informational briefing in the community where the land is located must be held before the finalization of a proposal to sell or gift Public Land Trust lands.<sup>210</sup>

Therefore, the Governor may not finalize any deal regarding the exchange, gift, or sale of lands without the prior approval of the Legislature and consultation with OHA. If the State fails to comply with these requirements, actions may be brought to force the State to comply. *See below* § II.C.5.

Additionally, Article XII, Section 6 of the Hawai‘i Constitution grants the board of trustees for the Office of Hawaiian Affairs (“OHA”) the power to manage and administer the proceeds derived from any sale or disposition of lands and other natural resources that have been designated for Native Hawaiians.<sup>211</sup> This includes the Office’s right to a *pro rata* share of the income and proceeds derived from the lands held in the Public Land Trust.<sup>212</sup> Though Article XII, Section 6 does not restrict the disposition of Public Land Trust lands, it does impose an additional requirement on the proceeds of any sale or other form of disposition of the lands at issue.<sup>213</sup> This means there are some limitations on the terms of any deal the State may reach—if an agreement means the State is effectively selling state land (*i.e.*, transferring fee simple in exchange for money or federal benefits), OHA is constitutionally entitled to a share of the proceeds. And

---

<sup>206</sup> See HRS § 171-50(c).

<sup>207</sup> See *id.*

<sup>208</sup> See HRS § 171-64.7(b).

<sup>209</sup> See HRS §§ 171-50(c) & 171-64.7(c).

<sup>210</sup> See HRS § 171-64.7(e).

<sup>211</sup> HAW. CONST. art. XII, § 6.

<sup>212</sup> *Id.*; *Fulfilling the State’s Public Land Trust Revenue Obligations*, OFFICE OF HAWAIIAN AFFAIRS, <https://www.oha.org/plt/> [<https://perma.cc/AS8F-OGKR>].

<sup>213</sup> See *id.*

therefore, the deal cannot include funding that is “earmarked” solely for certain state programs, such that OHA would not receive its *pro rata* share.<sup>214</sup>

e. State Actions Can Be Challenged Under State Law

Lastly, a voluntary agreement made by the State for the sale, exchange, or lease of Hawaii’s land is subject to state law. If the State fails to satisfy its constitutional and procedural obligations, interested parties (such as Native Hawaiian cultural practitioners who use the land at issue or beneficiaries of the Public Trust or Public Land Trust) can bring a lawsuit to challenge the State’s actions.<sup>215</sup> Such a lawsuit could include an emergency request that the State not execute a lease while the legality of its actions is determined by the court.<sup>216</sup> However, the remedies available in such a lawsuit would not necessarily extend to invalidating any lease agreement, if one was already executed—whether or not the lease could be voided would depend on the standing of the party bringing the lawsuit, what claims were raised, and any applicable legal defenses.<sup>217</sup>

For decisions made by the BLNR on behalf of the State, individuals who will be adversely impacted by the BLNR’s decision may request a contested case hearing to present evidence and make arguments.<sup>218</sup> Furthermore, following a contested case hearing or preliminary ruling, aggrieved persons may appeal to the Hawai‘i state courts. If the court finds that the BLNR’s decision or conclusion was “(1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedure; (4) affected by other

---

<sup>214</sup> For example, the current lease negotiations include a proposal the military pay for land restoration, UXO cleanup, and long-term management. See Letter from Josh Green, *supra* note 8. There could be an issue if those same terms were to be applied to a land sale, such that OHA did not receive its share of compensation.

<sup>215</sup> See, e.g., *Ching v. Case*, 145 Hawai‘i 148, 173, 449 P.3d 1146, 1171 (2019) (lawsuit alleging State breached its Public Land Trust responsibilities); *Price v. Akaka*, 928 F.2d 824, 826 (9th Cir. 1990) (holding plaintiff had challenge to allege violation of Hawai‘i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959)).

<sup>216</sup> HAW. R. CIV. P. 65.

<sup>217</sup> See, e.g., *Ching*, 145 Hawai‘i 185, 449 P.3d at 1183 (limiting scope of injunctive relief against state, not invalidating lease agreement); *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 415, 363 P.3d 224, 263 (2015) (requiring BLNR to hold contested case hearing, not banning potential construction); *Kilakila ‘O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai‘i 193, 206, 317 P.3d 27, 40 (2013) (same).

<sup>218</sup> See *Mauna Kea Anaina Hou*, 136 Hawai‘i at 390, 363 P.3d at 238.

error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion,” it may reverse or modify the decision or return the case to the BLNR with instructions on how to further proceed.

Therefore, State law provides avenues for individuals to challenge the land negotiation decisions of state actors.

