NON-EA OR EIS
PUBLICATION FORM
OFFICE OF ENVIRONMENTAL QUALITY CONTROL

Project Name: Second Amended Petition for Registration of Title to Accretion
Applicable Law: Petition for Registration of Title to Accretion under H.R.S. Chapter 501-33 and Rule 26 of the Rules of the Land Court
Type of Document: Second Amended Petition for Registration of Title to Accretion
Island: Oahu
District: Kailua, District of Koolaupoko
TMK: (1) 4-3-007: 034
Permits Required: N/A
Applicant or Proposing Agency: Petitioner CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated
c/o Janna Ahu, Esq., Dentons US LLP
1001 Bishop St., Suite 1800, Honolulu, HI 96813
808-524-1800
(*Address, Contact Person, Telephone*)
Approving Agency or Accepting Authority: Land Court, State of Hawai`i
(*Address, Contact Person, Telephone*)
Consultant: N/A
(*Address, Contact Person, Telephone*)
Status: Second Amended Petition for Registration of Title to Accretion filed July 23, 2024

Project Summary: (Provide proposed action and purpose/need in less than 200 words. Please keep the summary brief and on this one page)**: YOU ARE HEREBY NOTIFIED that Petitioner CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated, has filed a petition for registration of title to accretion in the Land Court, State of Hawai`i, L.D. No. 18-1-0771, to register title to accreted land within lands identified as Lot 20 as shown on Map 2 of Application No. 505, Tax Map Key No. (1) 4-3-007: 034, containing 0.29 acres, more or less, all situate, lying and being at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i.**

PAUL ALSTON 1126
JANNA WEHILANI AHU 10588

DENTONS US LLP
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Attorneys for Petitioner

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505
CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated, Petitioner, v. STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; AMELIA O. ANDRADE; LAWRENCE M. JOHNSON, Respondents.	1 L.D. 18-1-0771

SECOND AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505
CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated, Petitioner, v. STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; AMELIA O. ANDRADE; LAWRENCE M. JOHNSON, Respondents.	1 L.D. 18-1-0771 **SECOND AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION**

SECOND AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION

TO THE HONORABLE PRESIDING JUDGE OF THE LAND COURT OF THE STATE OF HAWAI`I:

On March 7, 2018, the Court accepted for filing Petitioner CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated, ("Petitioner") Petition for Registration of Title to Accretion to Lot 20 as shown on Map 2 of Application No. 505 (the "Original Petition"), and referred the matter to the State Land Surveyor for verification, check and report.

In response to the Return of the State Land Surveyor (the "Return") Petitioner amended and restated the Original Petition, and filed the Amended Petition for Registration of Title to Accretion on July 30, 2019 ("First Amended Petition").

A Stipulation and Order for Reference to the Surveyor of the First Amended Petition was filed on July 28, 2020.

On September 19, 2023 the State Land Surveyor filed the Second Amended Return of the State Land Surveyor.

In response to the Second Amended Return of the State Land Surveyor (the "Second Amended Return", Exhibit A) Petitioner desires to amend and restate the Original Petition as follows:

1. Petitioner is the owner of Lot 20 as shown on Map 2 of Land Court Application No. 505 covered by Transfer Certificate of Title ("TCT") No. 1,051,902. *See* Exhibit B (the Deed); *see also* Ex. I (TCT No. 1,051,902).

2. Pursuant to HRS § 501-33, "[a]n applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent and that the land accreted before or on May 20, 2003." *See also* HRS § 669-1(e) ("The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent and that the land accreted before or on May 20, 2003. The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343-3(c)(4)."). Accreted lands are "lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of nature forces". HRS § 171-1; *see also Maunalua Bay Beach Ohana 28 v. State*, 122 Hawaii 34, 50, 222 P.3d 441, 457 (Ct. App. 2009) (accreted lands are "lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of nature

forces")[1]. Beach-front property can be increased in size by the slow deposit of beach sand over time. "Permanent" means that the accretion has been in existence for at least twenty years. *See* HRS § 501-33; *see also* HRS § 669-1(e).

3. A landowner seeking to register accretion must prove: (1) the additional land existed before or on May 20, 2003 and (2) the accretion became permanent before the petition was filed (based upon evidence that it existed for at least twenty years before filing).

4. The language that "the land accreted before or on May 20, 2003" was added to HRS § 501-3 through Act 56[2] in response to an ICA opinion[3] regarding Act 73[4], which imposed an obligation on the State to pay compensation from a taking of accreted lands. The purpose of Act 56 was to "disclaim[] ownership of accreted land that was privately owned before Act 73 and for which 'just compensation' would otherwise be due."[5] Essentially, the amendment "tailors the State's accretion laws so that it only affects land that accreted after May 20, 2003."[6]

5. On December 30, 2009, the ICA in *Maunalua Bay Beach Ohana 28, et al. v. State* agreed that Act 73 effectuated a permanent taking of all then-existing accreted lands not otherwise awarded. *Maunalua,* 112 Hawai`i at 57, 222 P.3d at 464. Requests for certiorari to the Hawai`i and United States Supreme Courts were denied—thus, the ICA's ruling conclusively determined that where accretion existed as of May 20, 2003, an uncompensated taking occurred.[7]

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[1] A copy of *Maunalua v. State* is attached as Exhibit C.
[2] Exhibit D, Act 56.
[3] *See* Exhibit C.
[4] Exhibit E, Act 73 (H.B. 192).
[5] *See* Written Testimony of William J. Aila, Jr. and Written Testimony of David M. Louie and/or William J. Wynhoff before the Senate Committees on Water, Land, and Housing, and on Judiciary and Labor on House Bill 2591, dated March 20, 2012, attached hereto as Exhibit F.
[6] *Id.*
[7] Both the Supreme Court of Hawai`i and the U.S. Supreme Court denied *certiorari*. *Maunalua Bay Beach Ohana 28 v. State*, No. 28175, 2010 WL 2329366 (June 9, 2010); *Maunalua Bay Beach Ohana 28 v. State*, 131 S. Ct. 529 (Nov. 1. 2010).

The ICA ruled that Act 73 took — without compensation — all privately owned land that accreted before May 20, 2003 (effective date of Act 73). *Id.* at 57, 222 P.3d at 464. The ICA specifically rejected the State's argument that littoral owners had no ownership interest in lands that accreted before May 19, 2003. *Id.* The ICA expressly found accretion occurring after 1983 could become permanent and subject to registration, which necessarily means accreted lands subject to registration in this Court are not limited to whatever new land existed by or before 1983. *Id.*

6. Petitioner, as successor to the original grantee, owned all accretion that existed before May 2003, and he is entitled to register (or, in the case of non-Land Court property, quiet title) that land whenever he can establish it has become "permanent." Until that time, the accreted land is his, but it cannot be registered or recorded as being part of his up-land parcel. *See Application of Banning*, 73 Haw. 297, 303-4, 832 P.2d 724, 728 (1992) (holding that accretion belongs to the littoral landowner).

7. In accordance with the Second Amended Return (Exhibit A) and pursuant to HRS § 501-33, since the title of Lot 20 was originally registered, there has been gradual and natural accretion to Lot 20 that accreted on or before May 20, 2003 (*see* Hall Decl. ¶¶ 3-4; Exhibit H) so that the new shoreline boundary at the highest wash of waves and edge of vegetation as certified on July 17, 2017 is as shown on the map dated December 5, 2017 prepared by Ryan M. Suzuki, and showing an accretion area of 2,637 square feet, being filed herewith, and approved, a reduced copy of which is attached as Exhibit G (the "Map").

8. The accretion to Lot 20 as shown on the Map (Exhibit G) has existed for more than twenty years as evidenced by the aerial overlay photograph dated August 22, 1996. *See* Exhibit H; *see also* Hall Decl. ¶¶ 3-4.

9. In addition, this Court approved Petitioner's adjoining neighbor's (the Johnson Family Trust, owner of Lot 278) Amended Petition for Registration of Title to Accretion on April 6, 2021 based on similar evidence. *See* Exhibit J (Johnson Family Trust's Amended Petition for Registration of Title to Accretion); Exhibit K (Findings of Fact and Decision granting the Johnson Amended Petition); Exhibit L (Decree for the Johnson Amended Petition); and Exhibit M (new map 148 depicting the adjoining lot's accreted land).

10. According to the Second Amended Return of the State Land Surveyor, Lot 20 as shown on Map 7 of Land Court Application No. 505 with accretion will be redesignated as Lot 276. *See* Exhibit A at 2.

11. Lot 276 will be unencumbered and Petitioner is the sole owner. *See* Ex. I (TCT No. 1,051,902) and Exhibit B (Deed); *see also* Hall Decl. ¶ 5.

12. Lot 276 will have direct access to Mokulua Drive, a public road. *See* Hall Decl. ¶ 6.

13. Petitioner will supply the office of environmental quality control with notice of the Second Amended Petition, for publication, in compliance with HRS § 501-33 and HRS § 343-3(c)(4).

14. That no other person has any interest in the said accretion, and that the following named are all the adjoining owners, the location of whose lands in reference to the said accretion is as shown by the Map filed herewith (Exhibit G):

Lot 19:	Amelia O. Andrade, Trustee 908 Mokulua Drive Kailua, HI 96734
Lot 278:	Lawrence M. Johnson, Trustee of the Johnson Family Trust 922 Mokulua Drive Kailua, HI 96734

City and County of Honolulu
c/o Department of the Corporation Counsel
530 South King Street
Honolulu, HI 96813

State of Hawai`i
c/o Attorney General
425 Queen Street
Honolulu, HI 96813

15. The State Land Surveyor has determined: "After viewing the area on the ground, the State Land Surveyor is of the opinion that *the additional area claimed along the sea appears to have been formed by natural accretion*." Exhibit A at 2 (emphasis added).

16. Notice of this Second Amended Petition will be served upon the Attorney General and all adjoining owners and any others the Court may deem necessary and proper to be served.

WHEREFORE, it is prayed that the Court recognize the approval of the Map by the said surveyor, adjudge Petitioner to be the owner of said accretion, approve said Map and order the Assistant Registrar of the Land Court to endorse on the TCT a memorandum of the Decree so adjudging and approving said Map.

DATED: Honolulu, Hawai`i, July 23, 2024.

/s/ Janna Wehilani Ahu
PAUL ALSTON
JANNA WEHILANI AHU
Attorneys for Petitioner

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505
CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated, Petitioner, v. STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; AMELIA O. ANDRADE; LAWRENCE M. JOHNSON, Respondents.	1 L.D. 18-1-0771 **DECLARATION OF JANNA WEHILANI AHU**

DECLARATION OF JANNA WEHILANI AHU

I, Janna Wehilani Ahu, do hereby declare that:

1. I am an attorney licensed to practice before the courts of this State and I am an attorney with the law firm of Dentons US LLP, counsel for Petitioner in this case.

2. I make this *Declaration in Support of Petitioner's Second Amended Petition for Registration of Title to Accretion*.

3. Attached as Exhibit A is a true and correct copy of the *Second Amended Return of the State Land Surveyor* (Dkt. 86), filed September 19, 2023.

4. Attached as Exhibit C is a true and correct copy of *Maunalua Bay Beach Ohana 28 v. State*, 122 Hawai`i 34, 222 P.3d 441 (2009).

5. Attached as Exhibit D is a true and correct copy of Act 56 (H.B. 2591), 2012 Hawai`i Session Laws.

6. Attached as Exhibit E is a true and correct copy of Act 73 (H.B. 192), 2003 Hawai`i Session Laws.

7. Attached as Exhibit F is a true and correct copy of the Written Testimony of William J. Aila, Jr. and Written Testimony of David M. Louie and/or William J. Wynhoff before the Senate Committees on Water, Land, and Housing, and on Judiciary and Labor on H.B. 2591, dated March 20, 2012.

8. Attached as Exhibit I is a true and correct copy of State of Hawai`i Certificate of Title No. 1051902.

9. Attached as Exhibit J is a true and correct copy of Petitioner Lawrence M. Johnson, Trustee of the Johnson Family Trust's Amended Petition for Registration of Title to Accretion (Dkt. 5) filed on August 29, 2019 in Case No. 1L.D. 18-1-0775 in the Land Court of the State of Hawai`i.

10. Attached as Exhibit K is a true and correct copy of the Findings of Fact and Decision (Dkt. 44) filed on April 6, 2021 in Case No. 1L.D. 18-1-0775 in the Land Court of the State of Hawai`i.

11. Attached as Exhibit L is a true and correct copy of the Decree (Dkt. 46) filed on April 6, 2021 in Case No. 1L.D. 18-1-0775 in the Land Court of the State of Hawai`i.

12. Attached as Exhibit M is a true and correct copy of Map 148 in the Land Court of the State of Hawai`i for Land Court Application No. 505 depicting accretion to Lot 21 as shown on Map 2 and redesignation of said Lot 21 with accretion as Lot 278, which was certified by the Registrar of the Land Court on May 1, 2021.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai`i, July 23, 2024.

/s/ Janna Wehilani Ahu
JANNA WEHILANI AHU

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505
CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated, Petitioner, v. STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; AMELIA O. ANDRADE; LAWRENCE M. JOHNSON, Respondents.	1 L.D. 18-1-0771 **DECLARATION OF RYAN SUZUKI**

DECLARATION OF RYAN SUZUKI

I, Ryan Suzuki, do hereby declare that:

1. I am a Hawai`i licensed professional land surveyor working for R.M. Towill Corporation ("R.M. Towill").

2. I have been a land surveyor for 30 years, of which 30 years have been employed with R.M. Towill.

3. I make this declaration in support of Petitioner Charles L. Hall, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated ("Petitioner") *Second Amended Petition for Registration of Title to Accretion* filed July 30, 2019 ("Second Amended Petition").

4. R.M. Towill was retained by Petitioner to conduct a shoreline survey of Lot 20 as shown on Map 2 of Land Court Application No. 505, TMK: (1) 4-3-007: 034 ("Lot 20") and I was assigned to supervise the shoreline survey.

5. On January 9, 2017, I oversaw the Petitioner's shoreline survey in my capacity as a Hawai`i licensed professional land surveyor.

6. I submitted the resultant survey results from the January 9, 2017 work to the Land Division of the State Department of Land and Natural Resources for review in order to obtain certification of the shoreline.

7. I received comments from the State Land Survey Division office on May 16, 2017, and I amended the shoreline survey based on the feedback received on May 24, 2017.

8. On July 17, 2017, the State of Hawaii, Department of Land and Natural Resources certified the shoreline survey for Lot 20 performed by R.M. Towill under my supervision.

9. Attached as Exhibit G to the Second Amended Petition is a reduced copy of a map of Lot 20 dated December 5, 2017 which depicts the shoreline boundary at the highest wash of waves and edge of vegetation as certified on July 17, 2017, and showing an accretion area of 2,637 square feet.

10. R.M. Towill engages in the business of surveying, civil engineering, planning, and construction management and has engaged in that business for nearly 90 years. As part of R.M. Towill's regularly conducted surveying activities, it keeps records in a database which is regularly updated, including the taking and storage of historical aerial photographs, in the normal course of its business.

11. In my capacity as a surveyor at R.M. Towill, I have access to the historical aerial photograph database created and maintained by R.M. Towill. The aerial photographs were taken by a subconsultant under contract to R.M. Towill and they have been, and are maintained by R.M. Towill as part of its ongoing business for use by the company and its clients. As can be seen by the naked eye, the photographs depict land and the adjacent ocean waters including vegetation and improvements. In the normal course of its operations, R.M. Towill uses aerial photographs in its database in its surveying work and utilizes them for historical documentation.

12. I selected and examined an aerial photograph dated August 22, 1996, which according to R.M. Towill's database was taken in the vicinity of Lot 20 and the surrounding area. Having been on the ground in the area depicted in the course of R.M. Towill's shoreline certification survey of Lot 20, I have become familiar with and recognize landmarks that coincide with those found on Lot 20. From the physical landmarks, I believe the photograph fairly and accurately depicts Lot 20 as it existed on August 22, 1996 and its boundaries based on the January 9, 2017 survey I supervised.

13. Using the historic aerial photograph as a base, I created an overlay map by adding the lot lines and shoreline for Lot 20, to approximately show how they relate to the vegetation line as of August 22, 1996, depicted on said overlay.

14. Attached as Exhibit H to the Second Amended Petition is a true and correct copy of the composite aerial photograph overlay that I created. By knowing the distances between known objects and the recorded boundaries it is possible to extend the side boundaries, calculate the metes and bounds of the accreted area, and measure its area by extrapolation to a reasonable degree of certainty.

15. Comparing Map 2 of Land Court Application No. 505 with the composite aerial photograph overlay dated August 22, 1996 with the survey certified on July 17, 2017 indicates that accretion occurred and that the accretion has existed for at least 20 years.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai`i, JULY 10, 2024.

RYAN SUZUKI

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505
CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated, Petitioner, v. STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; AMELIA O. ANDRADE; LAWRENCE M. JOHNSON, Respondents.	1 L.D. 18-1-0771 **DECLARATION OF CHARLES L. HALL**

DECLARATION OF CHARLES L. HALL

I, Charles L. Hall, do hereby declare that:

1. I am the Petitioner in this matter. I make this declaration in support of the *Second Amended Petition for Registration of Title to Accretion* ("Second Amended Petition").

2. My family has owned and maintained Lot 20 as shown on Map 2 of Land Court Application No. 505 covered by Transfer Certificate of Title ("TCT") No. 1,051,902 since June 9, 1988. My revocable living trust became the sole owner of Lot 20 by Warranty Deed filed December 5, 2012 in the Land Court of the State of Hawaii as Document No. T-8374059, a true and correct copy of which is attached as Exhibit B.

3. I am familiar with and have observed the current shoreline boundary and edge of vegetation of Lot 20, as well as the shoreline boundary and edge of vegetation dating back to June 9, 1988.

4. The shoreline boundary and edge of vegetation of Lot 20 on May 21, 2024 was at or about the same level as it was on June 9, 1988. Thus, the additional land existed before May 20, 2003 and has existed for at least 36 years.

5. Lot 20 (which I understand will become Lot 276) is unencumbered and the trust is the sole owner.

6. Lot 276 will have direct access to Mokulua Drive, a public road.

I declare under penalty of law that the foregoing is true and correct.

DATED: KAILUA, Hawai`i, June 24, 2024.

CHARLES L. HALL
TRUSTEE

IN THE LAND COURT OF THE STATE OF HAWAII

In the Matter of the Application of HELENE IRWIN CROCKER Accretion to Lot 20 as shown on Map 2 and the redesignation of said Lot 20 with accretion as Lot 276, Kailua, Kooluapoko, Oahu, Hawaii	APPLICATION NO. 505 (Map 146)

APPLICATION OF
CHARLES L. HALL, TRUSTEE - OWNER
For Approval of Accretion

SECOND AMENDED RETURN OF THE STATE LAND SURVEYOR

To the Honorable Judge of the Land Court,
State of Hawaii

Pursuant to an Order duly made and issued out of said Honorable Court on the 7th day of March, 2018, referring the map filed for approval for accretion in the above-entitled matter, to the State Land Surveyor for verification, check on the ground if necessary and report.

And further, that said map has been compared with Certificate of Title No. 1,051,902.

This is an application to tack onto Lot 20 of Land Court Application 505, a certain parcel of land bordering the sea, which parcel applicant respectively declare to be natural accretion to this lot and to redesignate said Lot 20 with accretion as Lot 276.

EXHIBIT A

NOTE:

Allegations in the amended petition have been checked and found to be in accord therewith except for the following:

1. As to item 8, the phrase "the new shoreline boundary at the vegetation line is as shown" should be changed to "the new shoreline boundary at the highest wash of waves and edge of vegetation as certified on July 17, 2017 is as shown".
2. As to item 8, the phrase "prepared by Ryan M. Suzuki, and approved" should be changed to "prepared by Ryan M. Suzuki, and showing an accretion area of 2,637 square feet, being filed herewith, and approved".
3. A statement should be included noting that the accretion as shown on the map has existed for more than twenty years as evidenced by aerial overlay photograph dated August 22, 1996.
4. As to item 9, the phrase "Lot 20 is unencumbered" should be changed to "Lot 276 will be unencumbered".
5. The order of items 9 and 10 should be switched.
6. As to item 13, the phrase "the Map (Exhibit F) attached hereto:" should be changed to "the Map filed herewith:".
7. As to item 14, the phrase "Exhibit F" should be changed to "the Map filed herewith".
8. As to the Declaration of Ryan Suzuki, item 9, the phrase "is the shoreline survey map which depicts the shoreline" should be changed to "is a reduced copy of the map showing the new shoreline boundary at the shoreline". (Exhibit F is not the certified shoreline map of July 17, 2017, but the Land Court map showing the new shoreline boundary at the shoreline certified on July 17, 2017)

Only encumbrances in the petition have been checked.

After viewing the area on the ground, the State Land Surveyor is of the opinion that the additional area claimed along the sea appears to have been formed by natural accretion. The new shoreline boundary was established at the highest wash of the waves and edge of vegetation as certified on July 17, 2017, pursuant to Section 501-33, H.R.S.

And pending further instructions and/or approval of the Court, the map and five (5) whiteprints of the herein application are being returned reserving one (1) whiteprint for the Office of the State Land Surveyor.

DATED at Honolulu, this 30th day of June, 2021.

Examined by:

Assistant.
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STATE LAND SURVEYOR

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Received from the State Land Surveyor _____ blueprints of, and the approved tracing map in the above entitled matter and Certificate of Title No.

Honolulu, Hawaii
June 30, 2021

/s/Bess K. Palma

LAND COURT STATE OF HAWAII

REGISTRAR OF THE LAND COURT.

NOTICE OF ELECTRONIC FILING

An electronic filing was submitted in Case Number 1LD181000771. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: 1LD181000771
Title: CHARLES LAYTON HALL VS AMELIA O. ANDRADE ET AL
Filing Date / Time: TUESDAY, SEPTEMBER 19, 2023 09:27:23 AM
Filing Parties:
Case Type: Land Court
Lead Document(s):
Supporting Document(s): 86-Document
Document Name: 86-Second Amended Return of the State Land Surveyor

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:
Brianna Weaver *(brianna.weaver@honolulu.gov)*
Janna Wehilani Ahu *(janna.ahu@dentons.com)*
Colin J. Lau *(colin.j.lau@hawaii.gov)*
Paul Alston *(Paul.Alston@dentons.com)*
The following parties need to be conventionally served:
LAWRENCE M JOHNSON
AMELIA O. ANDRADE

STATE OF HAWAII
OFFICE OF ASSISTANT REGISTRAR
RECORDED
December 5, 2012 8:01 AM
Doc No(s) T-8374059
on Cert(s) 1051901
Issuance of Cert(s) 1051902

/s/ NICKI ANN THOMPSON
ASSISTANT REGISTRAR

1 3/3 DML
B-32171301

Conveyance Tax: $0.00

Return by Mail (X) Pickup ( ) To:
Mr. Charles Hall
914 Mokulua Drive
Kailua, HI 96734

TGOH: 201259130
TGES: 12017500
BARBARA PAULO

This document contains 5 pages

Tax Map Key No.: (1) 4-3-007-034

WARRANTY DEED

CHARLES LAYTON HALL, unmarried, of Honolulu, Hawaii, hereinafter called the "Grantor", in consideration of the sum of Ten Dollars ($10.00) and other valuable consideration to the Grantor paid by **CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated,** with full powers to sell, mortgage, lease or otherwise deal with the land, whose address is 914 Mokulua Drive, Kailua, Hawaii, 96734, hereinafter called the "Grantee", the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the Grantee and the Grantee's successors in trust and assigns:

ALL of the land and premises more fully described in Exhibit "A" attached hereto and made a part hereof, subject, however, to the encumbrance(s), if any, mentioned in said Exhibit "A";

AND the reversions, remainders, rents, issues and profits thereof, together with all buildings, improvements, tenements, rights, easements, privileges and appurtenances to the same belonging or appertaining or held and enjoyed therewith, and all of the estate, right, title and interest of the Grantor both at law and in equity therein and thereto;

TO HAVE AND TO HOLD the same unto the Grantee as aforesaid, forever, subject, however, to the encumbrance(s), if any, mentioned in said Exhibit "A";

EXHIBIT B

AND the Grantor hereby covenants with the Grantee: THAT the Grantor is the owner in fee simple of said land and premises; that the same are free and clear of and from all encumbrances except as mentioned in said Exhibit "A"; that the Grantor has good right to grant and convey the same unto the Grantee as aforesaid, and will WARRANT AND DEFEND the same unto the Grantee forever against the lawful claims and demands of all persons except as aforesaid.

The term "Grantor" as and when used herein shall mean and include the Grantor named above and the Grantor's heirs, personal representatives, successors and successors in trust, and the term "Grantee" as and when used herein shall mean and include the Grantee named above and the Grantee's heirs, personal representatives, successors, successors in trust and assigns; where there is more than one Grantor or Grantee, the use of the singular herein shall be construed to include the plural wherever the context shall so require; and the use of any gender shall include all genders.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.]

IN WITNESS WHEREOF, the Grantor has executed this instrument this _____ day of DEC 05 2012, 2012.

CHARLES LAYTON HALL

STATE OF HAWAII)
) SS
CITY AND COUNTY OF HONOLULU)

On November 7, 2012, before me personally appeared **CHARLES LAYTON HALL**, to me known or proven on the basis of satisfactory evidence to be such person, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

RONNIE R. McCAMLEY NOTARY PUBLIC 2001-470 STATE OF HAWAII

(Official Stamp or Seal)

Signature: _____
Name: Ronnie R. McCamley
Notary Public, State of Hawaii

My commission expires: 10/28/2013

NOTARY CERTIFICATION STATEMENT

Document Identification or Description: Warranty Deed covering property located at 914 Mokulua Drive, Kailua, Hawaii, 96734, identified by Tax Map Key No. (1) 4-3-007-034

Doc. Date: Undated at time of notarization

No. of Pages: -5- Jurisdiction: First Circuit (in which notarial act is performed)

RONNIE R. McCAMLEY NOTARY PUBLIC 2001-470 STATE OF HAWAII

_____ 11/07/2012
Signature of Notary Date of Notarization and Certification Statement

Ronnie R. McCamley (Official Stamp or Seal)
Printed Name of Notary

All of that certain parcel of land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawaii, described as follows:

LOT 20, area 12,694 square feet, more or less, "LANIKAI BEACH TRACT", as shown on Map 2, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii (the "Land Court") with Land Court Application No. 505 of Helene Irwin Crocker.

