

# Marine and Coastal Policy Research Group

## Towards Sustainable Native Hawaiian Access to Green Sea Turtle Take

### EXECUTIVE SUMMARY

In May 2018, Native Hawaiian Bronson Nakaahiki was arrested for killing a green sea turtle and harvesting its meat, violating the Endangered Species Act as well as Hawaii state law.<sup>1,2</sup> This arrest, one of several cases of harassing and killing sea turtles in 2018, intensified Native Hawaiian efforts to enact policy change and allow for the cultural practice of harvesting sea turtles, or honu as they are known in the Hawaiian language.<sup>3</sup> Indeed, green sea turtle populations have recovered significantly recently, particularly in Hawaii, thanks to strict state and federal legal protections, but they have not yet reached the official benchmark set out by the National Marine Fisheries Service and the US Fish and Wildlife Service in 1998 of 5,000 nesting green sea turtles per year.<sup>4</sup> With the increasing abundance of sea turtles, more Native individuals are pushing for access to harvesting honu, which was considered a mythological guardian of children and was utilized in the form of meat, bones, and eggs for ceremonial events and subsistence until the listing of green sea turtles as “threatened” under the Endangered Species Act in 1978. I recommend the amendment of the Endangered Species Act to



Figure 1: A bronze and lava stone monument at Punalu'u Beach Park was dedicated to Kauila in 1995. Source: Dohn Chapman

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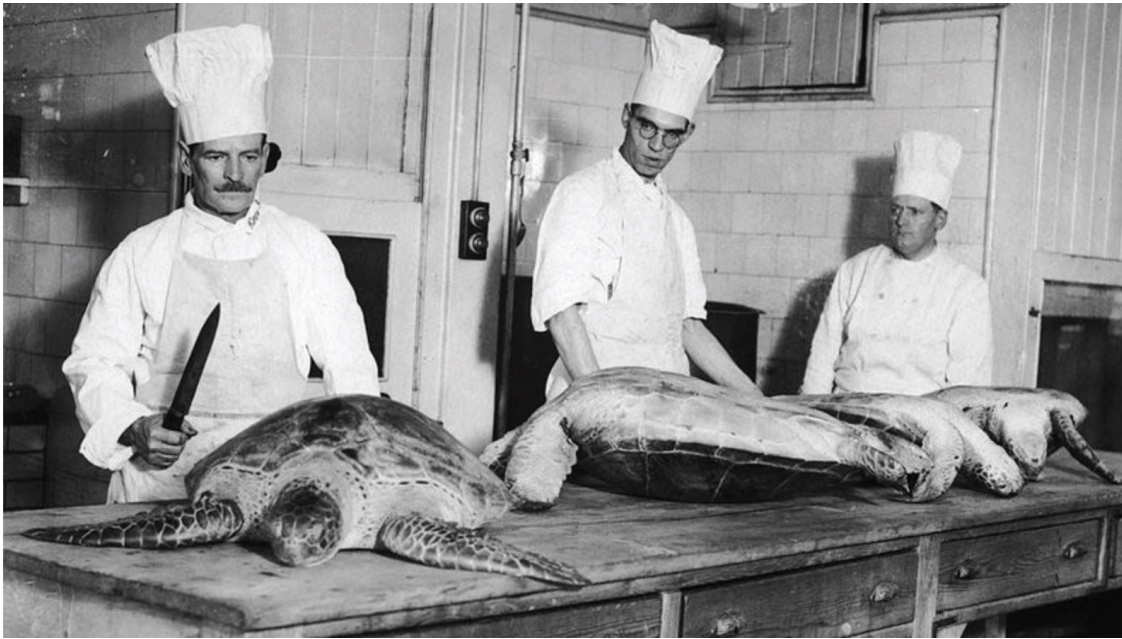


Figure 2: Chefs prepare turtle meat for a soup in 1931. Source: David McCowan

permit Native Hawaiians the ability to take endangered and threatened species, modelled off of the exception granted for Alaskan Natives, as well as the passage of a bill amending Hawaii Revised Statutes, Chapter 195D-4-E and Hawaii Administrative Rules 13-124-9 to decriminalize such take.<sup>5,6</sup>