### **III. Conclusion**

a. The Military Does Not Have a Carte Blanche to Exercise Eminent Domain Over Hawaii’s Lands and Any Taking Would Not Be Imminent

The military must act within the boundaries of federal law. While the military *could* exercise eminent domain over Hawaii’s land, it is likely not an imminent threat, and federal law does not currently allow the immediate exercise of eminent domain over Hawaii’s lands.

First, because the lands here would likely be valued at considerably more than \$9 million, the military must receive specific congressional authorization (typically through the NDAA) to acquire the leased lands.<sup>219</sup> The NDAA for Fiscal Year 2026 does not provide this authorization.<sup>220</sup> Furthermore, any congressional authorization must be followed by an appropriations bill providing the funds for the just compensation that would have to be paid in order to lawfully take the land.<sup>221</sup> Therefore, most likely, the earliest the military *could* exercise eminent domain would be after the passage of the Fiscal Year 2027 NDAA—and only if the NDAA for Fiscal Year 2027 (or other legislation) authorizes the use of eminent domain over Hawaii’s lands.

Second, the National Historic Preservation Act requires the Department of Defense to consult with Native Hawaiian organizations, taking into consideration their concerns and working collaboratively to address those concerns before exercising eminent domain on concerned lands.<sup>222</sup>

---

<sup>219</sup> See 10 U.S.C. § 2664; 10 U.S.C. §§ 2802 & 2805(a)(2); TILGHMAN, *supra* note 17.

<sup>220</sup> National Defense Authorization Act for Fiscal Year 2026, Pub. L. No. 119-60 (2025), available at <https://www.congress.gov/119/plaws/publ60/PLAW-119publ60.pdf> [<https://perma.cc/3XFB-AGB7>].

<sup>221</sup> See TILGHMAN, *supra* note 17.

<sup>222</sup> See 54 U.S.C.A. § 300101 (West); 36 C.F.R. §§ 800.1, 800.2(c)(2)(ii).

Third, it may be argued that the U.S. cannot exercise eminent domain over the leased lands without an act of Congress repealing (explicitly or implicitly) the Public Land Trust, since Congress had a clear non-military intent for the use of these lands when it passed the Admission Act.<sup>223</sup> *See above* § II.B.1.c. And notwithstanding any congressional authorization, it may also be argued that the sheer amount of land the military would be condemning violates Hawaii's Tenth Amendment right to state sovereignty.<sup>224</sup> The State may challenge the exercise of eminent domain for these reasons.<sup>225</sup> Thus, while the military could potentially exercise eminent domain over Hawaii's lands, it is likely not an imminent threat as the military must act within the boundaries of existing federal law and procedures.

b. Constitutional, Statutory, and Common Law Provisions Restrict the Governor's Ability to Sell, Exchange, or Lease Land Unilaterally

If the State and the military seek to negotiate a voluntary deal, the Public Trust Doctrine of the Hawai'i Constitution, which requires that Hawaii's natural resources be protected and held in trust by the State for the benefit of all people, must be kept in mind.<sup>226</sup> As the trustee, the State has an obligation to protect and preserve the leased lands.<sup>227</sup> The Hawai'i Supreme Court has recognized that the duties imposed on the State as the trustee of land are the same as those imposed on a common law trustee.<sup>228</sup> As such, the State has an obligation to protect and preserve the lands held in the public's trust.<sup>229</sup> Therefore, the State must adhere to its duties and obligations as a trustee when making a deal involving the disposition of the leased lands.<sup>230</sup> If the State fails to adhere to its duties and obligations, the rights created under the trust may be enforced under both state and federal law.<sup>231</sup>

---

<sup>223</sup> *See* U.S. CONST. art. I, § 1; Hawai'i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959).

<sup>224</sup> *See supra* note 113.

<sup>225</sup> *See Kelo v. City of New London*, 545 U.S. 469, 472 (2005); *United States v. Jones*, 109 U.S. 513, 518-19 (1883).

<sup>226</sup> HAW. CONST. art. XI, §§ 1, 7.

<sup>227</sup> *Ching v. Case*, 145 Hawai'i 148, 177-78, 449 P.3d 1146, 1175-76 (2019).

<sup>228</sup> *Id.* at 170, 449 P.3d at 1168.

<sup>229</sup> *Id.* at 183, 449 P.3d at 1181.

<sup>230</sup> *See id.* at 170-71, 449 P.3d at 1168-69.

<sup>231</sup> *See id.* at 154-55, 449 P.3d at 1152-53; *Pele Def. Fund v. Paty*, 73 Haw. 578, 591, 601-06, 837 P.2d 1247, 1256-57, 1261-64 (1992); *Price v. Akaka*, 928 F.2d 824, 827-29 (9th Cir. 1990).