Together with a perpetual right of way as an easement or easements appurtenant to said above described land, in common with all others entitled, over and along each and all of the several strips of land, each fifteen feet wide, leading from Mokulua Drive to the high water mark of the sea, described and shown on said Map as Lots B, C, D, E, F, G and H;

BEING THE PREMISES CONVEYED BY THE FOLLOWING:

1. By DEED dated May 17, 1988, to CHARLES LAYTON HALL and NANCY TATE, HALL, husband and wife, as Tenant in the Entirety, filed in the Land Court as Document No. 1556308.

   Note: Land Court Order No. 8374057, set forth the divorce of Charles L. Hall and Nancy T. Hall on June 15, 2000, in Honolulu, Hawaii.

2. By WARRANTY DEED dated NOV 19 2012, to CHARLES LAYTON HALL, unmarried, as Tenant in Severalty, as to an undivided fifty percent (50%) interest, filed in the Land Court as Document No. 8374058, whereupon Certificate of Title No. 1,051,901 was issued.

SUBJECT, HOWEVER, to:

1. Mineral and water rights of any nature in favor of the State of Hawaii.

2. Location of the seaward boundary in accordance with the laws of the State of Hawaii and shoreline setback line in accordance with County regulation and/or ordinance.

3. Discrepancies, conflicts in boundary lines, shortage in area, encroachments or any other matters which a correct survey or archaeological study would disclose.

122 Hawai'i 34

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Intermediate Court of Appeals of Hawai'i.

MAUNALUA BAY BEACH OHANA 28, a Hawai'i non-profit corporation; Maunalua Bay Beach Ohana 29, a Hawai'i non-profit corporation; Maunalua Bay Beach Ohana 38, a Hawai'i non-profit corporation, individually and on behalf of all others similarly situated, Plaintiffs–Appellees,

v.

STATE of Hawai'i, Defendant–Appellant.

No. 28175.

|

Dec. 30, 2009.

Synopsis

Background: Oceanfront landowners brought inverse-condemnation action to challenge constitutionality of Act which provided that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land. The Circuit Court, First Circuit, Eden Elizabeth Hifo, J., granted landowners' motion for partial summary judgment, and state appealed.

Holdings: The Intermediate Court of Appeals, Watanabe, J., held that:

[1] Act was not an unconstitutional taking of future accretions, and

[2] Act effectuated a taking of accretions that were unregistered as of the effective date of the Act.

Vacated in part and remanded.

Nakamura, C.J., concurred in part and dissented in part with opinion.

West Headnotes (3)

[1] **Water Law**

Title to Land Formed by Accretion or Lost Through Reliction;Effect on Adjacent Owners' Boundaries

Under Hawai'i common law, land accreted to oceanfront property belongs to the oceanfront property owner.

2 Cases that cite this headnote

[2] **Eminent Domain**

Water rights

Act which provided that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land was not an unconstitutional taking of future accretions without just compensation, as oceanfront landowners did not have any vested right to future accretions that might never materialize. Const.Art. 1, § 20, Art, 11, § 1; Laws 2003, Act 73, § 1 et seq.

Cases that cite this headnote

[3] **Eminent Domain**

Water rights

Eminent Domain

Water rights

Act which provided that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land permanently divested oceanfront landowners of ownership rights to any existing accretions to oceanfront property that were unregistered or unrecorded as of the effective date of the Act or for which no application for registration or petition to quiet title was pending and, therefore, Act effectuated a taking of such accretions. Const.Art. 1, § 20; Laws 2003, Act 73, § 1 et seq.

EXHIBIT C

Cases that cite this headnote

Attorneys and Law Firms

**442 Girard D. Lau, Deputy Attorney General (William J. Wynhoff, Deputy Attorney General, with him on the briefs), State of Hawai'i, for Defendant–Appellant.

Paul Alston (Laura P. Couch, with him on the briefs), (Alston Hunt Floyd & Ing), Honolulu, for Plaintiffs–Appellees.

Carl C. Christensen, on the amicus curiae brief, for Hawaii's Thousand Friends.

Robert H. Thomas (Damon Key Leong Kupchak Hastert), Honolulu, on the amicus curiae brief, for Pacific Legal Foundation Hawaii Center.

WATANABE and FOLEY, JJ.; with NAKAMURA, C.J., concurring separately and dissenting.

Opinion

Opinion of the Court by WATANABE, J.

*35 This appeal arises from an inverse-condemnation lawsuit filed by Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay Beach Ohana 38 [1] (collectively, Plaintiffs), on behalf of themselves and all non-governmental owners of oceanfront real property in Hawai'i on and/or after May 19, 2003 (oceanfront, littoral, or *36 **443 riparian owners), challenging the constitutionality of Act 73, 2003 Haw. Sess. Laws at 128 (Act 73). Plaintiffs alleged that Act 73:

> a. Took oceanfront owners' rights to claim accreted land (other than that which restored previously eroded land and that which was the subject of registration or quiet title proceedings on May 20, 2003) and declared all such land to be "state land";
>
> b. Took from oceanfront owners' [sic] their property rights in (1) all accreted oceanfront land which existed on May 20, 2003 and which had not previously been registered or been made the subject of then-pending registration proceedings; and (2) all future accretion which was not proven to be the restored portion of previously accreted land;
>
> c. Damaged oceanfront owners' remaining property by depriving them of ownership of the land abutting the ocean; and
>
> d. Damaged all accreted lands by placing them in the conservation district.

Plaintiffs sought just compensation, blight damages, a declaratory judgment that Act 73 was unenforceable under the Hawai'i State Constitution unless and until Defendant–Appellant State of Hawai'i (State) pays just compensation to Plaintiffs and the class they represented, and an injunction forbidding the State from asserting ownership or control over the affected property and from enforcing Act 73.

On September 1, 2006, the Circuit Court of the First Circuit [2] (circuit court) entered an order granting Plaintiffs' February 13, 2006 amended motion for partial summary judgment (PSJ) on Plaintiffs' claim for declaratory relief. In relevant part, the circuit court declared that

> Act 73 ... represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under [Hawaii Revised Statutes (HRS)] Chapter 501 and/or quieting title under [HRS] Chapter 669.

This interlocutory appeal by the State followed.

We vacate that part of the PSJ order which concluded that Act 73 effected an uncompensated taking of and injury to littoral owners' right to ownership of future accreted land and remand this case to the circuit court for further proceedings consistent with this opinion.

THE LEGAL LANDSCAPE

A. *Definitions and General Doctrines*

In his treatise on real property, Professor Powell notes:

> Where title to real property describes a boundary line as a body of water, the common law has developed

several different doctrines that respond to the issues raised by the moveable nature of those bodies of water. Accretion, dereliction (or reliction), erosion and avulsion are ancient common-law doctrines rooted in the Roman law of alluvion and the civil law doctrine of accession. As applied, these doctrines are as complex and muddy as the movements of the water.

The term "accretion" denotes the process by which an area of land is increased by the gradual deposit of soil due to the action of a boundary river, stream, lake, pond, or tidal waters. The term "dereliction," or its modern counterpart "reliction," denotes the process by which land is exposed by the gradual receding of a body of water. The term "erosion" denotes the process by which land is gradually covered by water. The term "avulsion" denotes the process by which there is a sudden and perceptible change in the location of a body of water.

....

Where the change in location of a body of water is caused by accretion, reliction, or erosion, the boundary line between the abutting landowners moved with the waterway. ***37** ****444** Thus the riparian or littoral owner is given title to lands that are gradually added by accretion or reliction. In some circumstances, whether the accretion occurs on the banks of a river or stream rather than on the banks of other bodies of water may be critical in determining the ownership of the accreted lands. Similarly, a riparian owner loses title to lands that are submerged through the process of erosion. In contrast, if the boundary river, stream, lake, or tidal water changes its location because of the process of avulsion, the boundary line remains the same. In some circumstances, the doctrine of re-emergence [3] will be applied to both accretive and avulsive changes to determine the ownership of certain lands.

Richard M. Powell, 9 *Powell on Real Property* §§ 66.01[1]–66.01[2], at 66–2–66–9 (2006) (footnote added; footnotes omitted).

Some scholars have expressed doubt that the doctrines of accretion, erosion, reliction, and avulsion are actually rules of law, causing a stated result upon the occurrence of stipulated facts, rather than rules of construction used to determine what the grantor of riparian land intended the grantee of the land to receive. *See, e.g.*, 9 *Powell on Real Property* § 66.03[1], at 66–24 (2006); Herbert Thorndike Tiffany, 4 *The Law of Real Property* § 1220 (3d ed.1975 & 2009–2010 cum. supp.). As Professor Tiffany explains,

> if we recognize a distinct doctrine of accretion, in effect a rule of law that an owner of land shall have whatever adjacent land may be created by the gradual action or change of water, the intention of the parties interested in the delimitation of the boundaries of the land is immaterial. In the presence of such a doctrine, the fact that, in conveying the property to its present owner, the grantor expressly retained all future accretions, would be immaterial, as would be the fact that the conveyance, in describing the land, made no reference to the body or stream of water, or to any incident or characteristic thereof. We do not find any case which explicitly decides that one can, in conveying property bounding on water, retain any subsequent accretions thereto, but there are dicta to that effect. The effectiveness of intention in this regard is also indicated by judicial assertions that when the boundary is fixed by the deed at a specified line without reference to the water, the grantee cannot claim accretions beyond such line.... The question whether there is a distinct doctrine of accretion, or whether the so-called doctrine is merely a rule for the ascertainment of boundaries on water, appears to be clearly presented by cases involving the right of one, whose nonriparian land has become riparian by the gradual encroachment of the water, to claim land subsequently formed by the accretion of the water. In such a case, the intention of the grantor of the present proprietor, or of some person anterior to him in the chain

> of title, was to convey land extending only to a boundary away from the water, and consequently if, because his land has become riparian, he is given the benefit of accretions thereto, he is in effect given what it was never the intention of his predecessor in title to convey. If there is a rule of law that accretions belong to the riparian proprietor, he is entitled to the accretions, while otherwise he is not so entitled.

4 *The Law of Real Property* § 1220, at 1075–76 (footnotes omitted).

The doctrine of accretion has been rationalized by courts and commentators on various grounds. Professor Powell summarized and critiqued these rationales as follows:

> Under the Roman law of accession, the owner of the cow also owns the calf, the owner of riparian or littoral land owns the accreted land. This rationale has received little support in recent times and is clearly not relevant when either the process of reliction or erosion is occurring.
>
> ****445 *38** A second rationale occasionally mentioned by the courts and commentators is the ancient legal maxim of *de minimis non curat lex.* There is a logical connection between the de minimis concept and the requirement for accretion, reliction, and erosion that the change be gradual and imperceptible, but the justification has received little modern support since in many accretion cases substantial and valuable acreage is involved.
>
> Another rationale is tautological. Where the parties have designated a body of water as a boundary line, that body of water remains the boundary even if it should change its location. This justification may have been derived from the Roman law where there is no distinction made between accretive and avulsive changes. It is inconsistent, however, with the existence of the doctrine of avulsion because the agreed-to water boundary does not move if the change is determined to be sudden and perceptible.
>
> A fourth rationale is alternatively identified as the productivity or efficiency theory. There are two subsets to this justification. The first notes the inefficiency of small slivers of land surrounded by water and unconnected by land with the owner. The second notes that the adjacent owner is in a better position to use the land than the state or the non-adjacent owner. As stated by the Supreme Court: "it is in the interest of the community, that all lands should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore."
>
> A fifth rationale is a compensation or equity theory. The Supreme Court succinctly summarized this justification when it stated:
>
> > Since a riparian owner is subject to losing land by erosion beyond his [or her] control, he [or she] should benefit from any additions to his [or her] lands by the accretions thereto which are equally beyond his [or her] control.
>
> This rationale has received only modest judicial support and has been criticized as being tautological and based on erroneous assumptions.
>
> The most persuasive and fundamental rationale for a doctrine that permits a boundary to follow the changing location of a body of water is the desirability of maintaining land as riparian that was riparian under earlier conditions, thus assuring the upland owners of access to the water along with the other advantages of such contiguity. A subset of the access to water rationale is the expectancy argument. One who purchases riparian land expects that the land will retain its riparian character even if the body of water moves. An essential attribute of a riparian or littoral parcel is its access to water, so when such a parcel was created or transferred the parties must have intended the transferee to retain that access.

9 *Powell on Real Property* § 66.01[3], at 66–9–66–13.

B. *Hawai'i Supreme Court Precedent*

The supreme court of the Kingdom of Hawai'i first addressed the ownership of accreted lands in *Halstead v. Gay,* 7 Haw. 587 (1889), a case in which the plaintiff sought damages from the defendant for trespassing on land seaward of the boundary of the plaintiff's oceanfront

property, as described in the plaintiff's deed. According to the deed, the property's seaside boundary was "ma kahakai a hiki i ka hope o ka holo mua ana," without distance given. The supreme court explained that "kaha" means "scratch, or mark," " '[k]ai means the sea, or salt water," and as described in the survey, "[k]ahakai ... means the mark of the sea, the junction or edge of the sea and land." *Id.* at 589. The supreme court translated "[a] hiki i kahakai" as "reaching to high water mark" and "ma kahakai a hiki i ka hope o ka holo mua ana" as "along the high water mark to the end of the first course," *id.*, and held, based on this description, that it was "clear" that "[t]he intention is ... to grant to the sea, and make it coterminous with it." *Id.* The supreme court then observed:

> In this kingdom the average rise and fall of the tide is two feet. Where the coast is of rock, high and low water are on the same line. Where it is of sand, the difference between high and low water is generally ***39 **446** too little and too ill-defined and shifting to be taken into account.
>
> Section 387 of the Code, page 92 Compiled Laws, [4] seems to imply that the proprietorship of land adjacent to the beach extended to low water mark, for it enacts that the fisheries for a mile from low water mark are the property of the owners of the lands adjacent and appurtenant, thus making the boundary between the land and the fishery to be the low water line.
>
> But *whether some land between present high and low water has been trespassed upon is not the question in this case, but it is whether land now above high-water mark, which has been formed by imperceptible accretion against the shore line existing at the date of the survey and grant, has become attached by the law of accretion to the land described in the grant. By the definitions we have given, it follows that the plaintiff has the rights of a littoral proprietor, and that the accretion is his.*
>
> *Id.* at 589–90 (emphasis and footnote added).

In *In re Ashford,* 50 Haw. 314, 440 P.2d 76 (1968), the petitioners sought to register title to two parcels of land on the island of Moloka'i, which were described in the royal patents as running "ma ke kai" (along the sea). The petitioners claimed that "the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on the publications of the U.S. Coast and Geodetic Survey." *Id.* at 314–15, 440 P.2d at 77. The State claimed "that 'ma ke kai' is the high water mark that is along the edge of vegetation or the line of debris left by the wash of waves during ordinary high tide[,]" or "approximately 20 to 30 feet above the line claimed by the [petitioners]." *Id.* at 315, 440 P.2d at 77 (footnote omitted). The Hawai'i Supreme Court, in a 4–1 decision, held:

> *We are of the opinion that 'ma ke kai' is along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves,* and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.
>
> ....
>
> When the royal patents were issued in 1866 by King Kamehameha V, the sovereign, not having any knowledge of the data contained in the publications of the U.S. Coast and Geodetic Survey, did not intend to and did not grant title to the land along the ocean boundary as claimed by the [petitioners]. Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. The method of locating the seaward boundaries was by reputation evidence from kamaainas [5] and by the custom and practice of the government's survey office. It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof.
>
> In this jurisdiction, it has long been the rule, based on necessity, to allow reputation evidence by kamaaina witnesses in land disputes. The rule has a historical ***40 **447** basis unique to Hawaiian land law. It was the custom of the ancient Hawaiians to name each division of land and the boundaries of each division were known to the people living thereon or in the neighborhood. 'Some persons were specially taught and made repositories of this knowledge, and it was carefully delivered from father to son.' With the Great Mahele in 1848, these kamaainas, who knew and lived in the area, went on the land with the government surveyors and pointed out the boundaries to the various divisions of land. In land disputes following the Great

Mahele, the early opinions of this court show that the testimony of kamaaina witnesses were permitted into evidence. In some cases, the outcome of decisions turned on such testimony.

> Two kamaaina witnesses, living in the area of [petitioners'] land, testified, over [petitioners'] objections, that according to ancient tradition, custom and usage, the location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves as represented by the edge of vegetation or the line of debris. In ancient Hawaii, the line of growth of a certain kind of tree, herb or grass sometimes made up a boundary.
>
> Cases cited from other jurisdictions cannot be used in determining the intention of the King in 1866.

Id. at 316–17, 440 P.2d at 77–78 (footnote added; citations and footnotes omitted).

Five years later, the Hawai'i Supreme Court further developed the rule pronounced in *Ashford* in an eminent-domain case initiated by the County of Hawai'i to acquire a park site. *County of Hawaii v. Sotomura,* 55 Haw. 176, 517 P.2d 57 (1973). In *Sotomura,* unlike in *Ashford,* the seaward boundary of the property at issue had been registered with the land court in 1962. The defendant property owners argued that "because land court proceedings are res judicata and conclusive against all persons as to the boundary determination, the certificate of registration [with the land court] shall be conclusive evidence of the location of the seaward boundary[,]" even if the seaward boundary had subsequently eroded. *Id.* at 178, 517 P.2d at 60. The supreme court disagreed with the property owners and held

> that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501–81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along the high water mark remains conclusive; however, the precise location of the high water mark on the ground is subject to change and may always be altered by erosion.

Id. at 181, 517 P.2d at 61. The supreme court then said:

> Having concluded that the trial court properly determined that the seaward boundary had been altered by erosion and the location of the high water mark has shifted, we now hold that the new location of the seaward boundary on the ground, as a matter of law, is to be determined by our decision in *In re Application of Ashford, supra.*
>
> The *Ashford* decision was a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right. Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.
>
> The trial court correctly determined that the seaward boundary lies along "the upper reaches of the wash of waves." However, the court erred in locating the boundary along the debris line, rather than along the vegetation line.
>
> We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation ***41 **448** line is a more permanent monument, its growth limited by the year's highest wash of the waves.

Id. at 182, 517 P.2d at 61–62 (citation and footnote omitted). The supreme court then turned its attention to the question of whether title to land lost by erosion passes to the State and stated:

> In the absence of kamaaina testimony or other evidence of Hawaiian custom relevant to the question, we resort to common law principles:

> The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership.... [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo,* 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

We find another line of cases persuasive to determine this question. Land below the high water mark, like flowing water, is a natural resource owned by the state, "subject to, but in some sense in trust for, the enjoyment of certain public rights." *Bishop v. Mahiko,* 35 Haw. 608, 647 (1940). The public trust doctrine, as this theory is commonly known, was adopted by this court in *King v. Oahu Railway & Land Co.,* 11 Haw. 717 (1899). In that case we adopted the reasoning of the United States Supreme Court in *Illinois Central R.R. v. Illinois,* 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892), holding that title to land below the high water mark was:

> ... different in character from that which the state holds in lands intended for sale.... It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.... The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. *King v. Oahu Railway & Land Co.,* 11 Haw. at 723–24.

We hold that the land below the *Ashford* seaward boundary line as to be redetermined belongs to the State of Hawaii, and the defendants should not be compensated therefor.

Id. at 183–84, 517 P.2d at 62–63 (brackets and ellipses in original).

In *In re Sanborn,* 57 Haw. 585, 562 P.2d 771 (1977), the appellees had sought approval from the County of Kaua'i (Kaua'i) to subdivide a beachfront lot into two smaller lots. Pursuant to the then-recently enacted state-shoreline-setback act, HRS §§ 205–31 through 205–37 (Supp.1975), the appellees were required to submit to the Kaua'i planning department a map of their property, certified partly by the state land surveyor (state surveyor). When the state surveyor refused to certify the map prepared by the appellees, they sued. *Id.* at 587, 562 P.2d at 772. The land court recognized that the vegetation and debris line drawn on a map of the appellees' property represented "the 'upper reaches of the wash of waves' during ordinary high tide during the winter season, when the ... waves are further mauka (or inland) than the highest wash of waves during the summer season." *Id.* at 588, 562 P.2d at 773. However, the land court denied legal significance to the vegetation and debris line, determining instead that the appellees' "beachfront title is fixed by certain distances and azimuths set out in the 1951 land court decree of registering title to the property." *Id.* at 589, 562 P.2d at 774. When these distances and azimuths were plotted on a map of the appellees' property, "they gave a line approximately 40 to 45 feet makai (seaward) of the 'vegetation and debris line'." *Id.,* 562 P.2d at 774. On appeal by the state surveyor, the Hawai'i Supreme Court held:

> It is undisputed that during the course of the year actual high water mark varies, with ordinary winter tides reaching substantially further mauka than ordinary summer tides, primarily due to the washing out of beach sands during the winter months. However it is also undisputed ***42 **449** that, because of the annual return of sands during the summer months, there has been no substantial *permanent* erosion of the [appellees'] beach since 1951.
>
> The court below held that, because there has been no permanent erosion since 1951, the State is bound by the measurements in the 1951 decree. We reverse. We hold that, regardless of whether or not there has been permanent erosion, the [appellees'] beachfront title boundary is the upper reaches of the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the [appellees'] title line as being "along the high water mark at seashore", we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise. The evidence adduced at trial below established that the 1951 measurements do not reflect (and given the lack of permanent erosion, probably never reflected) the upper reaches of the wash of waves. Rather, the trial court made the finding of fact that the "vegetation and debris line" represents the

upper reaches of the wash of waves. Such finding was not clearly erroneous. Accordingly, the "vegetation and debris line" represents the [appellees'] beachfront title line.

Id. at 589–91, 562 P.2d at 774–75. The supreme court then addressed the appellees' contention that HRS § 501–71 gave binding effect to the specific distances and azimuths set out in the 1951 decree for the line of high water. HRS § 501–71 provided then, as it does currently, in relevant part, as follows:

> Every decree of registration of absolute title shall bind the land, and quiet the title thereto, subject only to the exceptions stated in section 501–82. It shall be conclusive upon and against all persons, including the State[.]

Id. at 591, 562 P.2d at 775; HRS § 501–71 (2006). The supreme court stated that although the foregoing statute literally "states in general terms that a land court decree of registration shall bind the land and be conclusive [,]" "[t]he section does not say that every aspect of a land court decree is always conclusive." *Id.*, 562 P.2d at 775. The supreme court explained that

> [t]he underlying purpose of land court registration under the Torrens system is to afford certainty of title, but it is unrealistic to afford absolute certainty. Our statute explicitly states certain exceptions to the conclusiveness of land court decrees, both in HRS § 501–82 and in HRS § 501–71.... Such stated exceptions are not necessarily the sole limitations upon a Torrens decree of registration.
>
> ....
>
> In Hawaii, the public trust doctrine, recognized in our case law prior to the enactment of our land court statute, can similarly be deemed to create an exception to our land court statute, thus invalidating any purported registration of land below high water mark. Although the instant case is decided on narrower grounds, *infra,* we approve this court's analysis in *Sotomura, supra,* 55 Haw. at 183–84, 517 P.2d at 63, where it is stated, with reference to land courted property, that land below high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes. Under this analysis, any purported registration below the upper reaches of the wash of waves in favor of the appellees was ineffective.
>
> ....
>
> In *McCandless v. Du Roi,* 23 Haw. 51 (1915), this court stated that land court decrees are subject to the same rules of construction generally applicable to deeds and that therefore, in construing a land court decree, " 'course and distance will yield to known visible and definite objects whether natural or artificial.' " 23 Haw. at 54.
>
> ....
>
> We follow *McCandless,* finding that in the 1951 decree the natural monument "along high water mark" controls over the specific distances and azimuths. We further find that the true line of high water in this jurisdiction is along the upper reaches of the wash of waves, as discussed in *In re* ***43 **450** *Application of Ashford,* and *Sotomura, supra.*

Id. at 591–96, 562 P.2d at 775–77 (footnotes and some citations omitted). The supreme court then turned its attention to the appellees' contention that "both the Hawaii and federal constitutions would be violated if this court fixes [their] title line along the upper reaches of the wash of waves" because "such an adjudication would be a taking of private property for public use without just compensation." *Id.*, 562 P.2d at 777–78. The supreme court held as follows:

> Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the [appellees'] title extends to a line "along high water mark". We affirm the holding in *McCandless, supra,* that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.
>
> ....
>
> The absence of a clear legal standard in 1951 tends to disprove the existence of a reasonable expectation in 1951 that the land court would be able to fix

> conclusively the distances and azimuths of high water. Moreover, as of 1951 the *McCandless* decision had been standing undisturbed for over 35 years. It would have been unreasonable for the parties to rely on specific distances and azimuths after *McCandless* had held that such measurements are inconclusive.

Id. at 597, 562 P.2d at 778.