### CONTEXT OF THE ISSUE

Over 1,600 years ago, Polynesians arrived in what is now known as Hawaii, rumored to have been guided there by sea turtles.<sup>7</sup> Native Hawaiians have long told stories of the honu, emphasizing its value as a creature of spiritual importance. They tell of Kauila, a mythical turtle seen in Figure 1, that can transform herself between turtle and human, playing with children on the shore and protecting them against danger.<sup>8</sup>

Given such stories regarding honu, the turtle populations were regulated using kapu, sometimes known as tabu or tapu, a sort of cultural significance that made it taboo to consume turtles unless in a ceremonial or ritual context by the most elite members of society.<sup>9</sup> As both sea creatures and air-breathers, honu connected fishermen with the water and “belonged to the chiefs, were tapu to the use of the gods, used as sacrificial offerings to the aforementioned deities, and consumed only by men,” with violations of these restrictions punished with death.<sup>10</sup> The restrictions were eventually loosened slightly to include Chiefs, priests, and the elite class of any gender.

While Native Hawaiian consumption of sea turtle meat has occurred for centuries, the advent of commercial harvesting of sea turtles represented a ma-

ajor shift in population levels. In the late 17<sup>th</sup> century, British vessels were sent out to spear sea turtles, using their meat for food and the fat for candles and cooking oil.<sup>11</sup> Green sea turtles were considered the most useful and valuable species, and turtle soup became a popular delicacy amongst 18<sup>th</sup> century Europeans.<sup>12</sup> With the expanding middle-class market for stew made with canned sea turtle meat, seen in Figure 2, turtle populations plummeted. Dangerously low population levels that warranted the designation as “threatened” were largely caused by the harvesting of adult turtle meat by non-Natives.

In 1973, Congress passed the Endangered Species Act to conserve the ecosystems of threatened and endan-

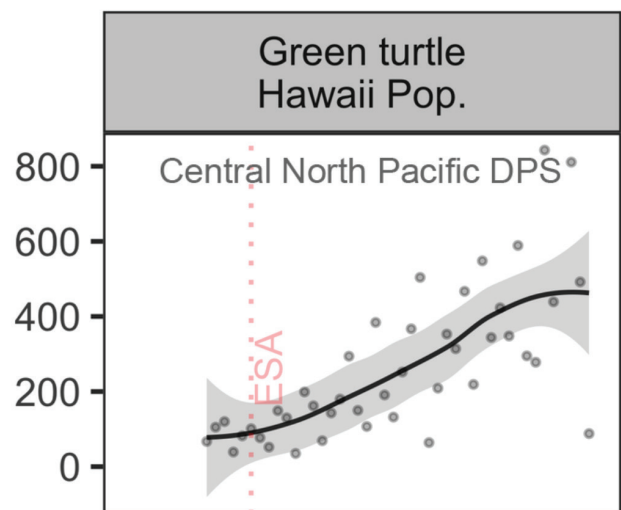


Figure 3: Increasing green sea turtle populations in the Central North Pacific. Note the red dotted line representing the passage of the ESA. Source: Abel Valdivia, Shaye Wolf, & Kieran Suckling





Figure 4: Fibropapilloma, a tumor-causing disease, has been spreading around turtle populations, most severely threatening the green turtle species. Source: David Duffy et al.

gered species.<sup>13</sup> It forbids the taking of endangered and threatened species, with taking defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Green sea turtles were added to the list of protected species in 1978 and were considered threatened, prohibiting anyone from harvesting honu.

The ESA designation successfully enabled significant green sea turtle population increase. Particularly in Hawaii, numbers have risen drastically. Since the listing of green sea turtles as threatened in 1978, populations have steadily increased, as seen in Figure 3. Lifelong Hawaii resident Jan TenBruggencate reports that “numbers certainly seem higher now,” an observation supported by stock assessments and corroborated by other Hawaiian residents.<sup>14,15,16</sup>