The Hawai‘i Constitution also requires that customary and traditional Native Hawaiian rights be protected.<sup>232</sup> The Hawai‘i Supreme Court has established the Ka Pa‘akai Analysis to ensure the enforcement of these constitutional provisions when state administrative agencies consider proposals that may affect Native Hawaiian rights.<sup>233</sup> Lastly, the public’s right to a “clean and healthful environment” (free from continued degradation by the U.S. military) is protected by the Hawai‘i Constitution.<sup>234</sup>

Additionally, there are several State statutory requirements that must be followed by state actors before a deal may be finalized, including required authorizations by the BLNR and Legislature.<sup>235</sup> So while the State has the authority to sell, exchange, or lease Hawaii’s lands, this authority is restricted and not absolute. Governor Green cannot make any final deal resulting in the renewal of leases, or a sale or exchange of land alone.<sup>236</sup>

c. The People Can Act If They Disagree with the Terms of a Land Deal Made

State law provides avenues for people to challenge violations of state law.<sup>237</sup> The Hawai‘i Constitution contains multiple provisions that may serve as a basis for people to challenge a voluntary agreement made by the State with the military.<sup>238</sup> Additionally, Hawaii’s statutes impose several procedural requirements that must be followed for the lease, sale, or exchange of Hawaii’s land.<sup>239</sup> If these procedural requirements are not complied with, challenges to governmental decisions may be brought.<sup>240</sup>

Therefore, while state actors, such as Governor Green, may engage in negotiations with the military relating to the leased lands, the people of Hawai‘i are not powerless. Beyond the legal actions that could be brought, the people can engage in advocacy efforts to help ensure their concerns are considered during ongoing negotiations. Members of the public may attend BLNR meetings and submit testimony to the BLNR to express their opinion if/when the BLNR considers actions relating to the

---

<sup>232</sup> HAW. CONST. art. XII, § 7.

<sup>233</sup> *Ka Pa‘akai o Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 46-47, 7 P.3d 1068, 1083-84 (2000).

<sup>234</sup> HAW. CONST. art. XI, § 9.

<sup>235</sup> See HRS §§ 171-11, 171-13(1), 171-50(c), 171-64.7(b).

<sup>236</sup> See *id.*

<sup>237</sup> See Hawai‘i Administrative Rules (HAR) § 13-1-29(a); HRS § 91-14.

<sup>238</sup> HAW. CONST. art. XI, §§ 1, 7, & 9; *id.* art. XII, §§ 4 & 7.

<sup>239</sup> HRS §§ 171-11, 171-13(1), 171-50(c), 171-64.7(b).

<sup>240</sup> HAR § 13-1-29(a); HRS § 91-14.

land negotiations. Individuals interested in attending a BLNR meeting or submitting testimony may find instructions and meeting dates on the DLNR’s website.<sup>241</sup> Additionally, the First Amendment of the U.S. Constitution protects the freedoms of speech and assembly.<sup>242</sup> Members of the community thus have the right to express their opinions on the actions of State Actors in relation to the land negotiations and may peacefully protest actions with which they disagree.<sup>243</sup>

Ultimately, the issue of military land leases is complex. The pending negotiations implicate a variety of different state and federal laws and legal doctrines. Every issue here, however, exists under the cloud of unresolved claims of Native Hawaiians, who have never relinquished their sovereignty, nor ceded their lands. Thus, while the State and the Army are actively engaging in negotiations, the unresolved claims and incontrovertible rights of Native Hawaiians should not be ignored. Both parties must ensure that the procedural requirements designed to protect the rights of Native Hawaiians—including the U.S.’s obligations under international human rights law—are adhered to before any significant action is taken. There is no outcome that is absolutely certain, not even eminent domain. Regardless of the outcome, constitutional and statutory rights must be safeguarded and are not up for negotiation.

---

<sup>241</sup> See FAQs, HAWAI‘I DEPARTMENT OF LAND AND NATURAL RESOURCES, <https://dlnr.hawaii.gov/boards-commissions/blnr-board/faqs/> [<https://perma.cc/7I4E-QAB6>]; *BLNR Meetings 2026*, HAWAI‘I DEPARTMENT OF LAND AND NATURAL RESOURCES <https://dlnr.hawaii.gov/meetings/blnr-meetings-2026/> [<https://perma.cc/S3LZ-ZF4S>].

<sup>242</sup> U.S. CONST. amend. I.

<sup>243</sup> See *id.*

---

*The American Civil Liberties Union of Hawai'i strives to build an equitable society. Our mission is to protect and promote the civil liberties and fundamental rights enshrined in the United States and Hawai'i constitutions through litigation, legislation, and public education. We serve – and center the voices of – our impacted and vulnerable communities, regardless of background, status, or circumstance. As a non-partisan non-profit organization, we provide our services at no cost to the public, and we never accept government funds.*