In *State v. Zimring,* 58 Haw. 106, 566 P.2d 725 (1977), the State sought to quiet title in itself as against the Zimrings and their predecessors-in-interest to approximately 7.9 acres of new land that had been added to the Zimrings' shoreline property by the Puna volcanic eruption of 1955 (lava extension). The Zimrings' deed described the oceanfront boundary of their property as being "along high water mark[.]" *Id.* at 108, 566 P.2d at 728. The Hawai'i Supreme Court initially observed that historically, "the people of Hawaii are the original owners of all Hawaiian land." *Id.* at 111, 566 P.2d at 729. However, bowing to pressure exerted by foreign residents who sought fee title to land, "King Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840's" which necessarily diminished the lands in the public domain. *Id.,* 566 P.2d at 729. The supreme court stated:

> This encapsulation of the original and development of the private title in Hawaii makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or granted, such land remains in the public domain. To establish legally cognizable private title to land in the great majority of cases, one must show that he or a predecessor-in-interest acquired a Land Commission Award, a Royal Patent, a Kamehameha Deed, a Grant, a Royal Patent Grant, or other government grant for the land in question. Such award for grant can be demonstrated by either the document itself or through the application of the "presumption of a lost grant."
>
> Aside from acquisition of documented title, one can also show acquisition of private ownership through operation of common law or as established by pre–1892 Hawaiian usage pursuant to HRS § 1–1....
>
> Therefore, we find the State's position that all land not awarded or granted remains public land to be basically correct. We would only add that transfer to private ownership can also be shown through the operation of common law or as established by pre–1892 Hawaiian usage.

Id. at 114–15, 566 P.2d at 731. The supreme court held that there was a paucity of evidence adduced that "Hawaii usage prior to 1892 gave to the owner of the land along the seashore, title to land created by volcanic eruption when the eruption destroyed the pre-existing seashore boundary and formed a new boundary along the sea[.]" *Id.* at 118, 566 P.2d at 733. The supreme court also disagreed with the Zimrings that "the common law on accretion and avulsion in other states is not directly on point" and held that

> [a]s known at common law, "the term 'accretion' denotes the process by which the ***44 **451** area of owned land is increased by the gradual deposit of soil due to the action of a bounding river, stream, lake, pond, or tidal waters." 7 R. Powell, Real Property (1976) ¶ 983. When accretion is found, the owner of the contiguous land takes title to the accreted land. Professor Powell indicates that the "basic justification for a doctrine which permits a boundary to follow the changing stream bank is the desirability of keeping land riparian which was riparian under earlier facts, thus assuring the upland owners access to the water and the advantages of this contiguity." *Id.*
>
> *While the accretion doctrine is founded on the public policy that littoral access should be preserved where possible, the law in other jurisdictions makes it clear that the preservation of littoral access is not sacrosanct and must sometimes defer to other interests and considerations. For example, it is well established in California "that accretions formed gradually and imperceptibly, but caused entirely by artificial means ... belong to the state or its grantee, and do not belong to the upland owner. In California it is also well settled that being cut off from contact with the sea is not basis for proper complaint.*
>
> ....
>
> Likewise, in cases where there have been rapid, easily perceived and sometimes violent shifts of land (avulsion) incident to floods, storms, or channel breakthroughs, preexisting legal foundations are retained notwithstanding the fact that former riparian owners may have lost their access to the water.

In determining in whom lava extensions should vest, we are guided by equitable principles and must balance between competing interests. On the one hand, there is the interest of the former littoral owner seeking to regain access to the ocean. On the other hand is the interest of the public at large, the original and ultimate owner of all Hawaiian land.

Certainly, a grant of the lava extension to the former littoral owner would compensate him [or her] for the loss of the beach-frontage character of his [or her] property. However, it is the windfall of the added acreage which such owner would also be afforded which this court finds troublesome. If a one-third acre parcel fronting the ocean is flowed over by lava which adds one or two seaward acres to the parcel, is it equitable that its owner acquire property which is three or six times the size of the preexisting parcel? If a littoral owner is to be thus compensated for lava devastation, should not an upland pasture or farm owner be also compensated with pasture or farm land for the destruction of what had been the chief economic attribute of the parcel?

It is impossible for any court to fashion a legal doctrine which will equitably compensate all victims of lava devastation. This court believes that it is within the province of the legislature to determine the nature and extent of compensation for such natural disasters.

Rather than allowing only a few of the many lava victims the windfall of lava extensions, this court believes that equity and sound public policy demand that such land inure to the benefit of all the people of Hawaii, in whose behalf the government acts as trustee. Given the paucity of land in our island state and the concentration of private ownership in relatively few citizens, a policy enriching only a few would be unwise. Thus we hold that lava extensions vest when created in the people of Hawaii, held in public trust by the government for the benefit, use and enjoyment of all the people.

Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, *e.g.,* recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

> While the Zimrings cannot be granted the private beachfront title which they seek, they, as members of the public, would share in public access to the lava extension and to the ocean, unless the interest in allowing public access is outweighed by some other public interest, or ***45 **452** unless the land is sold in furtherance of the public interest.

Id. at 120–21, 566 P.2d at 734–35 (emphasis added; some ellipses in original; citations and footnotes omitted).

In *In re Application of Banning,* 73 Haw. 297, 832 P.2d 724 (1992), the Trustees of Kalama Community Trust (Trustees) filed a petition with the land court pursuant to HRS § 501–33[6] to register title to approximately 0.251 acres of "accreted" land fronting their Kailua shoreline property and joined and served all neighboring landowners. A neighboring landowner and the State asserted that registration should be denied because the alleged "accretion" to the Trustees' property "was not natural and permanent." *Id.* at 302, 832 P.2d at 727. The land court found that the "accreted" land was permanent and natural but that it had been used by the general public for recreation and access to the beach for at least twenty years, with the acquiescence of the Trustees, and had therefore been impliedly dedicated to the general public. *Id.,* 832 P.2d at 727–28. On appeal, the supreme court reversed the land court's finding of implied dedication to the general public. In doing so, the supreme court initially observed:

> "Land now above the high water mark, which has been formed by imperceptible accretion against the shore line of a grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor." *Halstead v. Gray[Gay],* 7 Haw. 587 (1889). "[T]he accretion doctrine is founded on the public policy that littoral access should be preserved where possible...." *State v. Zimring,* 58 Haw. 106, 119, 566 P.2d 725, 734 (1977).
>
> > [Other] reasons ordinarily given for th[is] general rule as to accretions are ... that the loss or gain is so imperceptible that it is impossible to identify and follow the soil lost or to prove where it came from, that small portions of land between upland and water should not be allowed to lie idle and ownerless, or that, since the riparian owner may

> lose soil by the action of the water, he should have the benefit of any land gained by the same action.
>
> 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted).

Id. at 303–04, 832 P.2d at 728 (brackets and ellipsis in original). The supreme court also stated:

> We have acknowledged in *Hawaii County v. Sotomura,* 55 Haw. 176, 517 P.2d 57 (1973), *cert. denied,* 419 U.S. 872[, 95 S.Ct. 132, 42 L.Ed.2d 111] (1974), that public policy "favors extending to public use and ownership as much of Hawaii's shoreline as is *reasonably* possible." *Id.* at 182, 517 P.2d at 61–62 (emphasis added). This interest must be balanced against the littoral landowner's right to the enjoyment of his land.
>
> Under the facts of this case, public access to the beach can be preserved without infringing on the enjoyment of the littoral landowner in his accreted land.

Id. at 309–10, 832 P.2d at 731.

More recently, in *Diamond v. State,* 112 Hawai'i 161, 145 P.3d 704 (2006), the supreme court was called upon to determine the proper location of the shoreline under HRS chapter 205A, the Coastal Zone Management Act (CZMA). Pursuant to HRS § 205A–1 (2001), "[s]horeline" is defined as the "upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetarian growth, or the upper limit of debris left by the wash of the waves." This definition is thus equivalent to the Hawai'i Supreme Court's delineation of the boundary dividing private land from public beaches that was adopted in *Ashford.* Under the CZMA, the state board of land and natural resources (BLNR) is responsible for certifying the shoreline of an ***46 **453** oceanfront property for building-setback purposes. HRS § 205A–42 (2001). A certified shoreline, which is valid for twelve months, HRS § 205A–42(a), is the baseline that is used to (1) measure the shoreline setback line, defined as "that line established in this part [III [7]] or by the county running inland from the shoreline at a horizontal plane," HRS § 205A–41 (2001) (footnote added); and (2) determine the " shoreline area," which encompasses "all of the land area between the shoreline and the shoreline setback line," HRS § 205A–41, where structures and certain activities are prohibited by statute. *See* HRS § 205A–44 (2001).

In *Diamond,* an oceanfront property owner hired a contractor to cut the trees on the owner's property, hired a landscaper to plant salt-tolerant vegetation in the shoreline area of the property, and installed an irrigation line to water the newly planted vegetation. *Id.* at 164, 145 P.3d at 707. In certifying the property's shoreline, the BLNR used the "stable vegetation line"—the line where plants, "without continued human intervention, are well-established and would not be uprooted, broken off, or unable to survive occasional wash or run-up of waves"—even though the vegetation had originally been induced by human hands and the debris line representing the upper wash of the waves occur[red] mauka (inward) of the vegetation line. *Id.* at 168, 145 P.3d at 711.

The Hawai'i Supreme Court held that based on the plain and obvious meaning of the statute, the statute's legislative history, and relevant case law, the shoreline should be certified at the "highest reach of the highest wash of the waves," *id.* at 172–73, 145 P.3d at 715–16, and BLNR therefore erred in certifying the shoreline based on a per se rule establishing the primacy of a vegetation line, which is a more permanent monument, over the debris line. *Id.* at 174–75, 145 P.3d at 717–18. The supreme court noted that its *Sotomura* decision "clearly favored the public policy of extending 'as much of Hawaii's shoreline as is reasonably possible' to public ownership and use" and, therefore, the vegetation line cannot trump the debris line if the debris line is mauka of the vegetation line. *Id.* at 175, 145 P.3d at 718. The supreme court also rejected the use of artificially planted vegetation to determine the certified shoreline, stating:

> The utilization of artificially planted vegetation in determining the certified shoreline encourages private land owners to plant and promote salt-tolerant vegetation to extend their land further makai, which is contrary to the objectives and policies of HRS chapter 205A as well as the public policy we set forth in *Sotomura.* Merely because artificially planted vegetation survives more than

> one year does not deem it "naturally rooted and growing" such that it can be utilized to determine the shoreline. We therefore reconfirm the public policy set forth in *Sotomura* and HRS chapter 205A and reject attempts by landowners to evade this policy by artificial extensions of the vegetation lines on their properties.

Id. at 175–76, 145 P.3d at 718–19.

In summary, under Hawai'i Supreme Court precedent, (1) the "highest reach of the highest wash of the waves" delineates the boundary between private oceanfront property and public property for ownership purposes, as well as the baseline for measuring the shoreline setback line and determining the shoreline area, the so-called no-building zone, notwithstanding that the deed for the oceanfront property describes the property by "certain distances and azimuths" that put the seaward boundary of the property below the high-water mark, *In re Sanborn,* 57 Haw. at 589, 562 P.2d at 774; (2) land added to oceanfront property through avulsive lava extension belongs to the State; and (3) land added to oceanfront property through accretion belongs to the oceanfront property owner.

C. *The Statutory Landscape*

1. Act 221, 1985 Haw. Sess. Laws at 401 (Act 221)

In 1985, the Hawai'i State Legislature passed House Bill No. 194, entitled "A Bill for an Act Relating to Accretion[,]" which ***47 **454** was signed into law by the Governor as Act 221 on June 4, 1985. Act 221 provided, in relevant part, as follows:

> SECTION 1. Chapter 183, [HRS], is amended by adding a new section to be appropriately designated and to read as follows:
>
> " **§ 183–45 Accreted land.** No structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion, shall be permitted to accreted land as judicially decreed under section 501–33 or 669–1(e). This provision shall not in any way be construed to affect state or county property. Any structure or action in violation of this provision shall be immediately removed or stopped and the property owner shall be fined in accordance with section 183–41(e). Any action taken to impose or collect the penalty provided for in this subsection shall be considered a civil action."
>
> SECTION 2. Chapter 501, [HRS], is amended by adding a new section to be designated and to read as follows:
>
> " **§ 501–33 Accretion to land.** An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence at least twenty years. The accreted portion of the land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183–45."
>
> SECTION 3. Section 669–1, [HRS], is amended to read as follows:
>
> " **§ 669–1 Object of action.** (a) Action may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim.
>
> (b) Action for the purpose of establishing title to a parcel of real property of five acres or less may be brought by any person who has been in adverse possession of the real property for not less than twenty years. Action for the purpose of establishing title to a parcel of real property of greater than five acres may be brought by any person who had been in adverse

possession of the real property for not less than twenty years prior to November 7, 1978, or for not less than earlier applicable time periods of adverse possession. For purposes of this section, any person claiming title by adverse possession shall show that such person acted in good faith. Good faith means that, under all the facts and circumstances, a reasonable person would believe that he or she has an interest in title to the lands in question and such belief is based on inheritance, a written instrument of conveyance, or the judgment of a court of competent jurisdiction.

(c) Action brought to claim property of five acres or less on the basis of adverse possession may be asserted in good faith by any person not more than once in twenty years, after November 7, 1978.

(d) Action under subsection (a) or (b) shall be brought in the circuit court of the circuit in which the property is situated.

(e) Action may be brought by any person to quiet title to land by accretion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183–45."

(New statutory material is underscored.)

The legislative history of Act 221 indicates that one of the primary purposes of the act was "to protect the public's access to and enjoyment of Hawaii's beaches." H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142; S. Stand. Comm. Rep. No. 790, in 1985 Senate Journal, at 1223; S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291. The House Committees on Water, Land Use, Development and Hawaiian Affairs *48 **455 (WLUDHA) and Judiciary explained, in pertinent part, as follows:

Your Committees find that a recent problem has occurred along Hawaii's shoreline in places where there are extreme shifts in sand. In such locations, landowners have constructed seawalls to protect lands created by sand movement. The construction of a seawall often causes ocean currents to move laterally along the seashore. As a result, land adjacent to the lot in which the seawall is constructed begins to erode. This prompts the owner of the eroding land to build a second seawall. This sequence repeats itself as the ocean currents move along the beach.

As seawalls are constructed, two problems arise. First, a wide stretch of beach is destroyed. Only rock walls standing next to the water are left in its wake. Second, public access to the shoreline and ocean is inhibited.

This bill protects the public's access to and enjoyment of Hawaii's beaches by adding a new section to Chapter 183, Hawaii Revised Statutes. The section prohibits the construction of structures or seawalls, dredging, or grading, or other use of accreted land to which title has been obtained by judicial decree after the enactment of this bill and which interferes or may interfere with the future natural course of the beach.

H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142–43. Similarly, the Senate Judiciary Committee stated that House Bill No. 194 "will protect public's access to beaches, as well as to provide for the minimal interference with the natural processes of beach accretion and erosion." S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291.

Another legislative purpose of Act 221 was to establish a burden of proof and provide clear standards in cases where oceanfront property owners seek to register or quiet title to accreted lands. In this regard, the House Committees on WLUDHA and Judiciary reported:

This bill also amends Chapter 501, [HRS], which relates to registration of land registered under the Land Court system, by adding a new section to the chapter. The section states that an application to register accreted lands may be granted only if the applicant proves by a clear [8] preponderance of the evidence that the accretion is natural and permanent. An accretion is deemed to be "permanent" if it has been in existence for more than twenty years.

Similarly, this bill amends Section 669–1, [HRS], which relates to actions to quiet title, by adding a new subsection. The subsection also requires that a person bringing an action to quiet title to accreted land prove by a clear [[[[[[9]] preponderance of the evidence that

the accretion is natural and permanent. Again, an accretion is "permanent" if it has been in existence for more than twenty years.

Your Committees do not intend to affect the existing law in regard to ownership of and other rights relating to land created by accretion, and it is the intent of your Committees that the bill does not affect existing law.
H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142–43 (footnotes added). The Senate Judiciary Committee also explained:

> Problems have arisen along Hawaii's shoreline where the sand movement is extensive. Some beachfront owners have taken advantage of calm years when the vegetation line advances seaward to secure title to the new land. At the present time, courts have no clear standard for determining when accreted land becomes permanent and stable. This bill will remedy the problem.

S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291.
Written testimony submitted in support of House Bill No. 194 expressed the need for *49 **456 clearer standards. For example, Dr. Doak C. Cox (Dr. Cox) of the University of Hawai'i Environmental Center testified, in pertinent part:

HB 194 pertains to the registration and land-use designation of accreted land and to measures that may affect the erosion or further accretion to such land....

Before discussing details of the provisions proposed in the bill we wish to identify the problem in coastal-zone management that it is clearly intended to mitigate, and that it will indeed mitigate to a significant extent.

Natural coastal accretion, and its reciprocal, erosion, are processes whose human significance is restricted in Hawaii mainly to beaches. Particularly on open coasts, beaches are geomorphologically unstable features, being subject to extension and/or retreat on time scales ranging from seconds to durations of purely geological interest. By principles of common law applicable in Hawaii, the owner of land mauka of a beach shoreline loses title to land that is lost by erosion, that is through retreat, and gains title to land that is gained by accretion, that is through extension, at least when the erosion or accretion has persisted for some time.

Annual cycles are particularly marked on many Hawaiian beaches. It would be irrational to allow a land owner to claim ownership to land gained by beach extension during one season that will be lost less than a year later; and the courts generally do not apply to the annual cycles of extension and retreat the legal principles of accretion and erosion. However, many Hawaiian open coastal beaches have a history of not only annual cycles but net progressive retreat, net progressive extension, or successive periods of several decades duration during which there has been net progressive retreat and extension. It is with the implications of these longer term changes that HB 194 is concerned.

The principal problem that would be mitigated by the provisions proposed in the bill relates to the likelihood that the owner of land to which there has been net accretion over several years may treat the accretion as if permanent, will erect structures on it that will be at risk if there is a subsequent erosion, and will then attempt to save these structures by erecting a sea wall or similar structure along the shore. Such a structure would very likely seriously decrease the chances of subsequent accretion even during a period when such accretion would occur naturally.

The bill would require "proof by clear [10] preponderance of the evidence" that the accretion "has been in existence for at least twenty years" as a condition to the registration of the accreted land by the Land Court.

There are beaches in Hawaii on which net accretion over a period of as long as 20 years has been followed by net erosion over a period of similar duration. Nevertheless, the proposed 20–year criterion for registration is reasonable considering the provision of the bill that would place the accreted land in the Conservation District and the provision prohibiting measures that would affect the natural processes which might result in subsequent erosion or future further accretion.

> Statement by Dr. Cox on House Bill No. 194, Relating to Accretion for House Committees on WLUDHA and Judiciary, February 8, 1985 (footnote added).

2. Act 73

In 2003, the Hawai'i State Legislature passed House Bill No. 192, which was signed into law as Act 73 [11] on May 20, 2003, the *50 **457 date Act 73 became effective. Act 73 amended HRS §§ 501–33 and 669–1(e) to provide that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land. Act 73 also amended HRS §§ 171–2, 501–33, and 669–1 to provide that, henceforth, accreted lands not otherwise awarded shall be considered "[p]ublic lands" or "state land."

The conference committee considering House Bill No. 192 indicated that

> [t]he purpose of this bill is to protect public beach land by:
>
> (1) Including accreted lands, that is lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of nature forces, in the definition of state public lands;
>
> (2) Providing that no applicant other than the State shall register accreted lands, with the exception of certain private property owners;
>
> (3) Allowing a private property owner to file an accretion claim to regain title to and register the owner's eroded land that has been restored by accretion; and
>
> **458 *51 (4) Requiring the agency receiving the accretion application to supply the Office of Environmental Quality Control (OEQC) with a notice for publication in the OEQC's periodic bulletin.

Conf. Comm. Rep. No. 2, in 2003 House Journal, at 1700, 2003 Senate Journal, at 945. The Senate Committee on Judiciary and Hawaiian Affairs found that

> this measure will stop the unlawful taking of public beach land under the guise of fulfilling a nonexistent littoral right supposedly belonging to shorefront property owners. The measure will help Hawaii's public lands and fragile beaches by ensuring that coastal property owners do not inappropriately claim newly deposited lands makai of their property as their own.

S. Stand. Comm. Rep. No. 1224, in 2003 Senate Journal, at 1546. The House Committee on Judiciary similarly found "it crucial to protect public beaches from being transformed into private lands through the filing of accretion claims, except to restore to private ownership portions of private land removed by erosion." H. Stand. Comm. Rep. No. 626, in 2003 House Journal, at 1360.

PROCEDURAL HISTORY OF THE UNDERLYING LAWSUIT

On May 19, 2005, one day shy of two years from the date of Act 73's enactment, [12] Plaintiffs filed the underlying complaint in the circuit court.

On December 30, 2005, the circuit court, over the State's objection, entered an order granting Plaintiffs' October 28, 2005 Amended Motion for Class Certification and certified a class of plaintiffs consisting of "[a]ll non-governmental owners of oceanfront real property in the State of Hawai'i on and/or after May 19, 2003" (Class Certification Order) This order was not certified as final for appeal purposes and is therefore not before us.

On February 13, 2006, Plaintiffs filed an amended motion for PSJ "on their claim for Injunctive Relief, barring enforcement of [Act 73] unless and until the State of Hawai'i acknowledges that it must provide just compensation to the class members and undertakes to do so in conjunction with these proceedings." Plaintiffs claimed that they were "entitled to [PSJ] in their favor ... because there is no dispute that Act 73 is a taking of private property and no dispute that the State is refusing to pay for such taking. Injunctive Relief is necessary to enjoin the State's unlawful exercise of ownership over private real property rights it refuses to pay for." Plaintiffs argued that their motion should be granted because (1) "[i]t is undisputed that Plaintiffs owned property rights to accretion that the State wrongfully appropriated by

its enactment of Act 73;" (2) "[i]t is undisputed that the State has refused to pay for Plaintiffs' accreted property rights;" and (3) "Plaintiffs are entitled to injunctive relief as a matter of law because Plaintiffs must be protected against the State's unconstitutional actions." Plaintiffs argued that

> [o]rdinarily, the remedy for an unconstitutional taking of real property is payment of just compensation via an inverse condemnation proceeding. Here, however, the situation is different. Because the legislative scheme did not intend or provide for damages, this Court is able to grant the unique remedy of precluding enforcement of Act 73. Where a legislative act takes a property right without providing for payment of just compensation, injunctive relief is appropriate.

On September 1, 2006, the circuit court entered an order granting Plaintiffs' amended motion for PSJ "insofar as Plaintiffs sought declaratory relief." No injunctive relief was granted. In its order, the circuit court held, in relevant part, as follows:

> Having considered the memoranda filed by the parties, the arguments of counsel, and the records and files in this action, the Court finds that there are no disputed issues of material fact and that [P]laintiffs are entitled to partial summary judgment as a matter of law as follows:
>
> **459 *52 (1) [Act 73] represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669.
>
> (2) [Act 221] was not intended to alter, and did not alter, the common law of Hawai'i with respect to the ownership of accreted land by the littoral owner. Such land belongs to the littoral landowner, whether or not title thereto is registered under [HRS] Chapter 501 or quieted under [HRS] Chapter 669, and it was not taken by the State from littoral landowners so long as the littoral landowners remained free to register title thereto accretion [sic] under [HRS] Chapter 501 or quiet title thereto under [HRS] Stat. Chapter 669.
>
> (3) Land which accreted naturally and imperceptibly before Act 221 was not made "public land," and was not taken from littoral landowners by the State so long as littoral landowners remain free to register title to the accreted land under [HRS] Chapter 501 and/or quiet title under [HRS] Chapter 669;
>
> (4) Land which accreted naturally and imperceptibly after Act 221 is not public land and was not and was not [sic] taken by the State from littoral landowners by Act 73, even if the land is not "permanent" within the meaning of Act 221, so long as littoral landowners remains [sic] free to register title to "permanent" accreted land under [HRS] Chapter 501 and/or quiet title under [HRS] Chapter 669.
>
> Accordingly, for good cause it is ORDERED that the Amended Motion for Summary Judgment is GRANTED insofar as Plaintiffs sought declaratory relief.

On September 12, 2006, the parties filed their Stipulation for Leave to File Interlocutory Appeal and Order.

On September 27, 2006, the State filed its Notice of Appeal.

DISCUSSION

The dispositive issue in this case is whether the circuit court correctly held that Act 73 "effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be 'public land' and prohibited littoral owners from registering existing and future

accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669."

A. *Whether Plaintiffs Have Vested Property Rights in Future Accretions*

The circuit court concluded that Act 73 "represented a sudden change in the common law and effected an uncompensated taking of littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be 'public land' and prohibited littoral owners from registering ... future accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669."

[1] It is true that under Hawai'i common law, land accreted to oceanfront property belongs to the oceanfront property owner, and under Act 73, all accreted lands (except those which restored eroded lands or were the subject of proceedings pending at the time Act 73 was enacted) now belong to the State. However, pursuant to HRS § 1–1 (1993):

> **Common law of the State; exceptions.** The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, *except as otherwise expressly provided* by the Constitution or laws of the United States, or *by the laws of the State,* or fixed by Hawaiian judicial precedent, or established by Hawaiian usage[.]

(Emphases added.) Furthermore, the Hawai'i Supreme Court has held that "our state ***53** ****460** legislature may, by legislative act, change or entirely abrogate common law rules through its exercise of the legislative power under the Hawaii State Constitution, but in the exercise of such power, the legislature may not violate a constitutional provision." *Fujioka v. Kam,* 55 Haw. 7, 9, 514 P.2d 568, 570 (1973).

[2] In their underlying complaint, Plaintiffs claimed that Act 73 took their right to future accretions and thereby violated article I, section 20 of the Hawai'i State Constitution, which states: "Private property shall not be taken or damaged for public use without just compensation." However, any claims that Plaintiffs may have to future accretions are purely speculative, and other courts have held that a riparian owner has no vested right to future accretions.