However, while green sea turtles are far more abundant than they were in the 1970s, population levels are still below those laid out by the Marine Fisheries Service and US Fish and Wildlife as minimum benchmarks for the green sea turtle population to be considered recovered. One of their key benchmarks was having 5,000 nesting turtles per year, but the mean annual nesting abundance for 2009-2012 was only 464, less than 10% of the pre-established guidelines.<sup>17,18</sup> Policy and Advocacy Manager for the Turtle Island Restoration Network Annalisa Batanides Tuel concurs, saying that turtles are still a fragile and vulnerable species.<sup>19</sup> Irene Kelly, the Sea Turtle Recovery Coordinator for the Pacific Islands Region of NOAA Fisheries, likewise emphasizes that green sea turtles still face threats from habitat loss, pollution, entanglement, bycatch, disease (seen in Figure 4), foreign harvest, and climate change that may have untold future impacts.

However, since 2012, the International Union for Conservation of Nature and Natural Resources has categorized the Hawaiian green sea turtle as a species of “Least Concern,” the lowest category possible, as seen in Figure 5, reflecting the fact that female nesting abundance has been increasing over 5% per year over forty-two years of data.<sup>20</sup> Though the population of mature individuals is estimated to be around 6,550, lower than the typical threshold for being considered a vulnerable population of 10,000 mature adults, the Hawaiian green turtle population has continued steadily increasing and has seen no major fluctuations, allowing it to remain a species of “Least Concern.”

NOAA and US Fish and Wildlife have recognized major improvements in the turtle population in some areas, issuing a rule in 2016 that divided the green sea turtle into eleven “distinct population segments,” re-classifying eight of the DSPs as threatened, with the other three remaining as endan-

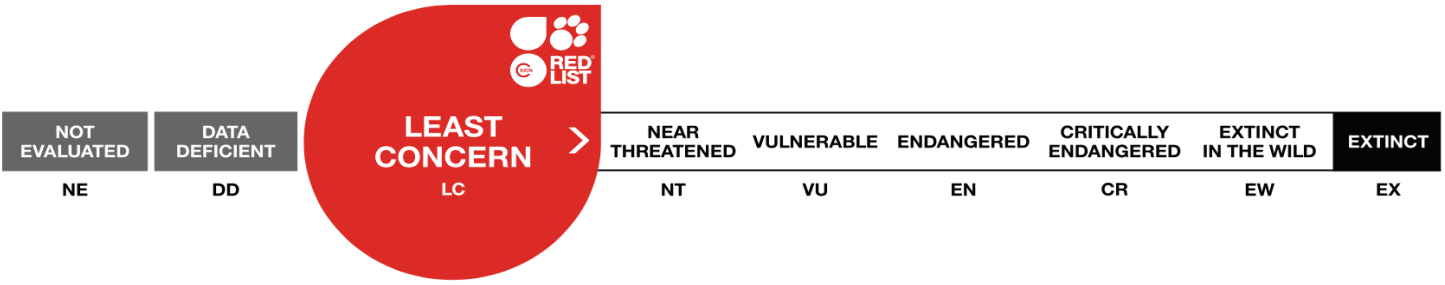


Figure 5: The IUCN categorizes Hawaiian green sea turtles as species of Least Concern. Source: M.Y. Chaloupka & N.J. Pilcher



Figure 6: A honu is released into the wild while crowds of tourists look on, celebrating World Turtle Day in May 2019. Source: Hawaii News Now

gered.<sup>21</sup> The North Central Pacific green sea turtle, sometimes known as the Hawaiian green sea turtle, was one of those DSPs moved down to threatened.

## CRITIQUE

There has long been controversy over the regulations on Native use of honu under the ESA. Beginning in 1983, the National Marine Fisheries Service published their “Review of Regulations Concerning the Taking of Sea Turtles for Subsistence Purposes” in response to Native Hawaiians’ request for access to subsistence harvesting of turtles.<sup>22</sup> However, the request was denied because no native communities were considered “dependent” on green sea turtles at that point in time and the request was not made on behalf of any particular cultural group so could not be classified as a native cultural group exception. Without an essential reliance on honu for subsistence, they were considered unnecessary. Thus, Native Hawaiian turtle harvesting was determined to be too similar to “a recreational take” and irrelevant under the ESA exceptions for subsistence. In accordance with this view, some Hawaiians claim that the harvesting of turtle meat is not a popular or necessary practice anymore and no longer plays a culturally significant role, while others also argue that sea turtles have more value now as a tourist attraction, illustrated in Figure 6.<sup>23, 24, 25</sup>