In *Western Pac. Ry. Co. v. Southern Pac. Co.,* 151 F. 376 (9th Cir.1907), for example, the Ninth Circuit Court of Appeals, in rejecting dictum in *County of St. Clair v. Lovingston,* 23 Wall. 46, 90 U.S. 46, 68, 23 L.Ed. 59 (1874), that "[t]he riparian right to future alluvion is a vested right [,]" held: "We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists." *Western Pac. Ry. Co.,* 151 F. at 399. After distinguishing vested, expectant, and contingent rights, the court concluded: "Within that definition of vested rights, there can be no question, we think, that the right to future possible accretion could be divested by legislative action." *Id. See also Cohen v. United States,* 162 F. 364, 370 (C.C.N.D.Cal.1908) ("The riparian owner has no vested right in future accretions. The riparian owner cannot have a present vested right to that which does not exist, and which may never have an existence.") (citations omitted); *Latourette v. United States,* 150 F.Supp. 123, 126 (D.Ore.1957) (The "plaintiff had no vested right in the continuance of future accretions to his property by way of sands carried by the winds and in turn washed by the sea upon his lands.").

In a somewhat similar situation, the Hawai'i Supreme Court held that it was not unconstitutional to terminate, by legislation, a statute that granted exclusive fishing rights in offshore fisheries to certain tenants of an ahupua'a. *Damon v. Tsutsui,* 31 Haw. 678, 693 (1930). The supreme court explained that as to these tenants, the repealed statute "amounted to nothing more than an offer to give them certain fishing rights when they should become tenants,-an offer which was withdrawn before they were in a position to accept it." *Id.* at 693. Additionally, the supreme court said:

> When the repealing statute went into effect there had been no identification of the tenant or of the land or of the fishery. Under these circumstances it cannot properly be said that there had been any vesting. "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right." 12 C.J. 955. "A mere expectancy of the future benefit, or a contingent interest in property founded upon anticipated continuance of existing laws, is not a vested right, and such right may be enlarged

> or abridged or entirely taken away by legislative enactment." 6 A. & E. Ency. L. 957. "Rights are vested, in contradiction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." Cooley, Principles of Constitutional Law, 332, quoted with approval in *Pearsall v. Great Northern Railway,* 161 U.S. 646, 673, 16 S.Ct. 705, 40 L.Ed. 838.

Id. at 693–94.

It is instructive that article XI, section 1 of the Hawai'i State Constitution, which was adopted in 1978, twenty-five years before the passage of Act 73, mandates that

> ****461 *54** [f]or the benefit of present and future generations, *the State* and its political subdivisions *shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water,* air, minerals and energy sources, *and shall promote the development and utilization of these resources in a manner consistent with their conservation* and in furtherance of the self-sufficiency of the State.
>
> *All public natural resources are held in trust by the State for the benefit of the people.*

(Emphases added.) The Hawai'i Supreme Court has stated that the foregoing provision adopts "the public trust doctrine as a fundamental principle of constitutional law in Hawai'i," *In re Water Use Permit Applications,* 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000), and that "[t]he public trust is a dual concept of sovereign right and responsibility." *Id.* at 135, 9 P.3d at 447. The foregoing constitutional provision clearly diminishes any expectation that oceanfront owners in Hawai'i had and may have in future accretions to their property.

Here, Plaintiffs have no vested right to future accretions that may never materialize and, therefore, Act 73 did not effectuate a taking of future accretions without just compensation.

B. *Whether Act 73 Effectuated an Uncompensated Taking of Littoral Owners' Existing Accreted Lands*

1.

[3] On appeal, the State classifies accreted lands into three categories: (1) Class I accreted lands—those lands that accreted before the effective date of Act 221, i.e., before June 4, 1985; (2) Class II accreted lands—those lands that accreted after the effective date of Act 221 but before the effective date of Act 73, i.e., between June 4, 1985 and May 19, 2003; and (3) Class III accreted lands—those lands that accreted on or after the effective date of Act 73, i.e., on or after May 20, 2003.

The State then argues that (1) "Act 221 was prospective and did *not* affect Class I accreted lands" but "essentially prohibited littoral landowners from claiming any interest in Class II accreted lands unless and until they became permanent, i.e., until they stayed in existence for 20 years"; (2) before any Class II accreted land could become permanent, Act 73 was enacted, "which denied non-State oceanfront landowners ownership of accreted lands (except to the extent the accretion restored previously eroded land) and made it all State land"; (3) neither Act 221 nor Act 73 affected littoral owners' interest in Class I accretions and, therefore, no taking of Class I accretions has occurred; (4) because Class II accretions, by definition, did not form until June 4, 1985, none of these accretions could have been in existence for twenty years at the time Act 73 became effective and, therefore, littoral owners had no vested property right in the Class II accretions that could be taken away by Act 73; they just had a hope that sometime in the future they might be able to assert control and dominion over Class II accretions; and (5) Act 73 did not effect a taking of Class III accretions, as those accretions did not physically exist at the time Act 73 became effective.

Contrary to the State's argument, however, Act 221, on its face, did not affect the common-law rights of a littoral owner to accreted lands. Indeed, the legislative history of Act 221 expressly mentions that the legislature did "not intend to affect the existing law in regard to ownership of and other rights relating to land created by accretion[.]" H. Stand. Comm. Rep. No. 346, in 1985 House Journal at 1142–43. As discussed above, Act 221 merely established a burden of proof and clear standards for registering or

quieting title to accreted lands. More specifically, Act 221 provided that in order to register or quiet title to accreted lands, a littoral owner was required to prove, by a preponderance of the evidence, that the accretion was natural and permanent (i.e., in existence for twenty years). Act 221 did not change the supreme court's precedent that accreted land above the high-water mark belongs to the littoral owner of the land to which the accretion attached. Act 221 also did not provide that all accreted land above the high-water mark was public or state land ***55 **462** until the littoral owner proves that the accretion was natural and permanent.

The State is also mistaken that littoral owners had no ownership interest in Class II accretions at the time Act 73 was enacted. As discussed above, at the time Act 73 was enacted, it was Hawai'i common law that shoreline property from the sea to the high-water mark was owned by the State, and any oceanfront accretions above the high-water mark belonged to the adjoining property owner, irrespective of whether a metes-and-bounds description of the accreted lands was included in the deed of the oceanfront property owner. Act 73 clearly changed the common law by declaring that all accreted lands "not otherwise awarded" and not previously recorded or the subject of a then-pending registration or quiet-title proceeding was now state or public property. Therefore, littoral owners who had such accreted lands when Act 73 became effective on May 20, 2003 had their ownership rights in their accreted lands taken from them by the passage of Act 73. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

In *Loretto,* the United States Supreme Court held:

> [W]hen the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.
>
> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.
>
> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself [or herself], and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he [or she] not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant.

Id. at 435–36, 102 S.Ct. 3164 (citations, internal quotation marks, and footnotes omitted). Act 73 permanently divested a littoral owner of his or her ownership rights to any existing accretions to oceanfront property that were unregistered or unrecorded as of the effective date of Act 73 or for which no application for registration or petition to quiet title was pending and, therefore, Act 73 effectuated a taking of such accretions.

2.

The parties do not dispute that there was a legitimate public purpose for the passage of Act 73. Since the parties stipulated to an appeal of the circuit court's declaratory judgment, the circuit court did not decide Plaintiffs' claim that Plaintiffs and the class they represent were entitled to damages for the taking of their property. On remand, the circuit court must do so.

As mentioned earlier, the circuit court's Class Certification Order was not certified as a final judgment for appeal purposes and is not before us. While certification of a class for purposes of determining generically whether Act 73 effectuated a taking of littoral owners' future accretions might have been appropriate, we have questions about whether the class certification was proper for determining whether Act 73 effectuated a taking of those accretions existing as of the effective date of Act 73, since each littoral

owner's factual situation regarding existing *56 **463 accretions would be different and not conducive to class adjudication.

Moreover, the United States Supreme Court has held that a court should not decide an inverse-condemnation claim where a party does not identify specific property that has allegedly been taken by the government. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the plaintiff challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977, a federal act that placed restrictions and conditions on mining operations. The district court found these restrictions and conditions to be unconstitutional takings. *Id.* at 294, 101 S.Ct. 2352. On appeal, the Supreme Court held that

> the [d]istrict [c]ourt's ruling on the "taking" issue suffers from a fatal deficiency: neither appellees nor the court identified any property in which [appellees] have an interest that has allegedly been taken by operation of the Act. By proceeding in this fashion, the court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary. Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. Just last Term, we reaffirmed that
>
> > "this Court has generally 'been unable to develop' any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors —such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance."
>
> These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.
>
> Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking. The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land[.]"

Id. at 294–95, 101 S.Ct. 2352.

The Supreme Court further stated in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), that "we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in that case." (Citations, internal quotation marks, and brackets omitted.) The *Penn Central* Court identified "several factors that have particular significance" in "engaging in these essentially ad hoc, factual inquiries[.]" *Id.* According to the Supreme Court,

> [t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citations omitted.)

Notably absent from Plaintiffs' complaint is any allegation that Plaintiffs have ownership rights in accreted lands that existed at the time Act 73 was enacted. Moreover,

the deeds by which Plaintiffs acquired the beach- *57 **464 reserve lots suggest that there were seawalls built on the lots, raising questions concerning the existence of any accretions. Because Plaintiffs have not alleged specific accretions which the State has taken from them by the enactment of Act 73 and, more damagingly, have not alleged that any accreted land even exists, the circuit court, on remand, must determine whether Plaintiffs have been injured by the enactment of Act 73.

CONCLUSION

We conclude that (1) Plaintiffs and the class they represented had no vested property rights to future accretions to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions; and (2) Act 73 effectuated a permanent taking of littoral owners' ownership rights to existing accretions to the owners' oceanfront properties that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions.

Accordingly, we vacate that part of the PSJ order which concluded that Act 73 took from oceanfront owners their property rights in all future accretion that was not proven to be the restored portion of previously eroded land. We remand this case to the circuit court for a determination of whether Plaintiffs have accreted lands that existed when Act 73 was enacted and, if so, for a determination of the damages they incurred as a result of the enactment of Act 73.

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

I concur in the analysis and result reached by the majority on the issues of whether Act 73, 2003 Haw. Sess. Laws at 128–30 (Act 73), effected an uncompensated taking with respect to future accretions and existing accretions to private oceanfront property. However, the circuit court's Class Certification Order was not appealed, and the appropriate remedy for any uncompensated taking effected by Act 73 was not an issue before this court. I would not address and do not express any view on matters that were not before us. To that extent, I respectfully dissent from the majority's opinion.

All Citations

122 Hawai'i 34, 222 P.3d 441

Footnotes

1 Plaintiffs are three Hawai'i non-profit corporations that were formed by homeowners in the Portlock area of O'ahu. The oceanfront lots underlying the Portlock homes were originally owned and developed in leasehold by the Trustees of the Estate of Bernice Pauahi Bishop (Bishop Estate). The lease for each oceanfront lot described the lot by specific metes and bounds. The leases did not include a narrow strip of land between the lot and the ocean, which Bishop Estate reserved for itself (beach-reserve lot). In the late 1980's or early 1990's, Bishop Estate sold its fee interest in the oceanfront lots to the Portlock homeowners but reserved its fee interest in the beach-reserve lots. On May 6, 2005, Bishop Estate sold to Plaintiffs the beach-reserve lots that adjoined the lots of Plaintiffs' respective homeowner members. Pursuant to the deeds for the beach-reserve lots, Bishop Estate reserved access and utility easements for itself, together with the right to grant easements over the lots to government agencies and public utilities; Plaintiffs agreed to continue to allow the public to use the beach-reserve lots "for access, customary beach activities and related recreational and community purposes"; and Plaintiffs accepted numerous restrictive covenants that ran with the lots.

2 The Honorable Eden Elizabeth Hifo presided.

3 The re-emergence doctrine typically applies to the following fact pattern:

> A owns a riparian parcel while B owns an adjacent upland non-riparian parcel. By the process of erosion all of A's parcel becomes submerged and B's parcel becomes riparian. Under the general rules of erosion, A loses title to his or her parcel. Then, by the process of accretion, A's parcel re-emerges.
>
> 9 *Powell on Real Property* § 66.03[1], at 66–25–66–26.

4 Section 387 of the Compiled Laws of the Hawaiian Kingdom provided:

> The fishing grounds from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low water mark, shall, in law, be considered the private property of the konohikis, whose

lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the said konohikis shall not be molested, except to the extent of the reservations and prohibitions hereinafter set forth.

1884 Compiled Laws of the Hawaiian Kingdom § 387, at 92–93. A "konohiki" is the "[h]eadman of an *ahupua'a* land division under the chief; land or fishing rights under control of the *konohiki;* such rights are sometimes called *konohiki* rights." Mary K. Pukui and Samuel H. Elbert, *Hawaiian Dictionary* 166 (1986). An "ahupua'a" is a "[l]and division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (*ahu*) of stones surmounted by an image of a pig (*pua'a*), or because a pig or other tribute was laid on the alter as tax to the chief." *Id.* at 9.

5 A "kama'aina" is defined as "[n]ative-born, one born in a place, host [.]" *Hawaiian Dictionary* at 124.

6 The supreme court noted in *Banning* that HRS § 501–33 required that

> [a]n applicant for registration of land by accretion shall ***prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence for at least twenty years.***

Id., 832 P.2d at 727 (bolded emphasis and brackets in original).

7 HRS § 205A–43(a) (2001) provides in part that "[s]etbacks along shorelines are established of not less than twenty feet and not more than forty feet inland from the shoreline."

8 The bill was subsequently amended to delete the word "clear" before the phrase "preponderance of the evidence[.]" S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1292.

9 See footnote 8.

10 As noted earlier, the word "clear" was subsequently deleted from the bill that was enacted as Act 221.

11 Act 73 states, in relevant part:

> SECTION 1. Section 171–1, [HRS], is amended by adding a new definition to be appropriately inserted and to read as follows:
>
> " "Accreted lands" means lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces."
>
> SECTION 2. Section 171–2, [HRS], is amended to read as follows:
>
> " **§ 171–2 Definition of public lands.** "Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including accreted lands not otherwise awarded, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter, except...."
>
> SECTION 3. Section 343–3, [HRS], is amended by amending subsection (c) to read as follows:
> "(c) The office [of environmental quality control] shall inform the public of:
> ....
> (4) An application for the registration of land by accretion pursuant to section 501–33 or 669–1(e) for any land accreted along the ocean."
> SECTION 4. Section 501–33, [HRS], is amended to read as follows:
>
> " **§ 501–33 Accretion to land**. An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent[~~:~~]~~; provided that no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion. The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in~~

~~compliance with section 343–3(c)(4). The application shall not be approved unless the office of environmental quality control has published notice in the office's periodic bulletin.~~

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of the land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183–45."

SECTION 5. Section 669–1, [HRS], is amended by amending subsection (e) to read as follows:

"(e) Action may be brought by any person to quiet title to land by accretion[~~.~~]; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343–3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin.

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183–45."

SECTION 6. Applications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

2003 Haw. Sess. Laws Act 73, at 128–30.

12 Pursuant to HRS § 661–5 (1993), "[e]very claim against the State, cognizable under this chapter, shall be forever barred unless the action is commenced within two years after the claim first accrues[.]"

End of Document

2012 Hawaii Laws Act 56 (H.B. 2591)

HAWAII 2012 SESSION LAWS

2012 REGULAR SESSION OF THE 26th LEGISLATURE

Additions are indicated by **Text**; deletions by ~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by ~~**Text**~~.

Act 56
H.B. No. 2591
ACCRETED LANDS

A BILL FOR AN ACT RELATING TO ACCRETED LANDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 171–2, Hawaii Revised Statutes, is amended to read as follows:

<< HI ST § 171–2 >>

"§ 171–2 Definition of public lands.

"Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including [~~accreted~~] lands **accreted after May 20, 2003, and** not otherwise awarded, submerged lands, and lands beneath tidal waters [~~which~~] **that** are suitable for reclamation, together with reclaimed lands [~~which~~] **that** have been given the status of public lands under this chapter, except:

(1) Lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, as amended;

(2) Lands set aside pursuant to law for the use of the United States;

(3) Lands being used for roads and streets;

(4) Lands to which the United States relinquished the absolute fee and ownership under section 91 of the Hawaiian Organic Act prior to the admission of Hawaii as a state of the United States unless subsequently placed under the control of the board of land and natural resources and given the status of public lands in accordance with the state constitution, the Hawaiian Homes Commission Act, 1920, as amended, or other laws;

(5) Lands to which the University of Hawaii holds title;

(6) Lands to which the Hawaii housing finance and development corporation in its corporate capacity holds title;

(7) Lands to which the Hawaii community development authority in its corporate capacity holds title;

(8) Lands to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167;

EXHIBIT D

(9) Lands [~~which~~] **that** are set aside by the governor to the Aloha Tower development corporation; lands leased to the Aloha Tower development corporation by any department or agency of the State; or lands to which the Aloha Tower development corporation holds title in its corporate capacity;

(10) Lands [~~which~~] **that** are set aside by the governor to the agribusiness development corporation; lands leased to the agribusiness development corporation by any department or agency of the State; or lands to which the agribusiness development corporation in its corporate capacity holds title; and

(11) Lands to which the high technology development corporation in its corporate capacity holds title."

SECTION 2. Section 501-33, Hawaii Revised Statutes, is amended to read as follows:

<< HI ST § 501-33 >>

"§ 501-33 Accretion to land.

An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent[~~;~~] **and that the land accreted before or on May 20, 2003;** provided that [~~no applicant other than the~~]:

(1) The State [~~shall~~] **may** register land accreted along the ocean[~~, except that a~~] **after May 20, 2003; and**

(2) A private property owner whose eroded land has been restored by accretion **after May 20, 2003,** may file an accretion claim to regain title to the restored portion.

The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The application shall not be approved unless the office of environmental quality control has published notice in the office's periodic bulletin.

As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of the land [~~shall be state land except as otherwise provided in this section and~~] shall be considered within the conservation district. **Land accreted after May 20, 2003, shall be public land except as otherwise provided in this section.** Prohibited uses are governed by section 183-45."

SECTION 3. Section 669-1, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

<< HI ST § 669-1 >>

"(e) Action may be brought by any person to quiet title to land by accretion; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean[~~;~~] **after May 20, 2003,** except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent[~~.~~] **and that the land accreted before or on May 20, 2003.** The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin.

As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land [~~shall be state land except as otherwise provided in this section and~~] shall be considered within the

conservation district. **Land accreted after May 20, 2003, shall be public land except as otherwise provided in this section.** Prohibited uses are governed by section 183–45."

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

Approved April 23, 2012.

Report Title:

Accreted Lands

Description:

Defines accreted lands. Includes accreted lands in the definition of public lands. Requires that accreted lands shall be state lands except a private property owner may file an accretion claim to regain title to the owner's eroded land that has been restored by accretion. Clarifies that the applicant provides the notice for publication in OEQC's periodic bulletin. (HB192 CD1)

HOUSE OF REPRESENTATIVES

TWENTY-SECOND LEGISLATURE, 2003

STATE OF HAWAII

H.B. NO. 192 H.D. 1 S.D. 1 C.D. 1

A BILL FOR AN ACT

RELATING TO ACCRETED LANDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 171-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

""Accreted lands" means lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces."

SECTION 2. Section 171-2, Hawaii Revised Statutes, is amended to read as follows:

"**§171-2 Definition of public lands.** "Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the

EXHIBIT E

exercise of the right of eminent domain, or in any other manner; including accreted lands not otherwise awarded, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter, except:

(1) Lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, as amended;

(2) Lands set aside pursuant to law for the use of the United States;

(3) Lands being used for roads and streets;

(4) Lands to which the United States relinquished the absolute fee and ownership under section 91 of the Hawaiian Organic Act prior to the admission of Hawaii as a state of the United States unless subsequently placed under the control of the board of land and natural resources and given the status of public lands in accordance with the State Constitution, the Hawaiian Homes Commission Act, 1920, as amended, or other laws;

(5) Lands to which the University of Hawaii holds title;

(6) Lands to which the housing and community development corporation of Hawaii in its corporate capacity holds title;

(7) Lands to which the Hawaii community development authority in its corporate capacity holds title;

(8) Lands to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167;

(9) Lands which are set aside by the governor to the Aloha Tower development corporation; lands leased to the Aloha Tower development corporation by any department or agency of the State; or lands to which the Aloha Tower development corporation holds title in its corporate capacity; and

(10) Lands to which the agribusiness development corporation in its corporate capacity holds title."

SECTION 3. Section 343-3, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) The office shall inform the public of:

(1) A public comment process or public hearing if a federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take license pursuant to the federal Endangered Species Act;

(2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment; [~~and~~]

(3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement [~~.~~]; and

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean."

SECTION 4. Section 501-33, Hawaii Revised Statutes, is amended to read as follows:

"**§501-33 Accretion to land.** An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent[~~.~~]; provided that no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion. The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The application shall not be approved unless the office of environmental quality control has published notice in the office's periodic bulletin.

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of the land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183-45."

SECTION 5. Section 669-1, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

"(e) Action may be brought by any person to quiet title to land by accretion[~~.~~]; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin. [~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183-45."

SECTION 6. Applications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect upon its approval.

HB2591

RELATING TO ACCRETED LANDS.
Clarifies that land accreted after May 20, 2003, shall be public land except as otherwise provided by law.
(HB2591 HD2)

EXHIBIT F

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

Testimony of
WILLIAM J. AILA, JR.
Chairperson

Before the Senate Committees on
WATER, LAND AND HOUSING
and
JUDICIARY AND LABOR

Tuesday, March 20, 2012
12:30 P.M.
State Capitol, Conference Room 016

In consideration of
HOUSE BILL 2591, HOUSE DRAFT 2
RELATING TO ACCRETED LANDS

The purpose of House Bill 2591, House Draft 2 is to relieve the State from the obligation to pay compensation resulting from a constitutional taking of accreted lands. The Department of Land and Natural Resources (Department) strongly supports this Administration measure.

Act 73, Session Laws of Hawaii 2003, disallowed the registration of accreted lands by private landowners. A class action suite was filed alleging that Act 73 affected a constitutional "taking" of privately owned land for which the State owned "just compensation." Both the Circuit Court and the Intermediate Court of Appeals have ruled that Act 73 was a constitutional "taking" as to accreted land that accreted before and existing when the Act became effective (May 20, 2003). Both courts ruled that accretion occurring after May 20, 2003, could be public land without affecting any privately owned vested rights.

This measure tailors the State's accretion laws so that it only affects land that accreted after May 20, 2003.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:
H.B. NO. 2591, H.D. 2, RELATING TO ACCRETED LANDS.

BEFORE THE:

SENATE COMMITTEES ON WATER, LAND, AND HOUSING AND ON JUDICIARY AND LABOR

DATE: Tuesday, March 20, 2012 **TIME:** 12:30 p.m.

LOCATION: State Capitol, Room 16

TESTIFIER(S): David M. Louie, Attorney General, or
William J. Wynhoff, Deputy Attorney General

Chairs Dela Cruz and Hee and Members of the Committees:

The Department of the Attorney General (the "Department") supports this bill.

The purpose of this bill is to correct and clarify existing law, which constitutionally "takes" an undefined amount of privately owned oceanfront land. Existing law requires the State to pay an indefinitely large sum – perhaps hundreds of millions of dollars – of just compensation for the land taken.

Background – legislation and litigation

Act 73, 2003 Hawai'i Session Laws 128, changed the definition of "public lands" in section 171-2, Hawai'i Revised Statutes (HRS). As amended, public lands means and includes "all accreted land not otherwise awarded." Act 73 made related changes to sections 501-33 and 669-1, HRS.

On May 19, 2005, a class action lawsuit was filed on behalf of all "owners of oceanfront property in the State of Hawai'i." The lawsuit contends that Act 73 took accreted land belonging to oceanfront owners and that the State must pay just compensation for the land taken. See Hawai'i Constitution, article I, section 20 ("Private property shall not be taken or damaged for public use without just compensation.").

The Hawai'i Intermediate Court of Appeals decided certain aspects of the case in Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 222 P.3d 441 (Haw. App. 2009).[1]

[1] Both the Hawai'i Supreme Court and the United States Supreme Court declined to review this ruling.

Specifically, the court ruled: (1) Act 73 is a taking as to all privately owned land that accreted before May 20, 2003 (effective date of Act 73); and (2) Act 73 is not a taking as to all privately owned land that has accreted on or after May 20, 2003, or that may accrete in the future.

The court did not determine the exact meaning of the phrase "all accreted land." Plaintiffs argue the phrase means (roughly) all land that has accreted since 1920. The State proposes a less expansive reading of the phrase.

The intermediate court remanded the case to the circuit court for further proceedings.

The proposed legislation

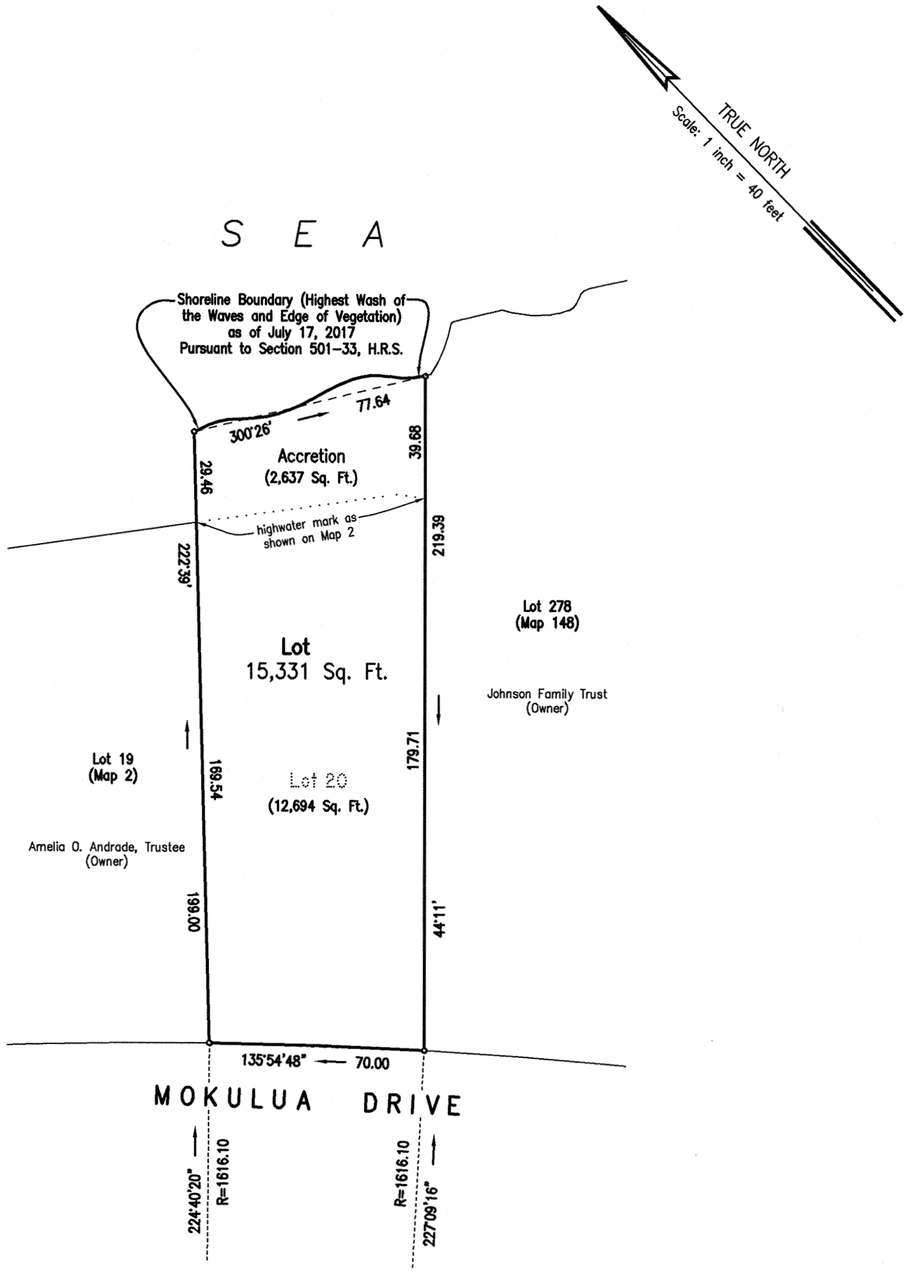
This bill proposes to modify Act 73 so that the State is the owner of all "lands accreted after May 20, 2003." In other words, the bill disclaims ownership of accreted land that was privately owned before Act 73 and for which "just compensation" would otherwise be due.

The Department believes this amendment is prudent and appropriate. It does not appear the Legislature was aware of the takings issue when it passed Act 73. If, going forward, the Legislature decides to take some or all accreted land, the Legislature would likely wish to consider all aspects of the issue.

Moreover, Act 73 does not adequately define exactly what accreted land it intended to cover. This leads to uncertainty as to both ownership of specific property and the amount of just compensation that might ultimately be owed by the State.

We respectfully ask the Committee to pass this bill.

MAP



LAND COURT

STATE OF HAWAII

LAND COURT APPLICATION 505

ACCRETION TO LOT 20
AS SHOWN ON MAP 2
AND REDESIGNATION OF SAID LOT 20
WITH ACCRETION AS LOT 276

AT KAILUA, KOOLAUPOKO, OAHU, HAWAII

NEW SHORELINE BOUNDARY AS SHOWN HEREON IS ESTABLISHED AT THE HIGHEST WASH OF THE WAVES AND EDGE OF VEGETATION AND IS FROM AN ACTUAL SURVEY ON THE GROUND LOCATED ON MAY 24, 2017 AND CERTIFIED ON JULY 17, 2017 PURSUANT TO SECTION 501-33, H.R.S. MADE UNDER THE DIRECT SUPERVISION OF THE UNDERSIGNED AND MAY BE CHECKED BY THE STATE LAND SURVEYOR WITH SAID CERTIFIED SHORELINE MAP ON FILE AT THE STATE SURVEY DIVISION.

2024 North King Street Suite 200
Honolulu, Hawaii 96819
July 12, 2024

RYAN M. SUZUKI
LICENSED PROFESSIONAL LAND SURVEYOR
No. 10059
HAWAII, U.S.A.

R. M. TOWILL CORPORATION

Ryan M. Suzuki 4/30/26
Ryan M. Suzuki Expiration Date
Licensed Professional Land Surveyor
Certificate Number 10059
Land Court Certificate Number 280

OWNER: CHARLES L. HALL, TRUSTEE
TRANSFER CERTIFICATE OF TITLE: 1,051,902

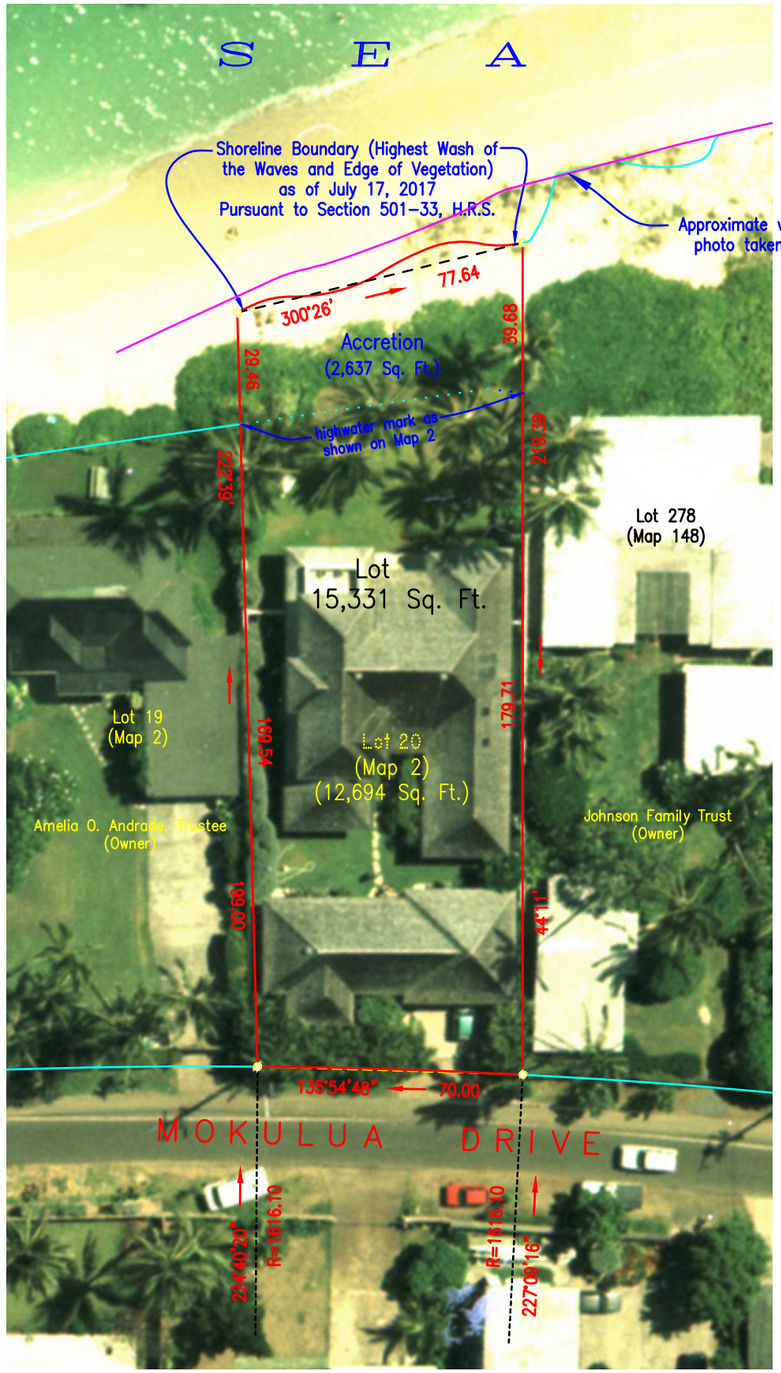
Note:

Owners of adjoining lands as shown on plan are from records in the Real Property Mapping Branch.

Tax Map Key: (1) 4-3-007: 034

EXHIBIT G

15" x 21" = 2.2 Sq. Ft.



TRUE NORTH

Scale: 1 inch = 40 feet

SHORELINE SURVEY
ACCRETION TO LOT 20
AS SHOWN ON MAP 2
OF LAND COURT APPLICATION 505
AND REDESIGNATION OF SAID LOT 20
WITH ACCRETION AS LOT

AT KAILUA, KOOLAUPOKO, OAHU, HAWAII

TAX MAP KEY: (1) 4-3-007: 034

Notes:

Azimuths are referred to Government Survey Triangulation Station "MOKAPU" △ .

Boundaries shown are from record data.

Aerial Photograph dated August 22, 1996.

EXHIBIT H

RMTC Ref no.: 1-22336-0-S

R. M. TOWILL CORPORATION
SINCE 1930

2024 North King Street Suite 200
Honolulu, Hawaii 96819
Tel: (808) 842-1133

State of Hawaii
Certificate of Title

Certificate No: 1051902

Issued: **12/5/2012**

Document No: **T-8374059**

Transfer from: **1051901**

I hereby certify that pursuant to Chapter 501 of the Hawaii Revised Statutes, the REGISTERED OWNER below is the owner in fee simple of the LAND described, subject, however to encumbrances mentioned in Section 501-82 of the Hawaii Revised Statutes and subject also to such exceptions, encumbrances, interests and entries as may appear under ENCUMBRANCES.

/s/ Kathleen H Dela Cruz

Assistant Registrar

REGISTERED OWNER

CHARLES L. HALL, TRUSTEE of that certain unrecorded Charles L. Hall Revocable Living Trust dated August 19, 1996, as amended and restated

914 Mokulua Drive, Kailua, Hawaii 96734

IN TRUST, with powers to sell, lease, mortgage and other powers as set forth in that certain Trust Instrument hereinabove mentioned

LAND

Situate at Kailua, Koolaupoko, Oahu

LOT 20, 12,694 square feet, Map 2,
Land Court Application 505 of Helene Irwin Crocker

TOGETHER WITH an easement for all purposes leading from Mokulua Drive to the high water mark of the sea across Lots B thru H

ENCUMBRANCES/MEMORIALS			
Document Number	Document Type	Recorded Date	Running in Favor Of

This seal of the Court has been affixed on this 29th day of March, 2019.

EXHIBIT I

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505 1 L.D. 18-1-0775 **AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION; DECLARATION OF JANNA WEHILANI AHU; EXHIBITS "A" - "G"; ORDER TO SHOW CAUSE; CITATION**

AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION

PAUL ALSTON 1126
A Law Corporation
JANNA WEHILANI AHU 10588

DENTONS US LLP
1001 Bishop Street, Suite 1800
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800

Attorneys for Petitioner

Referred to the Surveyor of the State of Hawai`i for check and report.
Map filed _____
_____ (__) white prints required.

Dated: _____

BY ORDER OF THE COURT:

_____
Registrar

A TRUE COPY, ATTEST WITH THE SEAL OF SAID COURT.
Kathleen A. Nashiro
Clerk

10111386\000001\110483342

EXHIBIT J

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505 1 L.D. 18-1-0775

AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION

TO THE HONORABLE PRESIDING JUDGE OF THE LAND COURT OF THE STATE OF HAWAI`I:

On March 7, 2018, the Court accepted for filing Petitioner LAWRENCE M. JOHNSON, Trustee of the Johnson Family Trust's ("Petitioner") Petition for Registration of Title to Accretion to Lot 21 as shown on Map 2 of Application No. 505 (the "Original Petition"), and referred the matter to the State Land Surveyor for verification, check and report.

In response to the Return of the State Land Surveyor (the "Return", Exhibit A), the Petitioner desires to amend the Original Petition as follows:

1. Petitioner is the owner of Lot 21 as shown on Map 2 of Land Court Application No. 505 covered by Transfer Certificate of Title ("TCT") No. 1,055,309.

2. Pursuant to HRS § 501-33, "[a]n applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent and that the land accreted before or on

May 20, 2003." Accreted lands are "lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of nature forces"[1]. Beach-front property can be increased in size by the slow deposit of beach sand over time. "Permanent" means that the accretion has been in existence for at least twenty years. HRS § 501-33.

3. A landowner seeking to register accretion must prove: (1) the additional land existed before or on May 20, 2003 and (2) the accretion became permanent before the petition was filed (based upon evidence that it existed for at least twenty years before filing).

4. The language that "the land accreted before or on May 20, 2003" was added to HRS § 501-33 through Act 56[2] in response to an ICA opinion[3] regarding Act 73[4], which imposed an obligation on the State to pay compensation from a taking of accreted lands. The purpose of Act 56 was to "disclaim[] ownership of accreted land that was privately owned before Act 73 and for which 'just compensation' would otherwise be due."[5] Essentially, the

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[1] *Maunalua Bay Beach Ohana 28, et al. v. State*, 122 Hawai`i 34, 50, 222 P.3d 441, 457 (App. 2009), *cert. denied,* 2010 WL 2320366 (June 9, 2010), and 131 S.Ct. 529 (Nov. 1, 2010) (citing Conf. Comm. Rep. No. 2, in 2003 House Journal, at 1700, 2003 Senate Journal, at 945). A copy of *Maunalua v. State* is attached as Exhibit B.

[2] Exhibit C, Act 56.

[3] Exhibit B.

[4] Exhibit D, Act 73 (H.B. 192).

[5] *See* Written Testimony of William J. Aila, Jr. and Written Testimony of David M. Louie or William J. Wynhoff before the Senate Committees on Water, Land, and Housing, and Judiciary and Labor on H.B. 2591, dated March 20, 2012, attached hereto as Exhibit E.

amendment "tailors the State's accretion laws so that it only affects land that accreted after May 20, 2003."[6]

5. On December 30, 2009, the ICA in *Maunalua Bay Beach Ohana 28, et al. v. State* agreed that Act 73 effectuated a permanent taking of all then-existing accreted lands not otherwise awarded. *Maunalua,* 112 Hawai`i at 57, 222 P.3d at 464. Requests for certiorari to the Hawai`i and United States Supreme Courts were denied—thus, the ICA's ruling conclusively determined that where accretion existed as of May 20, 2003, an uncompensated taking occurred. [7]

6. The ICA ruled that Act 73 took — without compensation — all privately owned land that accreted before May 20, 2003 (effective date of Act 73). *Id.* at 57, 222 P.3d at 464. The ICA specifically rejected the State's argument that littoral owners had no ownership interest in lands that accreted before May 19, 2003. *Id.* The ICA expressly found accretion occurring after 1983 could become permanent and subject to registration, which necessarily means accreted lands subject to registration in this Court are not limited to whatever new land existed by or before 1983. *Id.*

7. Petitioner, as successor to the original grantee, owned all accretion that existed before May 2003, and he is entitled to register (or, in the

---

[6] *Id.*

[7] Both the Supreme Court of Hawai`i and the U.S. Supreme Court denied *certiorari. Maunalua Bay Beach Ohana 28 v. State*, No. 28175, 2010 WL 2329366 (June 9, 2010); *Maunalua Bay Beach Ohana 28 v. State*, 131 S. Ct. 529 (Nov. 1. 2010).

case of non-Land Court property, quiet title) that land whenever he can establish it has become "permanent." Until that time, the accreted land is his, but it cannot be registered or recorded as being part of his up-land parcel.

8. In accordance with the Return and pursuant to HRS § 501-33, since the title of Lot 21 was originally registered, there has been gradual and natural accretion to Lot 21 that accreted on or before May 20, 2003 so that the new shoreline boundary at the highest wash of the waves and edge of vegetation as certified on July 17, 2017 is as shown on the map dated December 5, 2017 prepared by Ryan M. Suzuki (the "Map"), and filed herewith a reduced copy of which is attached as Exhibit F, and depicted in the aerial overlay photograph dated August 22, 1996, attached at Exhibit G.

9. The shoreline boundary set by the accretion that has existed for more than twenty years is shown on the aerial overlay photograph dated August 22, 1996. Exhibit G.

10. Petitioner is the sole owner of Lot 21.

11. Lot 21 with accretion will be redesignated as new Lot 278. Petitioner files herewith the Map showing accretion to Lot 21 and the redesignation of Lot 21 with accretion as new Lot 278. Exhibit F.

12. Lot 21 is encumbered by the Encroachment Agreement and License (Fence #7), more particularly described in Doc. No. 3007627 filed in the Office of the Assistant Registrar, State of Hawai`i on October 9, 2003.

13. Lot 21 is encumbered by the Encroachment Agreement and License (Wall), more particularly described in Doc. No. 10543133 filed in the Office of the Assistant Registrar, State of Hawai`i on November 13, 2018.

14. New Lot 278 has direct access to Mokulua Drive, a public road.

15. Petitioner will supply the office of environmental quality control with notice of the Amended Petition, for publication, in compliance with HRS §501-33 and HRS § 343-3(c)(4).

16. That no other person has any interest in the said accretion, and that the following named are all the adjoining owners, the location of whose lands in reference to the said accretion is as shown by the Map (Exhibit F) and photograph (Exhibit G) attached hereto:

Lot 20: CHARLES L. HALL,
Trustee of that certain unrecorded Charles L. Hall
Revocable Living Trust U/A dated August 19, 1996
914 Mokulua Drive
Kailua, HI 96734

Lots 264-266: XIN LIU, fee owner[8]
MEIYI MA, fee owner
928 Mokulua Drive
Kailua, HI 96734

CITY AND COUNTY OF HONOLULU
c/o Department of the Corporation Counsel
530 S. King Street
Honolulu, HI 96813

[8] Xin Liu and Meiyi Ma are the current owners of Lots 264-266. On July 17, 2017, when the boundary was certified, the owners of Lot 264 were Paul and Tanya Alston.

STATE OF HAWAI`I
c/o Attorney General
425 Queen Street
Honolulu, HI 96813

17. The Map was referred to the State Land Surveyor for check and report and "[a]fter viewing the area on the ground, the State Land Surveyor is of the opinion that the additional area claimed along the sea appears to have been formed by natural accretion. The new shoreline boundary was established at the highest wash of the waves and edge of vegetation as certified on July 17, 2017 and at the vegetation line as depicted on aerial photo dated August 22, 1996. . ." Exhibit A.

18. Notice of the Amended Petition will be served upon the Attorney General and all adjoining owners and any others the Court may deem necessary and proper to be served.

WHEREFORE, it is prayed that the Court recognize the approval of the Map by the said surveyor, adjudge the Petitioner to be the owner of said accretion, approve said Map and order the Assistant Registrar of the Land Court to endorse on the TCT a memorandum of the Decree so adjudging and approving said Map.

DATED: Honolulu, Hawai`i, August 2, 2019.

PAUL ALSTON
JANNA WEHILANI AHU
Attorneys for Petitioner

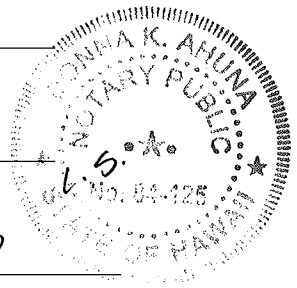
Subscribed and sworn to before me
this 2nd day of August, 2019.

Notary Public, State of Hawai`i

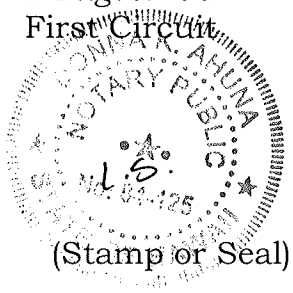
Donna K. Ahuna

Printed Name of Notary

My commission expires: 4-16-2020



Doc. Date: August 2, 2019 # Pages: 60
Notary Name: Donna K Ahuna First Circuit
Doc. Description: **AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION**



August 2, 2019
Notary Signature Date (Stamp or Seal)

NOTARY CERTIFICATION

Application No. 505; 1 L.D. 18-1-0775; In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i; ***AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION***

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505 1 L.D. 18-1-0775 **DECLARATION OF JANNA WEHILANI AHU**

DECLARATION OF JANNA WEHILANI AHU

I, Janna Wehilani Ahu, do hereby declare that:

1. I am an attorney licensed to practice before the courts of this State and I am an attorney with the law firm of Dentons US LLP, counsel for Petitioner in this case.

2. I make this *Declaration in Support of Petitioner's Amended Petition for Registration of Title to Accretion.*

3. Attached as Exhibit A is a true and correct copy of the *Return of the State Land Surveyor* filed March 4, 2019.

4. Attached as Exhibit B is a true and correct copy of *Maunalua Bay Beach Ohana 28 v. State*, 122 Hawai`i 34, 222 P.3d 441 (2009).

5. Attached as Exhibit C is a true and correct copy of Act 56 (H.B. 2591), 2012 Hawai`i Session Laws.

6. Attached as Exhibit D is a true and correct copy of Act 73 (H.B. 192), 2003 Hawai`i Session Laws.

7. Attached as Exhibit E is a true and correct copy of the Written Testimony of William J. Aila, Jr. and Written Testimony of David M. Louie and/or William J. Wynhoff before the Senate Committees on Water, Land, and Housing, and Judiciary and Labor on H.B. 2591, dated March 20, 2012.

8. Attached as Exhibit F is a reduced copy of a map of Lot 21 dated December 5, 2017 prepared by Ryan M. Suzuki.

9. Attached as Exhibit G is an aerial overlay photograph of Lot 21 dated August 22, 1996.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai`i, August 2, 2019.

JANNA WEHILANI AHU

IN THE LAND COURT OF THE STATE OF HAWAII

In the Matter of the Application of HELENE IRWIN CROCKER Accretion to Lot 21 as shown on Map 2 and redesignation of said Lot 21 with accretion as Lot 278, situate at Kailua, Koolaupoko, Oahu, Hawaii.	APPLICATION NO. 505 (Map 148) 1 L.D. Case No. 18-1-0775

APPLICATION OF
LAWRENCE M. JOHNSON, TRUSTEE - OWNER
For Approval of Accretion

RETURN OF THE STATE LAND SURVEYOR

To the Honorable Judge of the Land Court,
State of Hawaii

Pursuant to an Order duly made and issued out of said Honorable Court on the 7th day of March, 2018, referring the map filed for approval for accretion in the above-entitled matter, to the State Land Surveyor for verification, check on the ground if necessary and report.

And further, that said map has been compared with Certificate of Title No. 1,055,309.

This is an application to tack onto Lot 21 of Land Court Application 505, a certain parcel of land bordering the sea, which parcel applicant respectively declare to be natural accretion to this lot and to redesignate said Lot 21 with accretion as Lot 278.

Exhibit A

NOTE:

Allegations in the petition have been checked and found to be in accord therewith except for the following:

1. Lot 21 with accretion has been designated Lot 278.
2. As to page 2, the phrase "owner of the following Lot of the above Application" should be changed to "owner of Lot 21 as shown on Map 2 of Land Court Application 505".
3. As to page 2, the phrase "accretion to said lot so that the boundary along the high water mark as of July 17, 2017 is as shown on the map prepared by Ryan M. Suzuki" should be changed to "accretion to said Lot 21 that accreted on or before May 20, 2003 so that the new shoreline boundary at the highest wash of the waves and edge of vegetation as certified on July 17, 2017 and at the vegetation line as depicted on the aerial photo dated August 22, 1996 pursuant to Section 501-33, H.R.S. is as shown on the map dated December 5, 2017 prepared by Ryan M. Suzuki".
4. As to page 2, the phrase "filed herewith as Exhibit A" should be changed to "filed herewith, a reduced copy of which is attached as Exhibit A".
5. As to page 2, the phrase "photograph attached as Exhibit B" should be changed to "photograph dated August 22, 1996 attached as Exhibit B".
6. After the phrase "attached as Exhibit B.", a new paragraph should be inserted noting "Petitioners file herewith a map showing accretion to said Lot 21 and the redesignation of said Lot 21 with accretion as Lot 278".
7. As to page 3, the phrase "Chester L. Hall, Trustee" should be changed to "Charles L. Hall, Trustee".
8. The owners of Lot 264 should be changed from Paul Douglas Alston and Tanya Rose Alston to Xin Liu and Meiyi Ma. The address should be changed accordingly. (New owners by Document No. T-10543134)
9. Petition should note that Lot 278 will have direct access to Mokulua Drive, a public road.
10. The status of Document No. 3007627 should be clarified. (Noted on CT. Petition should include a statement of encumbrances noting the encumbrances affecting the new lot)
11. The status of Document No. 10543133 should be clarified. (Noted on CT)
12. It should be verified that publication requirements in Section 501-33, H.R.S. have been compiled with.

Only encumbrances in the petition have been checked.

After viewing the area on the ground, the State Land Surveyor is of the opinion that the additional area claimed along the sea appears to have been formed by natural accretion. The new shoreline boundary was established at the highest wash of the waves and edge of vegetation as certified on July 17, 2017 and at the vegetation line as depicted on aerial photo dated August 22, 1996, pursuant to Section 501-33, H.R.S.

And pending further instructions and/or approval of the Court, the map and five (6) whiteprints of the herein application are being returned reserving one (1) whiteprint for the Office of the State Land Surveyor.

DATED at Honolulu, this 4th day of March, 2019.

Examined by:

Assistant.
lk

STATE LAND SURVEYOR

= =

Received from the State Land Surveyor _____ blueprints of, and the approved tracing map in the above entitled matter and Certificate of Title No.

Honolulu, Hawaii
MAR 4 - 2019, 2019

REGISTRAR OF THE LAND COURT.

122 Hawai'i 34

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Intermediate Court of Appeals of Hawai'i.

MAUNALUA BAY BEACH OHANA 28, a Hawai'i non-profit corporation; Maunalua Bay Beach Ohana 29, a Hawai'i non-profit corporation; Maunalua Bay Beach Ohana 38, a Hawai'i non-profit corporation, individually and on behalf of all others similarly situated, Plaintiffs–Appellees,

v.

STATE of Hawai'i, Defendant–Appellant.

No. 28175.

|

Dec. 30, 2009.

Synopsis

Background: Oceanfront landowners brought inverse-condemnation action to challenge constitutionality of Act which provided that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land. The Circuit Court, First Circuit, Eden Elizabeth Hifo, J., granted landowners' motion for partial summary judgment, and state appealed.