The issue reemerged in 2012 when the Hawaiian Association of Civic Clubs, a community-based advocacy movement, filed a petition to determine whether the North Central Pacific Green Sea Turtle DSP had recovered enough to be removed from its classification as “threatened.”<sup>26</sup> NMFS and FWS did review the DSP and recommended that a more thorough analysis be completed. However, in the process of reviewing population numbers, the Secretaries of Commerce and the Interior failed to follow the Code of Federal Regulations timeline for responding to petitions.<sup>27</sup> Rather than publishing a 12-Month-Finding or publishing a proposed rule in the allotted twelve months, NMFS and FWS took thirty-seven months to publish a proposed rule in 2015, an outcome that some argue indicates that “delays and an apparently arbitrary, indiscriminate use of science have delayed the finding of recovery.”<sup>28</sup>

In 2016, NOAA and USFWS made the rule final and updated the status of green sea turtles in response to their population increase.<sup>29</sup> In categorizing the North Central Pacific DSP as threatened, the US Fish and Wildlife Service and NOAA opened the possibility of special permits for scientific research but the rule had no impact on Native access to turtles. In the present, the change in status of the North



Central Pacific DSP does not offer any practical changes for Native Hawaiian cultural harvesting.

In addition to seeking the de-listing of honu from the ESA, other Native activists have critiqued the ESA as a whole. The ESA includes several exemptions, including in cases of hardship, antique organism products, and Alaska Native status under Section 10.<sup>30</sup> The Alaskan Native exemption allows for taking of threatened and endangered species without a permit or license but subject to restrictions if “such taking materially and negatively affects the threatened or endangered species.”<sup>31</sup> Alaskan Natives are therefore able to take species for food, subsistence, clothing, handicraft, and interstate commercial sale, though no similar provision is offered for Natives of other regions.

In the 1990 cases of USA v. Daryl Nuesca and USA v. Daniel Peter Kaneholani, the District Court of Hawaii ruled that Native Hawaiians have no special status under the ESA since they are not dependent on the green sea turtle for food.<sup>32</sup> The Court further ruled that the exception for Alaskan Natives is not a violation of the Constitution’s Equal Protection clause, since Native Hawaiians are not a homogeneous group that relies upon subsistence hunting of endangered animals.<sup>33</sup> The court based their decision upon the 1983 NMFS review of turtle regulations that set forth two standards for permitting a subsistence authorization: 1) the existing culture must be “dependent on the taking of sea turtles for its continued existence” and 2) “the turtle stock involved would not be jeopardized by subsistence taking.”<sup>34</sup> According to the majority opinion, Native Hawaiians are not classified as dependent on the taking of sea turtles, since their taking primarily served a spiritual and cultural role rather than a subsistence role.<sup>35</sup> Dispute remains in respect to the second standard, as it is unclear how healthy turtle populations must be in order to not be jeopardized by subsistence taking and what effects subsistence taking may have.

## **POLICY OPTIONS AND RECOMMENDATION**

Although NOAA, USFWS, and the District Court of Hawaii were unable to grant Native Hawaiians access to take of the green sea turtle, legislative action could enable Native take while still allowing for appropriate regulations to protect the species’ sur-

vival. In order to explicitly permit Native individuals to have access to practices of spiritual and cultural value, I propose that the ESA be amended to include a Native Hawaiian exemption under Section 10.<sup>36</sup> Though they are not federally recognized as a tribe, Native Hawaiian is defined in U.S. Code as “a member or descendant of the aboriginal people who, before 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii.”<sup>37,38</sup>

In 2016, US Fish and Wildlife Service and NOAA considered this option when dividing the green sea turtle population into DSPs, upon suggestion by public comment.<sup>39</sup> However, they rejected the proposed option, saying that this rule was unable to provide an exemption for Hawaiian Natives similar to that for Alaskan Natives, as it was not within the authority of NOAA and USFWS to amend the ESA and the current exemption is explicit that it only applies to Alaskan Natives. Nonetheless, such a change would be possible through legislative action. Though this amendment would certainly not be supported by everyone, particularly environmental protection advocacy groups, resident Jan TenBruggencate did express that such a proposal would likely be politically feasible, based on his knowledge of his community’s views on the issue.<sup>40</sup> Such an amendment may also easily be modelled off of the Native Alaskan exception, minimizing the risk of litigative action.