Holdings: The Intermediate Court of Appeals, Watanabe, J., held that:

[1] Act was not an unconstitutional taking of future accretions, and

[2] Act effectuated a taking of accretions that were unregistered as of the effective date of the Act.

Vacated in part and remanded.

Nakamura, C.J., concurred in part and dissented in part with opinion.

West Headnotes (3)

[1] Water Law

Title to Land Formed by Accretion or Lost Through Reliction;Effect on Adjacent Owners' Boundaries

Under Hawai'i common law, land accreted to oceanfront property belongs to the oceanfront property owner.

2 Cases that cite this headnote

[2] Eminent Domain

Water rights

Act which provided that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land was not an unconstitutional taking of future accretions without just compensation, as oceanfront landowners did not have any vested right to future accretions that might never materialize. Const.Art. 1, § 20, Art, 11, § 1; Laws 2003, Act 73, § 1 et seq.

Cases that cite this headnote

[3] Eminent Domain

Water rights

Eminent Domain

Water rights

Act which provided that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land permanently divested oceanfront landowners of ownership rights to any existing accretions to oceanfront property that were unregistered or unrecorded as of the effective date of the Act or for which no application for registration or petition to quiet title was pending and, therefore, Act effectuated a taking of such accretions. Const.Art. 1, § 20; Laws 2003, Act 73, § 1 et seq.

Exhibit B

Cases that cite this headnote

Attorneys and Law Firms

**442 Girard D. Lau, Deputy Attorney General (William J. Wynhoff, Deputy Attorney General, with him on the briefs), State of Hawai'i, for Defendant–Appellant.

Paul Alston (Laura P. Couch, with him on the briefs), (Alston Hunt Floyd & Ing), Honolulu, for Plaintiffs–Appellees.

Carl C. Christensen, on the amicus curiae brief, for Hawaii's Thousand Friends.

Robert H. Thomas (Damon Key Leong Kupchak Hastert), Honolulu, on the amicus curiae brief, for Pacific Legal Foundation Hawaii Center.

WATANABE and FOLEY, JJ.; with NAKAMURA, C.J., concurring separately and dissenting.

Opinion

Opinion of the Court by WATANABE, J.

*35 This appeal arises from an inverse-condemnation lawsuit filed by Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay Beach Ohana 38[1] (collectively, Plaintiffs), on behalf of themselves and all non-governmental owners of oceanfront real property in Hawai'i on and/or after May 19, 2003 (oceanfront, littoral, or *36 **443 riparian owners), challenging the constitutionality of Act 73, 2003 Haw. Sess. Laws at 128 (Act 73). Plaintiffs alleged that Act 73:

> a. Took oceanfront owners' rights to claim accreted land (other than that which restored previously eroded land and that which was the subject of registration or quiet title proceedings on May 20, 2003) and declared all such land to be "state land";
>
> b. Took from oceanfront owners' [sic] their property rights in (1) all accreted oceanfront land which existed on May 20, 2003 and which had not previously been registered or been made the subject of then-pending registration proceedings; and (2) all future accretion which was not proven to be the restored portion of previously accreted land;
>
> c. Damaged oceanfront owners' remaining property by depriving them of ownership of the land abutting the ocean; and
>
> d. Damaged all accreted lands by placing them in the conservation district.

Plaintiffs sought just compensation, blight damages, a declaratory judgment that Act 73 was unenforceable under the Hawai'i State Constitution unless and until Defendant–Appellant State of Hawai'i (State) pays just compensation to Plaintiffs and the class they represented, and an injunction forbidding the State from asserting ownership or control over the affected property and from enforcing Act 73.

On September 1, 2006, the Circuit Court of the First Circuit[2] (circuit court) entered an order granting Plaintiffs' February 13, 2006 amended motion for partial summary judgment (PSJ) on Plaintiffs' claim for declaratory relief. In relevant part, the circuit court declared that

> Act 73 ... represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under [Hawaii Revised Statutes (HRS)] Chapter 501 and/or quieting title under [HRS] Chapter 669.

This interlocutory appeal by the State followed.

We vacate that part of the PSJ order which concluded that Act 73 effected an uncompensated taking of and injury to littoral owners' right to ownership of future accreted land and remand this case to the circuit court for further proceedings consistent with this opinion.

THE LEGAL LANDSCAPE

A. *Definitions and General Doctrines*

In his treatise on real property, Professor Powell notes:

> Where title to real property describes a boundary line as a body of water, the common law has developed

> several different doctrines that respond to the issues raised by the moveable nature of those bodies of water. Accretion, dereliction (or reliction), erosion and avulsion are ancient common-law doctrines rooted in the Roman law of alluvion and the civil law doctrine of accession. As applied, these doctrines are as complex and muddy as the movements of the water.
>
> The term "accretion" denotes the process by which an area of land is increased by the gradual deposit of soil due to the action of a boundary river, stream, lake, pond, or tidal waters. The term "dereliction," or its modern counterpart "reliction," denotes the process by which land is exposed by the gradual receding of a body of water. The term "erosion" denotes the process by which land is gradually covered by water. The term "avulsion" denotes the process by which there is a sudden and perceptible change in the location of a body of water.
>
> ....
>
> Where the change in location of a body of water is caused by accretion, reliction, or erosion, the boundary line between the abutting landowners moved with the waterway. ***37 **444** Thus the riparian or littoral owner is given title to lands that are gradually added by accretion or reliction. In some circumstances, whether the accretion occurs on the banks of a river or stream rather than on the banks of other bodies of water may be critical in determining the ownership of the accreted lands. Similarly, a riparian owner loses title to lands that are submerged through the process of erosion. In contrast, if the boundary river, stream, lake, or tidal water changes its location because of the process of avulsion, the boundary line remains the same. In some circumstances, the doctrine of re-emergence [3] will be applied to both accretive and avulsive changes to determine the ownership of certain lands.

Richard M. Powell, 9 *Powell on Real Property* §§ 66.01[1]–66.01[2], at 66–2–66–9 (2006) (footnote added; footnotes omitted).

Some scholars have expressed doubt that the doctrines of accretion, erosion, reliction, and avulsion are actually rules of law, causing a stated result upon the occurrence of stipulated facts, rather than rules of construction used to determine what the grantor of riparian land intended the grantee of the land to receive. *See, e.g.*, 9 *Powell on Real Property* § 66.03[1], at 66–24 (2006); Herbert Thorndike Tiffany, 4 *The Law of Real Property* § 1220 (3d ed.1975 & 2009–2010 cum. supp.). As Professor Tiffany explains,

> if we recognize a distinct doctrine of accretion, in effect a rule of law that an owner of land shall have whatever adjacent land may be created by the gradual action or change of water, the intention of the parties interested in the delimitation of the boundaries of the land is immaterial. In the presence of such a doctrine, the fact that, in conveying the property to its present owner, the grantor expressly retained all future accretions, would be immaterial, as would be the fact that the conveyance, in describing the land, made no reference to the body or stream of water, or to any incident or characteristic thereof. We do not find any case which explicitly decides that one can, in conveying property bounding on water, retain any subsequent accretions thereto, but there are dicta to that effect. The effectiveness of intention in this regard is also indicated by judicial assertions that when the boundary is fixed by the deed at a specified line without reference to the water, the grantee cannot claim accretions beyond such line.... The question whether there is a distinct doctrine of accretion, or whether the so-called doctrine is merely a rule for the ascertainment of boundaries on water, appears to be clearly presented by cases involving the right of one, whose nonriparian land has become riparian by the gradual encroachment of the water, to claim land subsequently formed by the accretion of the water. In such a case, the intention of the grantor of the present proprietor, or of some person anterior to him in the chain

> of title, was to convey land extending only to a boundary away from the water, and consequently if, because his land has become riparian, he is given the benefit of accretions thereto, he is in effect given what it was never the intention of his predecessor in title to convey. If there is a rule of law that accretions belong to the riparian proprietor, he is entitled to the accretions, while otherwise he is not so entitled.

4 *The Law of Real Property* § 1220, at 1075–76 (footnotes omitted).

The doctrine of accretion has been rationalized by courts and commentators on various grounds. Professor Powell summarized and critiqued these rationales as follows:

> Under the Roman law of accession, the owner of the cow also owns the calf, the owner of riparian or littoral land owns the accreted land. This rationale has received little support in recent times and is clearly not relevant when either the process of reliction or erosion is occurring.
>
> ****445 *38** A second rationale occasionally mentioned by the courts and commentators is the ancient legal maxim of *de minimis non curat lex.* There is a logical connection between the de minimis concept and the requirement for accretion, reliction, and erosion that the change be gradual and imperceptible, but the justification has received little modern support since in many accretion cases substantial and valuable acreage is involved.
>
> Another rationale is tautological. Where the parties have designated a body of water as a boundary line, that body of water remains the boundary even if it should change its location. This justification may have been derived from the Roman law where there is no distinction made between accretive and avulsive changes. It is inconsistent, however, with the existence of the doctrine of avulsion because the agreed-to water boundary does not move if the change is determined to be sudden and perceptible.
>
> A fourth rationale is alternatively identified as the productivity or efficiency theory. There are two subsets to this justification. The first notes the inefficiency of small slivers of land surrounded by water and unconnected by land with the owner. The second notes that the adjacent owner is in a better position to use the land than the state or the non-adjacent owner. As stated by the Supreme Court: "it is in the interest of the community, that all lands should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore."
>
> A fifth rationale is a compensation or equity theory. The Supreme Court succinctly summarized this justification when it stated:
>
> > Since a riparian owner is subject to losing land by erosion beyond his [or her] control, he [or she] should benefit from any additions to his [or her] lands by the accretions thereto which are equally beyond his [or her] control.
>
> This rationale has received only modest judicial support and has been criticized as being tautological and based on erroneous assumptions.
>
> The most persuasive and fundamental rationale for a doctrine that permits a boundary to follow the changing location of a body of water is the desirability of maintaining land as riparian that was riparian under earlier conditions, thus assuring the upland owners of access to the water along with the other advantages of such contiguity. A subset of the access to water rationale is the expectancy argument. One who purchases riparian land expects that the land will retain its riparian character even if the body of water moves. An essential attribute of a riparian or littoral parcel is its access to water, so when such a parcel was created or transferred the parties must have intended the transferee to retain that access.

9 *Powell on Real Property* § 66.01[3], at 66–9–66–13.

B. *Hawai'i Supreme Court Precedent*

The supreme court of the Kingdom of Hawai'i first addressed the ownership of accreted lands in *Halstead v. Gay,* 7 Haw. 587 (1889), a case in which the plaintiff sought damages from the defendant for trespassing on land seaward of the boundary of the plaintiff's oceanfront

property, as described in the plaintiff's deed. According to the deed, the property's seaside boundary was "ma kahakai a hiki i ka hope o ka holo mua ana," without distance given. The supreme court explained that "kaha" means "scratch, or mark," " '[k]ai means the sea, or salt water," and as described in the survey, "[k]ahakai ... means the mark of the sea, the junction or edge of the sea and land." *Id.* at 589. The supreme court translated "[a] hiki i kahakai" as "reaching to high water mark" and "ma kahakai a hiki i ka hope o ka holo mua ana" as "along the high water mark to the end of the first course," *id.*, and held, based on this description, that it was "clear" that "[t]he intention is ... to grant to the sea, and make it coterminous with it." *Id.* The supreme court then observed:

> In this kingdom the average rise and fall of the tide is two feet. Where the coast is of rock, high and low water are on the same line. Where it is of sand, the difference between high and low water is generally ***39 **446** too little and too ill-defined and shifting to be taken into account.
>
> Section 387 of the Code, page 92 Compiled Laws, [4] seems to imply that the proprietorship of land adjacent to the beach extended to low water mark, for it enacts that the fisheries for a mile from low water mark are the property of the owners of the lands adjacent and appurtenant, thus making the boundary between the land and the fishery to be the low water line.
>
> But *whether some land between present high and low water has been trespassed upon is not the question in this case, but it is whether land now above high-water mark, which has been formed by imperceptible accretion against the shore line existing at the date of the survey and grant, has become attached by the law of accretion to the land described in the grant. By the definitions we have given, it follows that the plaintiff has the rights of a littoral proprietor, and that the accretion is his.*
>
> *Id.* at 589–90 (emphasis and footnote added).

In *In re Ashford,* 50 Haw. 314, 440 P.2d 76 (1968), the petitioners sought to register title to two parcels of land on the island of Moloka'i, which were described in the royal patents as running "ma ke kai" (along the sea). The petitioners claimed that "the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on the publications of the U.S. Coast and Geodetic Survey." *Id.* at 314–15, 440 P.2d at 77. The State claimed "that 'ma ke kai' is the high water mark that is along the edge of vegetation or the line of debris left by the wash of waves during ordinary high tide[,]" or "approximately 20 to 30 feet above the line claimed by the [petitioners]." *Id.* at 315, 440 P.2d at 77 (footnote omitted). The Hawai'i Supreme Court, in a 4–1 decision, held:

> *We are of the opinion that 'ma ke kai' is along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves,* and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.
>
> ....
>
> When the royal patents were issued in 1866 by King Kamehameha V, the sovereign, not having any knowledge of the data contained in the publications of the U.S. Coast and Geodetic Survey, did not intend to and did not grant title to the land along the ocean boundary as claimed by the [petitioners]. Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. The method of locating the seaward boundaries was by reputation evidence from kamaainas [5] and by the custom and practice of the government's survey office. It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof.
>
> In this jurisdiction, it has long been the rule, based on necessity, to allow reputation evidence by kamaaina witnesses in land disputes. The rule has a historical ***40 **447** basis unique to Hawaiian land law. It was the custom of the ancient Hawaiians to name each division of land and the boundaries of each division were known to the people living thereon or in the neighborhood. 'Some persons were specially taught and made repositories of this knowledge, and it was carefully delivered from father to son.' With the Great Mahele in 1848, these kamaainas, who knew and lived in the area, went on the land with the government surveyors and pointed out the boundaries to the various divisions of land. In land disputes following the Great

> Mahele, the early opinions of this court show that the testimony of kamaaina witnesses were permitted into evidence. In some cases, the outcome of decisions turned on such testimony.
>
> > Two kamaaina witnesses, living in the area of [petitioners'] land, testified, over [petitioners'] objections, that according to ancient tradition, custom and usage, the location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves as represented by the edge of vegetation or the line of debris. In ancient Hawaii, the line of growth of a certain kind of tree, herb or grass sometimes made up a boundary.
> >
> > Cases cited from other jurisdictions cannot be used in determining the intention of the King in 1866.
>
> *Id.* at 316–17, 440 P.2d at 77–78 (footnote added; citations and footnotes omitted).

Five years later, the Hawai'i Supreme Court further developed the rule pronounced in *Ashford* in an eminent-domain case initiated by the County of Hawai'i to acquire a park site. *County of Hawaii v. Sotomura,* 55 Haw. 176, 517 P.2d 57 (1973). In *Sotomura,* unlike in *Ashford,* the seaward boundary of the property at issue had been registered with the land court in 1962. The defendant property owners argued that "because land court proceedings are res judicata and conclusive against all persons as to the boundary determination, the certificate of registration [with the land court] shall be conclusive evidence of the location of the seaward boundary[,]" even if the seaward boundary had subsequently eroded. *Id.* at 178, 517 P.2d at 60. The supreme court disagreed with the property owners and held

> > that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501–81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along the high water mark remains conclusive; however, the precise location of the high water mark on the ground is subject to change and may always be altered by erosion.

Id. at 181, 517 P.2d at 61. The supreme court then said:

> Having concluded that the trial court properly determined that the seaward boundary had been altered by erosion and the location of the high water mark has shifted, we now hold that the new location of the seaward boundary on the ground, as a matter of law, is to be determined by our decision in *In re Application of Ashford, supra.*
>
> The *Ashford* decision was a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right. Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.
>
> The trial court correctly determined that the seaward boundary lies along "the upper reaches of the wash of waves." However, the court erred in locating the boundary along the debris line, rather than along the vegetation line.
>
> We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation ***41 **448** line is a more permanent monument, its growth limited by the year's highest wash of the waves.

Id. at 182, 517 P.2d at 61–62 (citation and footnote omitted). The supreme court then turned its attention to the question of whether title to land lost by erosion passes to the State and stated:

> In the absence of kamaaina testimony or other evidence of Hawaiian custom relevant to the question, we resort to common law principles:

> The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership.... [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo,* 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

We find another line of cases persuasive to determine this question. Land below the high water mark, like flowing water, is a natural resource owned by the state, "subject to, but in some sense in trust for, the enjoyment of certain public rights." *Bishop v. Mahiko,* 35 Haw. 608, 647 (1940). The public trust doctrine, as this theory is commonly known, was adopted by this court in *King v. Oahu Railway & Land Co.,* 11 Haw. 717 (1899). In that case we adopted the reasoning of the United States Supreme Court in *Illinois Central R.R. v. Illinois,* 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892), holding that title to land below the high water mark was:

> ... different in character from that which the state holds in lands intended for sale.... It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.... The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. *King v. Oahu Railway & Land Co.,* 11 Haw. at 723–24.

We hold that the land below the *Ashford* seaward boundary line as to be redetermined belongs to the State of Hawaii, and the defendants should not be compensated therefor.

Id. at 183–84, 517 P.2d at 62–63 (brackets and ellipses in original).

In *In re Sanborn,* 57 Haw. 585, 562 P.2d 771 (1977), the appellees had sought approval from the County of Kaua'i (Kaua'i) to subdivide a beachfront lot into two smaller lots. Pursuant to the then-recently enacted state-shoreline-setback act, HRS §§ 205–31 through 205–37 (Supp.1975), the appellees were required to submit to the Kaua'i planning department a map of their property, certified partly by the state land surveyor (state surveyor). When the state surveyor refused to certify the map prepared by the appellees, they sued. *Id.* at 587, 562 P.2d at 772. The land court recognized that the vegetation and debris line drawn on a map of the appellees' property represented "the 'upper reaches of the wash of waves' during ordinary high tide during the winter season, when the ... waves are further mauka (or inland) than the highest wash of waves during the summer season." *Id.* at 588, 562 P.2d at 773. However, the land court denied legal significance to the vegetation and debris line, determining instead that the appellees' "beachfront title is fixed by certain distances and azimuths set out in the 1951 land court decree of registering title to the property." *Id.* at 589, 562 P.2d at 774. When these distances and azimuths were plotted on a map of the appellees' property, "they gave a line approximately 40 to 45 feet makai (seaward) of the 'vegetation and debris line'." *Id.,* 562 P.2d at 774. On appeal by the state surveyor, the Hawai'i Supreme Court held:

> It is undisputed that during the course of the year actual high water mark varies, with ordinary winter tides reaching substantially further mauka than ordinary summer tides, primarily due to the washing out of beach sands during the winter months. However it is also undisputed ***42 **449** that, because of the annual return of sands during the summer months, there has been no substantial *permanent* erosion of the [appellees'] beach since 1951.
>
> The court below held that, because there has been no permanent erosion since 1951, the State is bound by the measurements in the 1951 decree. We reverse. We hold that, regardless of whether or not there has been permanent erosion, the [appellees'] beachfront title boundary is the upper reaches of the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the [appellees'] title line as being "along the high water mark at seashore", we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise. The evidence adduced at trial below established that the 1951 measurements do not reflect (and given the lack of permanent erosion, probably never reflected) the upper reaches of the wash of waves. Rather, the trial court made the finding of fact that the "vegetation and debris line" represents the

> upper reaches of the wash of waves. Such finding was not clearly erroneous. Accordingly, the "vegetation and debris line" represents the [appellees'] beachfront title line.

Id. at 589–91, 562 P.2d at 774–75. The supreme court then addressed the appellees' contention that HRS § 501–71 gave binding effect to the specific distances and azimuths set out in the 1951 decree for the line of high water. HRS § 501–71 provided then, as it does currently, in relevant part, as follows:

> Every decree of registration of absolute title shall bind the land, and quiet the title thereto, subject only to the exceptions stated in section 501–82. It shall be conclusive upon and against all persons, including the State[.]

Id. at 591, 562 P.2d at 775; HRS § 501–71 (2006). The supreme court stated that although the foregoing statute literally "states in general terms that a land court decree of registration shall bind the land and be conclusive [,]" "[t]he section does not say that every aspect of a land court decree is always conclusive." *Id.*, 562 P.2d at 775. The supreme court explained that

> [t]he underlying purpose of land court registration under the Torrens system is to afford certainty of title, but it is unrealistic to afford absolute certainty. Our statute explicitly states certain exceptions to the conclusiveness of land court decrees, both in HRS § 501–82 and in HRS § 501–71.... Such stated exceptions are not necessarily the sole limitations upon a Torrens decree of registration.
>
> ....
>
> In Hawaii, the public trust doctrine, recognized in our case law prior to the enactment of our land court statute, can similarly be deemed to create an exception to our land court statute, thus invalidating any purported registration of land below high water mark. Although the instant case is decided on narrower grounds, *infra,* we approve this court's analysis in *Sotomura, supra,* 55 Haw. at 183–84, 517 P.2d at 63, where it is stated, with reference to land courted property, that land below high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes. Under this analysis, any purported registration below the upper reaches of the wash of waves in favor of the appellees was ineffective.
>
> ....
>
> In *McCandless v. Du Roi,* 23 Haw. 51 (1915), this court stated that land court decrees are subject to the same rules of construction generally applicable to deeds and that therefore, in construing a land court decree, " 'course and distance will yield to known visible and definite objects whether natural or artificial.' " 23 Haw. at 54.
>
> ....
>
> We follow *McCandless,* finding that in the 1951 decree the natural monument "along high water mark" controls over the specific distances and azimuths. We further find that the true line of high water in this jurisdiction is along the upper reaches of the wash of waves, as discussed in *In re* ***43 **450** *Application of Ashford,* and *Sotomura, supra.*

Id. at 591–96, 562 P.2d at 775–77 (footnotes and some citations omitted). The supreme court then turned its attention to the appellees' contention that "both the Hawaii and federal constitutions would be violated if this court fixes [their] title line along the upper reaches of the wash of waves" because "such an adjudication would be a taking of private property for public use without just compensation." *Id.*, 562 P.2d at 777–78. The supreme court held as follows:

> Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the [appellees'] title extends to a line "along high water mark". We affirm the holding in *McCandless, supra,* that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.
>
> ....
>
> The absence of a clear legal standard in 1951 tends to disprove the existence of a reasonable expectation in 1951 that the land court would be able to fix

> conclusively the distances and azimuths of high water. Moreover, as of 1951 the *McCandless* decision had been standing undisturbed for over 35 years. It would have been unreasonable for the parties to rely on specific distances and azimuths after *McCandless* had held that such measurements are inconclusive.

Id. at 597, 562 P.2d at 778.

In *State v. Zimring,* 58 Haw. 106, 566 P.2d 725 (1977), the State sought to quiet title in itself as against the Zimrings and their predecessors-in-interest to approximately 7.9 acres of new land that had been added to the Zimrings' shoreline property by the Puna volcanic eruption of 1955 (lava extension). The Zimrings' deed described the oceanfront boundary of their property as being "along high water mark[.]" *Id.* at 108, 566 P.2d at 728. The Hawai'i Supreme Court initially observed that historically, "the people of Hawaii are the original owners of all Hawaiian land." *Id.* at 111, 566 P.2d at 729. However, bowing to pressure exerted by foreign residents who sought fee title to land, "King Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840's" which necessarily diminished the lands in the public domain. *Id.,* 566 P.2d at 729. The supreme court stated:

> This encapsulation of the original and development of the private title in Hawaii makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or granted, such land remains in the public domain. To establish legally cognizable private title to land in the great majority of cases, one must show that he or a predecessor-in-interest acquired a Land Commission Award, a Royal Patent, a Kamehameha Deed, a Grant, a Royal Patent Grant, or other government grant for the land in question. Such award for grant can be demonstrated by either the document itself or through the application of the "presumption of a lost grant."
>
> Aside from acquisition of documented title, one can also show acquisition of private ownership through operation of common law or as established by pre–1892 Hawaiian usage pursuant to HRS § 1–1....
>
> Therefore, we find the State's position that all land not awarded or granted remains public land to be basically correct. We would only add that transfer to private ownership can also be shown through the operation of common law or as established by pre–1892 Hawaiian usage.

Id. at 114–15, 566 P.2d at 731. The supreme court held that there was a paucity of evidence adduced that "Hawaii usage prior to 1892 gave to the owner of the land along the seashore, title to land created by volcanic eruption when the eruption destroyed the pre-existing seashore boundary and formed a new boundary along the sea[.]" *Id.* at 118, 566 P.2d at 733. The supreme court also disagreed with the Zimrings that "the common law on accretion and avulsion in other states is not directly on point" and held that

> [a]s known at common law, "the term 'accretion' denotes the process by which the ***44 **451** area of owned land is increased by the gradual deposit of soil due to the action of a bounding river, stream, lake, pond, or tidal waters." 7 R. Powell, Real Property (1976) ¶ 983. When accretion is found, the owner of the contiguous land takes title to the accreted land. Professor Powell indicates that the "basic justification for a doctrine which permits a boundary to follow the changing stream bank is the desirability of keeping land riparian which was riparian under earlier facts, thus assuring the upland owners access to the water and the advantages of this contiguity." *Id.*
>
> *While the accretion doctrine is founded on the public policy that littoral access should be preserved where possible, the law in other jurisdictions makes it clear that the preservation of littoral access is not sacrosanct and must sometimes defer to other interests and considerations. For example, it is well established in California "that accretions formed gradually and imperceptibly, but caused entirely by artificial means ... belong to the state or its grantee, and do not belong to the upland owner. In California it is also well settled that being cut off from contact with the sea is not basis for proper complaint.*
>
> ....
>
> Likewise, in cases where there have been rapid, easily perceived and sometimes violent shifts of land (avulsion) incident to floods, storms, or channel breakthroughs, preexisting legal foundations are retained notwithstanding the fact that former riparian owners may have lost their access to the water.