Additionally, in order to decriminalize Native harvesting of honu, the Hawaiian Legislature would also need to pass a bill amending Hawaii Revised Statutes, Chapter 195D-4-E and Hawaii Administrative Rules 13-124-9, which currently both prohibit the taking and disturbance of sea turtles.<sup>41,42</sup> These changes would thus remove the state criminal charges associated with Native Hawaiians taking endangered and threatened species, setting a framework for future cultural practices involving species protected by the ESA and allowing Hawaiians to resume their historical and cultural practices.

Several individuals have expressed concern to opening up unrestricted access to harvesting turtles, given that these amendments would not offer explicit limits on the numbers of turtles taken.<sup>43,44</sup> However, the Alaska Native exemption includes the possibility that if “such taking materially and negatively affects the threatened or endangered species, [the

Secretary of the Interior] may prescribe regulations upon the taking of such species by any such Indian” and furthermore specifically prohibits any take that is “accomplished in a wasteful manner.”<sup>45</sup> With this possibility for further regulation and the fact that under a similar policy, Alaskan Natives have cooperated with conscientious take of animals, this proposal is not expected to have adverse impacts on sea turtle stocks.<sup>46</sup> Moreover, a significant portion of the Native Hawaiian population has expressed a desire to abstain from harvesting honu and instead focus on their spiritual and touristic value.<sup>47, 48, 49</sup> Even if populations were to experience adverse effects, sea

turtle stocks are now robust enough that they are not immediately at risk of extinction and appropriate regulation, as described in Section 10 of the ESA, may be passed to remedy any short-term decline.<sup>50</sup>

Ultimately, amending the ESA and associated state law would offer key cultural benefits to Native Hawaiians who have long been marginalized communities on their own land, subject to regulations for a population decline that they did not cause. In restoring their access to harvesting honu, policymakers would be upholding respect for Native cultures and traditions without seriously harming populations.

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25. Email Correspondence from Shelby Serra, Conservation Coordinator for Pacific Whale Foundation, Maui, HI (Dec. 5, 2019).

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27. 50 C.F.R. § 424.14 (2001).

28. Western Pacific Regional Fishery Management Council, *supra*

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29. Fish and Wildlife Service & National Oceanic and Atmospheric Administration, *supra* note 21, at 5

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31. *Id.* at 7

32. *United States v. Daryl Nuesca, United States of America v. Daniel Peter Kaneholani*, 945 F.2d 254 (9th Cir. 1991) [<https://www.courtlistener.com/opinion/568593/united-states-v-daryl-nuesca-united-states-of-america-v-daniel-peter/>], accessed Oct. 30, 2019.

33. *Id.* at 7

34. National Oceanic and Atmospheric Administration, *supra* note 22, at 6

35. *United States v. Daryl Nuesca*, *supra* note 32, at 7

36. While I was in contact with several Native Hawaiians throughout the process of writing this policy brief, I myself am not Native. Any attempt at proposing or implementing policy regarding honu ought to involve substantial input from Native Hawaiians, and I fully welcome critiques and input from those communities that are historically and presently represented in the policy-making entities that govern their culture and daily lives.

37. 20 U.S.C. § 80q-14 (1989) [<https://www.law.cornell.edu/uscode/text/20/80q-14>], accessed Dec. 10, 2019.

38. There are inherent problems with using this definition, including the colonial history of defining valid identities of Native individuals and the exclusion of other Native Pacific Islanders. Future policy-making ought to explore options for creating a more inclusive and accurate concept of indigeneity.

39. Fish and Wildlife Service & National Oceanic and Atmospheric Administration, *supra* note 21, at 5

40. TenBruggencate, *supra* note 14, at 3

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47. Javillonar, *supra* note 16, at 3

48. Kelly, *supra* note 24, at 6

49. Serra, *supra* note 25, at 6

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