> In determining in whom lava extensions should vest, we are guided by equitable principles and must balance between competing interests. On the one hand, there is the interest of the former littoral owner seeking to regain access to the ocean. On the other hand is the interest of the public at large, the original and ultimate owner of all Hawaiian land.
>
> Certainly, a grant of the lava extension to the former littoral owner would compensate him [or her] for the loss of the beach-frontage character of his [or her] property. However, it is the windfall of the added acreage which such owner would also be afforded which this court finds troublesome. If a one-third acre parcel fronting the ocean is flowed over by lava which adds one or two seaward acres to the parcel, is it equitable that its owner acquire property which is three or six times the size of the preexisting parcel? If a littoral owner is to be thus compensated for lava devastation, should not an upland pasture or farm owner be also compensated with pasture or farm land for the destruction of what had been the chief economic attribute of the parcel?
>
> It is impossible for any court to fashion a legal doctrine which will equitably compensate all victims of lava devastation. This court believes that it is within the province of the legislature to determine the nature and extent of compensation for such natural disasters.
>
> Rather than allowing only a few of the many lava victims the windfall of lava extensions, this court believes that equity and sound public policy demand that such land inure to the benefit of all the people of Hawaii, in whose behalf the government acts as trustee. Given the paucity of land in our island state and the concentration of private ownership in relatively few citizens, a policy enriching only a few would be unwise. Thus we hold that lava extensions vest when created in the people of Hawaii, held in public trust by the government for the benefit, use and enjoyment of all the people.
>
> Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, *e.g.,* recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.
>
> While the Zimrings cannot be granted the private beachfront title which they seek, they, as members of the public, would share in public access to the lava extension and to the ocean, unless the interest in allowing public access is outweighed by some other public interest, or ***45 **452** unless the land is sold in furtherance of the public interest.

Id. at 120–21, 566 P.2d at 734–35 (emphasis added; some ellipses in original; citations and footnotes omitted).

In *In re Application of Banning,* 73 Haw. 297, 832 P.2d 724 (1992), the Trustees of Kalama Community Trust (Trustees) filed a petition with the land court pursuant to HRS § 501–33[6] to register title to approximately 0.251 acres of "accreted" land fronting their Kailua shoreline property and joined and served all neighboring landowners. A neighboring landowner and the State asserted that registration should be denied because the alleged "accretion" to the Trustees' property "was not natural and permanent." *Id.* at 302, 832 P.2d at 727. The land court found that the "accreted" land was permanent and natural but that it had been used by the general public for recreation and access to the beach for at least twenty years, with the acquiescence of the Trustees, and had therefore been impliedly dedicated to the general public. *Id.,* 832 P.2d at 727–28. On appeal, the supreme court reversed the land court's finding of implied dedication to the general public. In doing so, the supreme court initially observed:

> "Land now above the high water mark, which has been formed by imperceptible accretion against the shore line of a grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor." *Halstead v. Gray[Gay],* 7 Haw. 587 (1889). "[T]he accretion doctrine is founded on the public policy that littoral access should be preserved where possible...." *State v. Zimring,* 58 Haw. 106, 119, 566 P.2d 725, 734 (1977).
>
> > [Other] reasons ordinarily given for th[is] general rule as to accretions are ... that the loss or gain is so imperceptible that it is impossible to identify and follow the soil lost or to prove where it came from, that small portions of land between upland and water should not be allowed to lie idle and ownerless, or that, since the riparian owner may

> lose soil by the action of the water, he should have the benefit of any land gained by the same action.
>
> 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted).

Id. at 303–04, 832 P.2d at 728 (brackets and ellipsis in original). The supreme court also stated:

> We have acknowledged in *Hawaii County v. Sotomura,* 55 Haw. 176, 517 P.2d 57 (1973), *cert. denied,* 419 U.S. 872[, 95 S.Ct. 132, 42 L.Ed.2d 111] (1974), that public policy "favors extending to public use and ownership as much of Hawaii's shoreline as is *reasonably* possible." *Id.* at 182, 517 P.2d at 61–62 (emphasis added). This interest must be balanced against the littoral landowner's right to the enjoyment of his land.
>
> Under the facts of this case, public access to the beach can be preserved without infringing on the enjoyment of the littoral landowner in his accreted land.

Id. at 309–10, 832 P.2d at 731.

More recently, in *Diamond v. State,* 112 Hawai'i 161, 145 P.3d 704 (2006), the supreme court was called upon to determine the proper location of the shoreline under HRS chapter 205A, the Coastal Zone Management Act (CZMA). Pursuant to HRS § 205A–1 (2001), "[s]horeline" is defined as the "upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetarian growth, or the upper limit of debris left by the wash of the waves." This definition is thus equivalent to the Hawai'i Supreme Court's delineation of the boundary dividing private land from public beaches that was adopted in *Ashford.* Under the CZMA, the state board of land and natural resources (BLNR) is responsible for certifying the shoreline of an ***46** ****453** oceanfront property for building-setback purposes. HRS § 205A–42 (2001). A certified shoreline, which is valid for twelve months, HRS § 205A–42(a), is the baseline that is used to (1) measure the shoreline setback line, defined as "that line established in this part [III [7]] or by the county running inland from the shoreline at a horizontal plane," HRS § 205A–41 (2001) (footnote added); and (2) determine the " shoreline area," which encompasses "all of the land area between the shoreline and the shoreline setback line," HRS § 205A–41, where structures and certain activities are prohibited by statute. *See* HRS § 205A–44 (2001).

In *Diamond,* an oceanfront property owner hired a contractor to cut the trees on the owner's property, hired a landscaper to plant salt-tolerant vegetation in the shoreline area of the property, and installed an irrigation line to water the newly planted vegetation. *Id.* at 164, 145 P.3d at 707. In certifying the property's shoreline, the BLNR used the "stable vegetation line"—the line where plants, "without continued human intervention, are well-established and would not be uprooted, broken off, or unable to survive occasional wash or run-up of waves"—even though the vegetation had originally been induced by human hands and the debris line representing the upper wash of the waves occur[red] mauka (inward) of the vegetation line. *Id.* at 168, 145 P.3d at 711.

The Hawai'i Supreme Court held that based on the plain and obvious meaning of the statute, the statute's legislative history, and relevant case law, the shoreline should be certified at the "highest reach of the highest wash of the waves," *id.* at 172–73, 145 P.3d at 715–16, and BLNR therefore erred in certifying the shoreline based on a per se rule establishing the primacy of a vegetation line, which is a more permanent monument, over the debris line. *Id.* at 174–75, 145 P.3d at 717–18. The supreme court noted that its *Sotomura* decision "clearly favored the public policy of extending 'as much of Hawaii's shoreline as is reasonably possible' to public ownership and use" and, therefore, the vegetation line cannot trump the debris line if the debris line is mauka of the vegetation line. *Id.* at 175, 145 P.3d at 718. The supreme court also rejected the use of artificially planted vegetation to determine the certified shoreline, stating:

> The utilization of artificially planted vegetation in determining the certified shoreline encourages private land owners to plant and promote salt-tolerant vegetation to extend their land further makai, which is contrary to the objectives and policies of HRS chapter 205A as well as the public policy we set forth in *Sotomura.* Merely because artificially planted vegetation survives more than

> one year does not deem it "naturally rooted and growing" such that it can be utilized to determine the shoreline. We therefore reconfirm the public policy set forth in*Sotomura* and HRS chapter 205A and reject attempts by landowners to evade this policy by artificial extensions of the vegetation lines on their properties.

Id. at 175–76, 145 P.3d at 718–19.

In summary, under Hawai'i Supreme Court precedent, (1) the "highest reach of the highest wash of the waves" delineates the boundary between private oceanfront property and public property for ownership purposes, as well as the baseline for measuring the shoreline setback line and determining the shoreline area, the so-called no-building zone, notwithstanding that the deed for the oceanfront property describes the property by "certain distances and azimuths" that put the seaward boundary of the property below the high-water mark, *In re Sanborn,* 57 Haw. at 589, 562 P.2d at 774; (2) land added to oceanfront property through avulsive lava extension belongs to the State; and (3) land added to oceanfront property through accretion belongs to the oceanfront property owner.

C. *The Statutory Landscape*

1. Act 221, 1985 Haw. Sess. Laws at 401 (Act 221)

In 1985, the Hawai'i State Legislature passed House Bill No. 194, entitled "A Bill for an Act Relating to Accretion[,]" which ***47 **454** was signed into law by the Governor as Act 221 on June 4, 1985. Act 221 provided, in relevant part, as follows:

> SECTION 1. Chapter 183, [HRS], is amended by adding a new section to be appropriately designated and to read as follows:
>
> " **§ 183–45 Accreted land.** No structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion, shall be permitted to accreted land as judicially decreed under section 501–33 or 669–1(e). This provision shall not in any way be construed to affect state or county property. Any structure or action in violation of this provision shall be immediately removed or stopped and the property owner shall be fined in accordance with section 183–41(e). Any action taken to impose or collect the penalty provided for in this subsection shall be considered a civil action."
>
> SECTION 2. Chapter 501, [HRS], is amended by adding a new section to be designated and to read as follows:
>
> " **§ 501–33 Accretion to land.** An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence at least twenty years. The accreted portion of the land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183–45."
>
> SECTION 3. Section 669–1, [HRS], is amended to read as follows:
>
> " **§ 669–1 Object of action.** (a) Action may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim.
>
> (b) Action for the purpose of establishing title to a parcel of real property of five acres or less may be brought by any person who has been in adverse possession of the real property for not less than twenty years. Action for the purpose of establishing title to a parcel of real property of greater than five acres may be brought by any person who had been in adverse

possession of the real property for not less than twenty years prior to November 7, 1978, or for not less than earlier applicable time periods of adverse possession. For purposes of this section, any person claiming title by adverse possession shall show that such person acted in good faith. Good faith means that, under all the facts and circumstances, a reasonable person would believe that he or she has an interest in title to the lands in question and such belief is based on inheritance, a written instrument of conveyance, or the judgment of a court of competent jurisdiction.

(c) Action brought to claim property of five acres or less on the basis of adverse possession may be asserted in good faith by any person not more than once in twenty years, after November 7, 1978.

(d) Action under subsection (a) or (b) shall be brought in the circuit court of the circuit in which the property is situated.

(e) Action may be brought by any person to quiet title to land by accretion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183–45."

(New statutory material is underscored.)

The legislative history of Act 221 indicates that one of the primary purposes of the act was "to protect the public's access to and enjoyment of Hawaii's beaches." H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142; S. Stand. Comm. Rep. No. 790, in 1985 Senate Journal, at 1223; S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291. The House Committees on Water, Land Use, Development and Hawaiian Affairs ***48 **455** (WLUDHA) and Judiciary explained, in pertinent part, as follows:

Your Committees find that a recent problem has occurred along Hawaii's shoreline in places where there are extreme shifts in sand. In such locations, landowners have constructed seawalls to protect lands created by sand movement. The construction of a seawall often causes ocean currents to move laterally along the seashore. As a result, land adjacent to the lot in which the seawall is constructed begins to erode. This prompts the owner of the eroding land to build a second seawall. This sequence repeats itself as the ocean currents move along the beach.

As seawalls are constructed, two problems arise. First, a wide stretch of beach is destroyed. Only rock walls standing next to the water are left in its wake. Second, public access to the shoreline and ocean is inhibited.

This bill protects the public's access to and enjoyment of Hawaii's beaches by adding a new section to Chapter 183, Hawaii Revised Statutes. The section prohibits the construction of structures or seawalls, dredging, or grading, or other use of accreted land to which title has been obtained by judicial decree after the enactment of this bill and which interferes or may interfere with the future natural course of the beach.

H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142–43. Similarly, the Senate Judiciary Committee stated that House Bill No. 194 "will protect public's access to beaches, as well as to provide for the minimal interference with the natural processes of beach accretion and erosion." S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291.

Another legislative purpose of Act 221 was to establish a burden of proof and provide clear standards in cases where oceanfront property owners seek to register or quiet title to accreted lands. In this regard, the House Committees on WLUDHA and Judiciary reported:

This bill also amends Chapter 501, [HRS], which relates to registration of land registered under the Land Court system, by adding a new section to the chapter. The section states that an application to register accreted lands may be granted only if the applicant proves by a clear [8] preponderance of the evidence that the accretion is natural and permanent. An accretion is deemed to be "permanent" if it has been in existence for more than twenty years.

Similarly, this bill amends Section 669–1, [HRS], which relates to actions to quiet title, by adding a new subsection. The subsection also requires that a person bringing an action to quiet title to accreted land prove by a clear [[[[[[9]] preponderance of the evidence that

the accretion is natural and permanent. Again, an accretion is "permanent" if it has been in existence for more than twenty years.

Your Committees do not intend to affect the existing law in regard to ownership of and other rights relating to land created by accretion, and it is the intent of your Committees that the bill does not affect existing law.
H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142–43 (footnotes added). The Senate Judiciary Committee also explained:

> Problems have arisen along Hawaii's shoreline where the sand movement is extensive. Some beachfront owners have taken advantage of calm years when the vegetation line advances seaward to secure title to the new land. At the present time, courts have no clear standard for determining when accreted land becomes permanent and stable. This bill will remedy the problem.

S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291.
Written testimony submitted in support of House Bill No. 194 expressed the need for ***49** ****456** clearer standards. For example, Dr. Doak C. Cox (Dr. Cox) of the University of Hawai'i Environmental Center testified, in pertinent part:

HB 194 pertains to the registration and land-use designation of accreted land and to measures that may affect the erosion or further accretion to such land....

Before discussing details of the provisions proposed in the bill we wish to identify the problem in coastal-zone management that it is clearly intended to mitigate, and that it will indeed mitigate to a significant extent.

Natural coastal accretion, and its reciprocal, erosion, are processes whose human significance is restricted in Hawaii mainly to beaches. Particularly on open coasts, beaches are geomorphologically unstable features, being subject to extension and/or retreat on time scales ranging from seconds to durations of purely geological interest. By principles of common law applicable in Hawaii, the owner of land mauka of a beach shoreline loses title to land that is lost by erosion, that is through retreat, and gains title to land that is gained by accretion, that is through extension, at least when the erosion or accretion has persisted for some time.

Annual cycles are particularly marked on many Hawaiian beaches. It would be irrational to allow a land owner to claim ownership to land gained by beach extension during one season that will be lost less than a year later; and the courts generally do not apply to the annual cycles of extension and retreat the legal principles of accretion and erosion. However, many Hawaiian open coastal beaches have a history of not only annual cycles but net progressive retreat, net progressive extension, or successive periods of several decades duration during which there has been net progressive retreat and extension. It is with the implications of these longer term changes that HB 194 is concerned.

The principal problem that would be mitigated by the provisions proposed in the bill relates to the likelihood that the owner of land to which there has been net accretion over several years may treat the accretion as if permanent, will erect structures on it that will be at risk if there is a subsequent erosion, and will then attempt to save these structures by erecting a sea wall or similar structure along the shore. Such a structure would very likely seriously decrease the chances of subsequent accretion even during a period when such accretion would occur naturally.

The bill would require "proof by clear [10] preponderance of the evidence" that the accretion "has been in existence for at least twenty years" as a condition to the registration of the accreted land by the Land Court.

There are beaches in Hawaii on which net accretion over a period of as long as 20 years has been followed by net erosion over a period of similar duration. Nevertheless, the proposed 20–year criterion for registration is reasonable considering the provision of the bill that would place the accreted land in the Conservation District and the provision prohibiting measures that would affect the natural processes which might result in subsequent erosion or future further accretion.

> Statement by Dr. Cox on House Bill No. 194, Relating to Accretion for House Committees on WLUDHA and Judiciary, February 8, 1985 (footnote added).

2. Act 73

In 2003, the Hawai'i State Legislature passed House Bill No. 192, which was signed into law as Act 73 [11] on May 20, 2003, the ***50 **457** date Act 73 became effective. Act 73 amended HRS §§ 501–33 and 669–1(e) to provide that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land. Act 73 also amended HRS §§ 171–2, 501–33, and 669–1 to provide that, henceforth, accreted lands not otherwise awarded shall be considered "[p]ublic lands" or "state land."

The conference committee considering House Bill No. 192 indicated that

> [t]he purpose of this bill is to protect public beach land by:
>
> (1) Including accreted lands, that is lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of nature forces, in the definition of state public lands;
>
> (2) Providing that no applicant other than the State shall register accreted lands, with the exception of certain private property owners;
>
> (3) Allowing a private property owner to file an accretion claim to regain title to and register the owner's eroded land that has been restored by accretion; and
>
> ****458 *51** (4) Requiring the agency receiving the accretion application to supply the Office of Environmental Quality Control (OEQC) with a notice for publication in the OEQC's periodic bulletin.

Conf. Comm. Rep. No. 2, in 2003 House Journal, at 1700, 2003 Senate Journal, at 945. The Senate Committee on Judiciary and Hawaiian Affairs found that

> this measure will stop the unlawful taking of public beach land under the guise of fulfilling a nonexistent littoral right supposedly belonging to shorefront property owners. The measure will help Hawaii's public lands and fragile beaches by ensuring that coastal property owners do not inappropriately claim newly deposited lands makai of their property as their own.

S. Stand. Comm. Rep. No. 1224, in 2003 Senate Journal, at 1546. The House Committee on Judiciary similarly found "it crucial to protect public beaches from being transformed into private lands through the filing of accretion claims, except to restore to private ownership portions of private land removed by erosion." H. Stand. Comm. Rep. No. 626, in 2003 House Journal, at 1360.

PROCEDURAL HISTORY OF THE UNDERLYING LAWSUIT

On May 19, 2005, one day shy of two years from the date of Act 73's enactment, [12] Plaintiffs filed the underlying complaint in the circuit court.

On December 30, 2005, the circuit court, over the State's objection, entered an order granting Plaintiffs' October 28, 2005 Amended Motion for Class Certification and certified a class of plaintiffs consisting of "[a]ll non-governmental owners of oceanfront real property in the State of Hawai'i on and/or after May 19, 2003" (Class Certification Order) This order was not certified as final for appeal purposes and is therefore not before us.

On February 13, 2006, Plaintiffs filed an amended motion for PSJ "on their claim for Injunctive Relief, barring enforcement of [Act 73] unless and until the State of Hawai'i acknowledges that it must provide just compensation to the class members and undertakes to do so in conjunction with these proceedings." Plaintiffs claimed that they were "entitled to [PSJ] in their favor ... because there is no dispute that Act 73 is a taking of private property and no dispute that the State is refusing to pay for such taking. Injunctive Relief is necessary to enjoin the State's unlawful exercise of ownership over private real property rights it refuses to pay for." Plaintiffs argued that their motion should be granted because (1) "[i]t is undisputed that Plaintiffs owned property rights to accretion that the State wrongfully appropriated by

its enactment of Act 73;" (2) "[i]t is undisputed that the State has refused to pay for Plaintiffs' accreted property rights;" and (3) "Plaintiffs are entitled to injunctive relief as a matter of law because Plaintiffs must be protected against the State's unconstitutional actions." Plaintiffs argued that

> [o]rdinarily, the remedy for an unconstitutional taking of real property is payment of just compensation via an inverse condemnation proceeding. Here, however, the situation is different. Because the legislative scheme did not intend or provide for damages, this Court is able to grant the unique remedy of precluding enforcement of Act 73. Where a legislative act takes a property right without providing for payment of just compensation, injunctive relief is appropriate.

On September 1, 2006, the circuit court entered an order granting Plaintiffs' amended motion for PSJ "insofar as Plaintiffs sought declaratory relief." No injunctive relief was granted. In its order, the circuit court held, in relevant part, as follows:

> Having considered the memoranda filed by the parties, the arguments of counsel, and the records and files in this action, the Court finds that there are no disputed issues of material fact and that [P]laintiffs are entitled to partial summary judgment as a matter of law as follows:
>
> ****459 *52** (1) [Act 73] represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669.
>
> (2) [Act 221] was not intended to alter, and did not alter, the common law of Hawai'i with respect to the ownership of accreted land by the littoral owner. Such land belongs to the littoral landowner, whether or not title thereto is registered under [HRS] Chapter 501 or quieted under [HRS] Chapter 669, and it was not taken by the State from littoral landowners so long as the littoral landowners remained free to register title thereto accretion [sic] under [HRS] Chapter 501 or quiet title thereto under [HRS] Stat. Chapter 669.
>
> (3) Land which accreted naturally and imperceptibly before Act 221 was not made "public land," and was not taken from littoral landowners by the State so long as littoral landowners remain free to register title to the accreted land under [HRS] Chapter 501 and/or quiet title under [HRS] Chapter 669;
>
> (4) Land which accreted naturally and imperceptibly after Act 221 is not public land and was not and was not [sic] taken by the State from littoral landowners by Act 73, even if the land is not "permanent" within the meaning of Act 221, so long as littoral landowners remains [sic] free to register title to "permanent" accreted land under [HRS] Chapter 501 and/or quiet title under [HRS] Chapter 669.
>
> Accordingly, for good cause it is ORDERED that the Amended Motion for Summary Judgment is GRANTED insofar as Plaintiffs sought declaratory relief.

On September 12, 2006, the parties filed their Stipulation for Leave to File Interlocutory Appeal and Order.

On September 27, 2006, the State filed its Notice of Appeal.

DISCUSSION

The dispositive issue in this case is whether the circuit court correctly held that Act 73 "effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be 'public land' and prohibited littoral owners from registering existing and future

accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669."

A. *Whether Plaintiffs Have Vested Property Rights in Future Accretions*

The circuit court concluded that Act 73 "represented a sudden change in the common law and effected an uncompensated taking of littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be 'public land' and prohibited littoral owners from registering ... future accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669."

[1] It is true that under Hawai'i common law, land accreted to oceanfront property belongs to the oceanfront property owner, and under Act 73, all accreted lands (except those which restored eroded lands or were the subject of proceedings pending at the time Act 73 was enacted) now belong to the State. However, pursuant to HRS § 1–1 (1993):

> **Common law of the State; exceptions.** The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, *except as otherwise expressly provided* by the Constitution or laws of the United States, or *by the laws of the State,* or fixed by Hawaiian judicial precedent, or established by Hawaiian usage[.]

(Emphases added.) Furthermore, the Hawai'i Supreme Court has held that "our state ***53** ****460** legislature may, by legislative act, change or entirely abrogate common law rules through its exercise of the legislative power under the Hawaii State Constitution, but in the exercise of such power, the legislature may not violate a constitutional provision." *Fujioka v. Kam,* 55 Haw. 7, 9, 514 P.2d 568, 570 (1973).

[2] In their underlying complaint, Plaintiffs claimed that Act 73 took their right to future accretions and thereby violated article I, section 20 of the Hawai'i State Constitution, which states: "Private property shall not be taken or damaged for public use without just compensation." However, any claims that Plaintiffs may have to future accretions are purely speculative, and other courts have held that a riparian owner has no vested right to future accretions.

In *Western Pac. Ry. Co. v. Southern Pac. Co.,* 151 F. 376 (9th Cir.1907), for example, the Ninth Circuit Court of Appeals, in rejecting dictum in *County of St. Clair v. Lovingston,* 23 Wall. 46, 90 U.S. 46, 68, 23 L.Ed. 59 (1874), that "[t]he riparian right to future alluvion is a vested right [,]" held: "We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists." *Western Pac. Ry. Co.,* 151 F. at 399. After distinguishing vested, expectant, and contingent rights, the court concluded: "Within that definition of vested rights, there can be no question, we think, that the right to future possible accretion could be divested by legislative action." *Id. See also Cohen v. United States,* 162 F. 364, 370 (C.C.N.D.Cal.1908) ("The riparian owner has no vested right in future accretions. The riparian owner cannot have a present vested right to that which does not exist, and which may never have an existence.") (citations omitted); *Latourette v. United States,* 150 F.Supp. 123, 126 (D.Ore.1957) (The "plaintiff had no vested right in the continuance of future accretions to his property by way of sands carried by the winds and in turn washed by the sea upon his lands.").

In a somewhat similar situation, the Hawai'i Supreme Court held that it was not unconstitutional to terminate, by legislation, a statute that granted exclusive fishing rights in offshore fisheries to certain tenants of an ahupua'a. *Damon v. Tsutsui,* 31 Haw. 678, 693 (1930). The supreme court explained that as to these tenants, the repealed statute "amounted to nothing more than an offer to give them certain fishing rights when they should become tenants,-an offer which was withdrawn before they were in a position to accept it." *Id.* at 693. Additionally, the supreme court said:

> When the repealing statute went into effect there had been no identification of the tenant or of the land or of the fishery. Under these circumstances it cannot properly be said that there had been any vesting. "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right." 12 C.J. 955. "A mere expectancy of the future benefit, or a contingent interest in property founded upon anticipated continuance of existing laws, is not a vested right, and such right may be enlarged

> or abridged or entirely taken away by legislative enactment." 6 A. & E. Ency. L. 957. "Rights are vested, in contradiction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." Cooley, Principles of Constitutional Law, 332, quoted with approval in *Pearsall v. Great Northern Railway,* 161 U.S. 646, 673, 16 S.Ct. 705, 40 L.Ed. 838.

Id. at 693–94.

It is instructive that article XI, section 1 of the Hawai'i State Constitution, which was adopted in 1978, twenty-five years before the passage of Act 73, mandates that

> ****461 *54** [f]or the benefit of present and future generations, *the State* and its political subdivisions *shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water,* air, minerals and energy sources, *and shall promote the development and utilization of these resources in a manner consistent with their conservation* and in furtherance of the self-sufficiency of the State.
>
> *All public natural resources are held in trust by the State for the benefit of the people.*

(Emphases added.) The Hawai'i Supreme Court has stated that the foregoing provision adopts "the public trust doctrine as a fundamental principle of constitutional law in Hawai'i," *In re Water Use Permit Applications,* 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000), and that "[t]he public trust is a dual concept of sovereign right and responsibility." *Id.* at 135, 9 P.3d at 447. The foregoing constitutional provision clearly diminishes any expectation that oceanfront owners in Hawai'i had and may have in future accretions to their property.

Here, Plaintiffs have no vested right to future accretions that may never materialize and, therefore, Act 73 did not effectuate a taking of future accretions without just compensation.

B. *Whether Act 73 Effectuated an Uncompensated Taking of Littoral Owners' Existing Accreted Lands*

1.

[3] On appeal, the State classifies accreted lands into three categories: (1) Class I accreted lands—those lands that accreted before the effective date of Act 221, i.e., before June 4, 1985; (2) Class II accreted lands—those lands that accreted after the effective date of Act 221 but before the effective date of Act 73, i.e., between June 4, 1985 and May 19, 2003; and (3) Class III accreted lands—those lands that accreted on or after the effective date of Act 73, i.e., on or after May 20, 2003.

The State then argues that (1) "Act 221 was prospective and did *not* affect Class I accreted lands" but "essentially prohibited littoral landowners from claiming any interest in Class II accreted lands unless and until they became permanent, i.e., until they stayed in existence for 20 years"; (2) before any Class II accreted land could become permanent, Act 73 was enacted, "which denied non-State oceanfront landowners ownership of accreted lands (except to the extent the accretion restored previously eroded land) and made it all State land"; (3) neither Act 221 nor Act 73 affected littoral owners' interest in Class I accretions and, therefore, no taking of Class I accretions has occurred; (4) because Class II accretions, by definition, did not form until June 4, 1985, none of these accretions could have been in existence for twenty years at the time Act 73 became effective and, therefore, littoral owners had no vested property right in the Class II accretions that could be taken away by Act 73; they just had a hope that sometime in the future they might be able to assert control and dominion over Class II accretions; and (5) Act 73 did not effect a taking of Class III accretions, as those accretions did not physically exist at the time Act 73 became effective.

Contrary to the State's argument, however, Act 221, on its face, did not affect the common-law rights of a littoral owner to accreted lands. Indeed, the legislative history of Act 221 expressly mentions that the legislature did "not intend to affect the existing law in regard to ownership of and other rights relating to land created by accretion[.]" H. Stand. Comm. Rep. No. 346, in 1985 House Journal at 1142–43. As discussed above, Act 221 merely established a burden of proof and clear standards for registering or

quieting title to accreted lands. More specifically, Act 221 provided that in order to register or quiet title to accreted lands, a littoral owner was required to prove, by a preponderance of the evidence, that the accretion was natural and permanent (i.e., in existence for twenty years). Act 221 did not change the supreme court's precedent that accreted land above the high-water mark belongs to the littoral owner of the land to which the accretion attached. Act 221 also did not provide that all accreted land above the high-water mark was public or state land ***55 **462** until the littoral owner proves that the accretion was natural and permanent.

The State is also mistaken that littoral owners had no ownership interest in Class II accretions at the time Act 73 was enacted. As discussed above, at the time Act 73 was enacted, it was Hawai'i common law that shoreline property from the sea to the high-water mark was owned by the State, and any oceanfront accretions above the high-water mark belonged to the adjoining property owner, irrespective of whether a metes-and-bounds description of the accreted lands was included in the deed of the oceanfront property owner. Act 73 clearly changed the common law by declaring that all accreted lands "not otherwise awarded" and not previously recorded or the subject of a then-pending registration or quiet-title proceeding was now state or public property. Therefore, littoral owners who had such accreted lands when Act 73 became effective on May 20, 2003 had their ownership rights in their accreted lands taken from them by the passage of Act 73. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

In *Loretto,* the United States Supreme Court held:

> [W]hen the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.
>
> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.
>
> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself [or herself], and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he [or she] not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant.

Id. at 435–36, 102 S.Ct. 3164 (citations, internal quotation marks, and footnotes omitted). Act 73 permanently divested a littoral owner of his or her ownership rights to any existing accretions to oceanfront property that were unregistered or unrecorded as of the effective date of Act 73 or for which no application for registration or petition to quiet title was pending and, therefore, Act 73 effectuated a taking of such accretions.

2.

The parties do not dispute that there was a legitimate public purpose for the passage of Act 73. Since the parties stipulated to an appeal of the circuit court's declaratory judgment, the circuit court did not decide Plaintiffs' claim that Plaintiffs and the class they represent were entitled to damages for the taking of their property. On remand, the circuit court must do so.

As mentioned earlier, the circuit court's Class Certification Order was not certified as a final judgment for appeal purposes and is not before us. While certification of a class for purposes of determining generically whether Act 73 effectuated a taking of littoral owners' future accretions might have been appropriate, we have questions about whether the class certification was proper for determining whether Act 73 effectuated a taking of those accretions existing as of the effective date of Act 73, since each littoral

owner's factual situation regarding existing *56 **463 accretions would be different and not conducive to class adjudication.

Moreover, the United States Supreme Court has held that a court should not decide an inverse-condemnation claim where a party does not identify specific property that has allegedly been taken by the government. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the plaintiff challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977, a federal act that placed restrictions and conditions on mining operations. The district court found these restrictions and conditions to be unconstitutional takings. *Id.* at 294, 101 S.Ct. 2352. On appeal, the Supreme Court held that

> the [d]istrict [c]ourt's ruling on the "taking" issue suffers from a fatal deficiency: neither appellees nor the court identified any property in which [appellees] have an interest that has allegedly been taken by operation of the Act. By proceeding in this fashion, the court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary. Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. Just last Term, we reaffirmed that
>
> > "this Court has generally 'been unable to develop' any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors —such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance."
>
> These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.
>
> Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking. The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land[.]"

Id. at 294–95, 101 S.Ct. 2352.

The Supreme Court further stated in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), that "we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in that case." (Citations, internal quotation marks, and brackets omitted.) The *Penn Central* Court identified "several factors that have particular significance" in "engaging in these essentially ad hoc, factual inquiries[.]" *Id.* According to the Supreme Court,

> [t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citations omitted.)

Notably absent from Plaintiffs' complaint is any allegation that Plaintiffs have ownership rights in accreted lands that existed at the time Act 73 was enacted. Moreover,

the deeds by which Plaintiffs acquired the beach- *57 **464 reserve lots suggest that there were seawalls built on the lots, raising questions concerning the existence of any accretions. Because Plaintiffs have not alleged specific accretions which the State has taken from them by the enactment of Act 73 and, more damagingly, have not alleged that any accreted land even exists, the circuit court, on remand, must determine whether Plaintiffs have been injured by the enactment of Act 73.

CONCLUSION

We conclude that (1) Plaintiffs and the class they represented had no vested property rights to future accretions to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions; and (2) Act 73 effectuated a permanent taking of littoral owners' ownership rights to existing accretions to the owners' oceanfront properties that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions.

Accordingly, we vacate that part of the PSJ order which concluded that Act 73 took from oceanfront owners their property rights in all future accretion that was not proven to be the restored portion of previously eroded land. We remand this case to the circuit court for a determination of whether Plaintiffs have accreted lands that existed when Act 73 was enacted and, if so, for a determination of the damages they incurred as a result of the enactment of Act 73.

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

I concur in the analysis and result reached by the majority on the issues of whether Act 73, 2003 Haw. Sess. Laws at 128–30 (Act 73), effected an uncompensated taking with respect to future accretions and existing accretions to private oceanfront property. However, the circuit court's Class Certification Order was not appealed, and the appropriate remedy for any uncompensated taking effected by Act 73 was not an issue before this court. I would not address and do not express any view on matters that were not before us. To that extent, I respectfully dissent from the majority's opinion.

All Citations

122 Hawai'i 34, 222 P.3d 441

Footnotes

1 Plaintiffs are three Hawai'i non-profit corporations that were formed by homeowners in the Portlock area of O'ahu. The oceanfront lots underlying the Portlock homes were originally owned and developed in leasehold by the Trustees of the Estate of Bernice Pauahi Bishop (Bishop Estate). The lease for each oceanfront lot described the lot by specific metes and bounds. The leases did not include a narrow strip of land between the lot and the ocean, which Bishop Estate reserved for itself (beach-reserve lot). In the late 1980's or early 1990's, Bishop Estate sold its fee interest in the oceanfront lots to the Portlock homeowners but reserved its fee interest in the beach-reserve lots. On May 6, 2005, Bishop Estate sold to Plaintiffs the beach-reserve lots that adjoined the lots of Plaintiffs' respective homeowner members. Pursuant to the deeds for the beach-reserve lots, Bishop Estate reserved access and utility easements for itself, together with the right to grant easements over the lots to government agencies and public utilities; Plaintiffs agreed to continue to allow the public to use the beach-reserve lots "for access, customary beach activities and related recreational and community purposes"; and Plaintiffs accepted numerous restrictive covenants that ran with the lots.

2 The Honorable Eden Elizabeth Hifo presided.

3 The re-emergence doctrine typically applies to the following fact pattern:

> A owns a riparian parcel while B owns an adjacent upland non-riparian parcel. By the process of erosion all of A's parcel becomes submerged and B's parcel becomes riparian. Under the general rules of erosion, A loses title to his or her parcel. Then, by the process of accretion, A's parcel re-emerges.

9 *Powell on Real Property* § 66.03[1], at 66–25–66–26.

4 Section 387 of the Compiled Laws of the Hawaiian Kingdom provided:

> The fishing grounds from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low water mark, shall, in law, be considered the private property of the konohikis, whose

lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the said konohikis shall not be molested, except to the extent of the reservations and prohibitions hereinafter set forth.

1884 Compiled Laws of the Hawaiian Kingdom § 387, at 92–93. A "konohiki" is the "[h]eadman of an *ahupua'a* land division under the chief; land or fishing rights under control of the *konohiki;* such rights are sometimes called *konohiki* rights." Mary K. Pukui and Samuel H. Elbert, *Hawaiian Dictionary* 166 (1986). An "ahupua'a" is a "[l]and division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (*ahu*) of stones surmounted by an image of a pig (*pua'a*), or because a pig or other tribute was laid on the alter as tax to the chief." *Id.* at 9.

5 A "kama'aina" is defined as "[n]ative-born, one born in a place, host [.]" *Hawaiian Dictionary* at 124.

6 The supreme court noted in *Banning* that HRS § 501–33 required that

> [a]n applicant for registration of land by accretion shall ***prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence for at least twenty years.***

Id., 832 P.2d at 727 (bolded emphasis and brackets in original).

7 HRS § 205A–43(a) (2001) provides in part that "[s]etbacks along shorelines are established of not less than twenty feet and not more than forty feet inland from the shoreline."

8 The bill was subsequently amended to delete the word "clear" before the phrase "preponderance of the evidence[.]" S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1292.

9 See footnote 8.

10 As noted earlier, the word "clear" was subsequently deleted from the bill that was enacted as Act 221.

11 Act 73 states, in relevant part:

> SECTION 1. Section 171–1, [HRS], is amended by adding a new definition to be appropriately inserted and to read as follows:
>
> " "Accreted lands" means lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces."
>
> SECTION 2. Section 171–2, [HRS], is amended to read as follows:
>
> " **§ 171–2 Definition of public lands.** "Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including accreted lands not otherwise awarded, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter, except...."
>
> SECTION 3. Section 343–3, [HRS], is amended by amending subsection (c) to read as follows:
> "(c) The office [of environmental quality control] shall inform the public of:
> ....
> (4) An application for the registration of land by accretion pursuant to section 501–33 or 669–1(e) for any land accreted along the ocean."
> SECTION 4. Section 501–33, [HRS], is amended to read as follows:
>
> " **§ 501–33 Accretion to land**. An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent[:]~~; provided that no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion. The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in~~

~~compliance with section 343–3(c)(4). The application shall not be approved unless the office of environmental quality control has published notice in the office's periodic bulletin.~~

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of the land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183–45."

SECTION 5. Section 669–1, [HRS], is amended by amending subsection (e) to read as follows:

"(e) Action may be brought by any person to quiet title to land by accretion[~~.~~]; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343–3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin.

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183–45."

SECTION 6. Applications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

2003 Haw. Sess. Laws Act 73, at 128–30.

12 Pursuant to HRS § 661–5 (1993), "[e]very claim against the State, cognizable under this chapter, shall be forever barred unless the action is commenced within two years after the claim first accrues[.]"

End of Document

2012 Hawaii Laws Act 56 (H.B. 2591)

HAWAII 2012 SESSION LAWS

2012 REGULAR SESSION OF THE 26th LEGISLATURE

Additions are indicated by **Text**; deletions by ~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by ~~**Text**~~.

Act 56
H.B. No. 2591
ACCRETED LANDS

A BILL FOR AN ACT RELATING TO ACCRETED LANDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 171-2, Hawaii Revised Statutes, is amended to read as follows:

<< HI ST § 171-2 >>

"§ 171-2 Definition of public lands.

"Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including [~~accreted~~] lands **accreted after May 20, 2003, and** not otherwise awarded, submerged lands, and lands beneath tidal waters [~~which~~] **that** are suitable for reclamation, together with reclaimed lands [~~which~~] **that** have been given the status of public lands under this chapter, except:

(1) Lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, as amended;

(2) Lands set aside pursuant to law for the use of the United States;

(3) Lands being used for roads and streets;

(4) Lands to which the United States relinquished the absolute fee and ownership under section 91 of the Hawaiian Organic Act prior to the admission of Hawaii as a state of the United States unless subsequently placed under the control of the board of land and natural resources and given the status of public lands in accordance with the state constitution, the Hawaiian Homes Commission Act, 1920, as amended, or other laws;

(5) Lands to which the University of Hawaii holds title;

(6) Lands to which the Hawaii housing finance and development corporation in its corporate capacity holds title;

(7) Lands to which the Hawaii community development authority in its corporate capacity holds title;

(8) Lands to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167;

Exhibit C

(9) Lands [~~which~~] **that** are set aside by the governor to the Aloha Tower development corporation; lands leased to the Aloha Tower development corporation by any department or agency of the State; or lands to which the Aloha Tower development corporation holds title in its corporate capacity;

(10) Lands [~~which~~] **that** are set aside by the governor to the agribusiness development corporation; lands leased to the agribusiness development corporation by any department or agency of the State; or lands to which the agribusiness development corporation in its corporate capacity holds title; and

(11) Lands to which the high technology development corporation in its corporate capacity holds title."

SECTION 2. Section 501–33, Hawaii Revised Statutes, is amended to read as follows:

<< HI ST § 501–33 >>

"§ 501–33 Accretion to land.

An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent[~~:~~] **and that the land accreted before or on May 20, 2003;** provided that [~~no applicant other than the~~]:

(1) The State [~~shall~~] **may** register land accreted along the ocean[~~, except that a~~] **after May 20, 2003; and**

(2) A private property owner whose eroded land has been restored by accretion **after May 20, 2003,** may file an accretion claim to regain title to the restored portion.

The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in compliance with section 343–3(c)(4). The application shall not be approved unless the office of environmental quality control has published notice in the office's periodic bulletin.

As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of the land [~~shall be state land except as otherwise provided in this section and~~] shall be considered within the conservation district. **Land accreted after May 20, 2003, shall be public land except as otherwise provided in this section.** Prohibited uses are governed by section 183–45."

SECTION 3. Section 669–1, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

<< HI ST § 669–1 >>

"(e) Action may be brought by any person to quiet title to land by accretion; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean[~~:~~] **after May 20, 2003,** except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent[~~:~~] **and that the land accreted before or on May 20, 2003.** The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343–3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin.

As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land [~~shall be state land except as otherwise provided in this section and~~] shall be considered within the

conservation district. **Land accreted after May 20, 2003, shall be public land except as otherwise provided in this section.** Prohibited uses are governed by section 183–45."

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

Approved April 23, 2012.

Report Title:

Accreted Lands

Description:

Defines accreted lands. Includes accreted lands in the definition of public lands. Requires that accreted lands shall be state lands except a private property owner may file an accretion claim to regain title to the owner's eroded land that has been restored by accretion. Clarifies that the applicant provides the notice for publication in OEQC's periodic bulletin. (HB192 CD1)

HOUSE OF REPRESENTATIVES

TWENTY-SECOND LEGISLATURE, 2003

STATE OF HAWAII

H.B. NO. 192 H.D. 1 S.D. 1 C.D. 1

A BILL FOR AN ACT

RELATING TO ACCRETED LANDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 171-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

""Accreted lands" means lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces."

SECTION 2. Section 171-2, Hawaii Revised Statutes, is amended to read as follows:

"**§171-2 Definition of public lands.** "Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the

Exhibit D

exercise of the right of eminent domain, or in any other manner; including accreted lands not otherwise awarded, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter, except:

(1) Lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, as amended;

(2) Lands set aside pursuant to law for the use of the United States;

(3) Lands being used for roads and streets;

(4) Lands to which the United States relinquished the absolute fee and ownership under section 91 of the Hawaiian Organic Act prior to the admission of Hawaii as a state of the United States unless subsequently placed under the control of the board of land and natural resources and given the status of public lands in accordance with the State Constitution, the Hawaiian Homes Commission Act, 1920, as amended, or other laws;

(5) Lands to which the University of Hawaii holds title;

(6) Lands to which the housing and community development corporation of Hawaii in its corporate capacity holds title;

(7) Lands to which the Hawaii community development authority in its corporate capacity holds title;

(8) Lands to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167;

(9) Lands which are set aside by the governor to the Aloha Tower development corporation; lands leased to the Aloha Tower development corporation by any department or agency of the State; or lands to which the Aloha Tower development corporation holds title in its corporate capacity; and

(10) Lands to which the agribusiness development corporation in its corporate capacity holds title."

SECTION 3. Section 343-3, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) The office shall inform the public of:

(1) A public comment process or public hearing if a federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take license pursuant to the federal Endangered Species Act;

(2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment; [~~and~~]

(3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement [~~.~~]; and

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean."

SECTION 4. Section 501-33, Hawaii Revised Statutes, is amended to read as follows:

"**§501-33 Accretion to land.** An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent[~~.~~]; provided that no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion. The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The application shall not be approved unless the office of environmental quality control has published notice in the office's periodic bulletin.

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of the land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183-45."

SECTION 5. Section 669-1, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

"(e) Action may be brought by any person to quiet title to land by accretion[~~.~~]; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin. [~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183-45."

SECTION 6. Applications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect upon its approval.

HB2591

RELATING TO ACCRETED LANDS.
Clarifies that land accreted after May 20, 2003, shall be public land except as otherwise provided by law.
(HB2591 HD2)

Exhibit E

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

Testimony of
WILLIAM J. AILA, JR.
Chairperson

Before the Senate Committees on
WATER, LAND AND HOUSING
and
JUDICIARY AND LABOR

Tuesday, March 20, 2012
12:30 P.M.
State Capitol, Conference Room 016

In consideration of
HOUSE BILL 2591, HOUSE DRAFT 2
RELATING TO ACCRETED LANDS

The purpose of House Bill 2591, House Draft 2 is to relieve the State from the obligation to pay compensation resulting from a constitutional taking of accreted lands. The Department of Land and Natural Resources (Department) strongly supports this Administration measure.

Act 73, Session Laws of Hawaii 2003, disallowed the registration of accreted lands by private landowners. A class action suite was filed alleging that Act 73 affected a constitutional "taking" of privately owned land for which the State owned "just compensation." Both the Circuit Court and the Intermediate Court of Appeals have ruled that Act 73 was a constitutional "taking" as to accreted land that accreted before and existing when the Act became effective (May 20, 2003). Both courts ruled that accretion occurring after May 20, 2003, could be public land without affecting any privately owned vested rights.

This measure tailors the State's accretion laws so that it only affects land that accreted after May 20, 2003.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:
H.B. NO. 2591, H.D. 2, RELATING TO ACCRETED LANDS.

BEFORE THE:

SENATE COMMITTEES ON WATER, LAND, AND HOUSING AND ON JUDICIARY AND LABOR

DATE: Tuesday, March 20, 2012 **TIME:** 12:30 p.m.

LOCATION: State Capitol, Room 16

TESTIFIER(S): David M. Louie, Attorney General, or
William J. Wynhoff, Deputy Attorney General

Chairs Dela Cruz and Hee and Members of the Committees:

The Department of the Attorney General (the "Department") supports this bill.

The purpose of this bill is to correct and clarify existing law, which constitutionally "takes" an undefined amount of privately owned oceanfront land. Existing law requires the State to pay an indefinitely large sum – perhaps hundreds of millions of dollars – of just compensation for the land taken.

Background – legislation and litigation

Act 73, 2003 Hawai'i Session Laws 128, changed the definition of "public lands" in section 171-2, Hawai'i Revised Statutes (HRS). As amended, public lands means and includes "all accreted land not otherwise awarded." Act 73 made related changes to sections 501-33 and 669-1, HRS.

On May 19, 2005, a class action lawsuit was filed on behalf of all "owners of oceanfront property in the State of Hawai'i." The lawsuit contends that Act 73 took accreted land belonging to oceanfront owners and that the State must pay just compensation for the land taken. See Hawai'i Constitution, article I, section 20 ("Private property shall not be taken or damaged for public use without just compensation.").

The Hawai'i Intermediate Court of Appeals decided certain aspects of the case in Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 222 P.3d 441 (Haw. App. 2009).[1]

[1] Both the Hawai'i Supreme Court and the United States Supreme Court declined to review this ruling.

Specifically, the court ruled: (1) Act 73 is a taking as to all privately owned land that accreted before May 20, 2003 (effective date of Act 73); and (2) Act 73 is not a taking as to all privately owned land that has accreted on or after May 20, 2003, or that may accrete in the future.

The court did not determine the exact meaning of the phrase "all accreted land." Plaintiffs argue the phrase means (roughly) all land that has accreted since 1920. The State proposes a less expansive reading of the phrase.

The intermediate court remanded the case to the circuit court for further proceedings.

The proposed legislation

This bill proposes to modify Act 73 so that the State is the owner of all "lands accreted after May 20, 2003." In other words, the bill disclaims ownership of accreted land that was privately owned before Act 73 and for which "just compensation" would otherwise be due.

The Department believes this amendment is prudent and appropriate. It does not appear the Legislature was aware of the takings issue when it passed Act 73. If, going forward, the Legislature decides to take some or all accreted land, the Legislature would likely wish to consider all aspects of the issue.

Moreover, Act 73 does not adequately define exactly what accreted land it intended to cover. This leads to uncertainty as to both ownership of specific property and the amount of just compensation that might ultimately be owed by the State.

We respectfully ask the Committee to pass this bill.

MAP 148

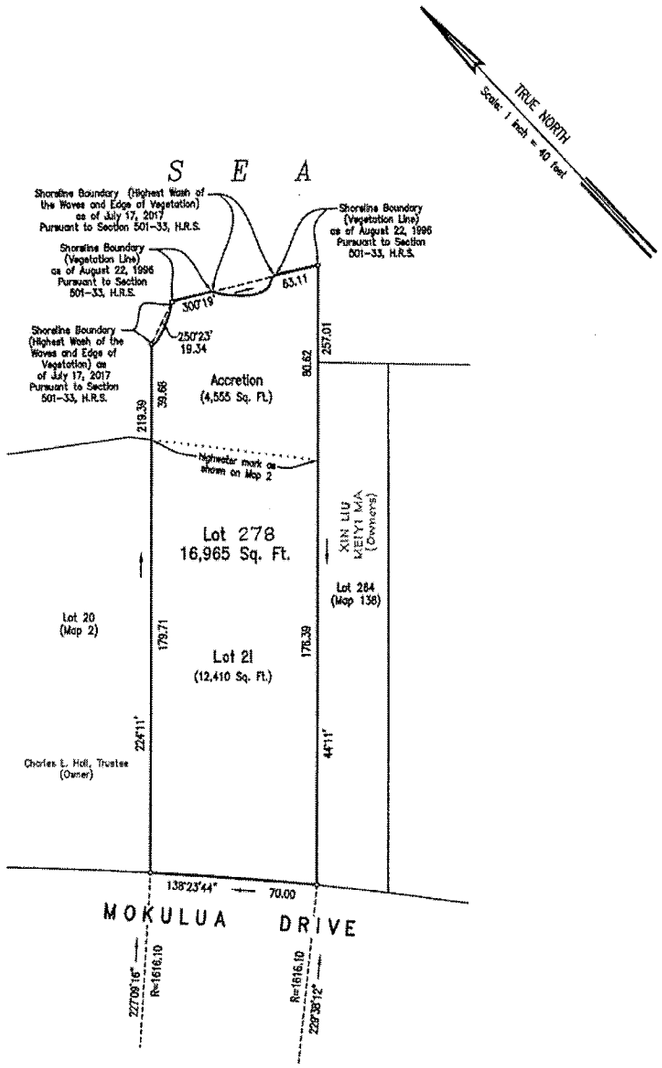
LAND COURT

STATE OF HAWAII

LAND COURT APPLICATION 505

ACCRETION TO LOT 21
AS SHOWN ON MAP 2
AND REDESIGNATION OF SAID LOT 21
WITH ACCRETION AS LOT 278

AT KAILUA, KOOLAUPOKO, OAHU, HAWAII



NEW SHORELINE BOUNDARY AS SHOWN HEREON IS ESTABLISHED AT THE HIGHEST WASH OF THE WAVES AND EDGE OF VEGETATION AND IS FROM AN ACTUAL SURVEY ON THE GROUND LOCATED ON MAY 24, 2017 AND CERTIFIED ON JULY 17, 2017 AND AT THE VEGETATION LINE AS DEPICTED ON THE AERIAL PHOTO DATED AUGUST 22, 1996, PURSUANT TO SECTION 501-33, H.R.S. MADE UNDER THE DIRECT SUPERVISION OF THE UNDERSIGNED AND MAY BE CHECKED BY THE STATE LAND SURVEYOR WITH SAID MAP AND AERIAL PHOTO ON FILE AT THE STATE SURVEY DIVISION.

RYAN M. SUZUKI
LICENSED PROFESSIONAL LAND SURVEYOR
No. 10059
HAWAII, U.S.A.

R. M. TOWILL CORPORATION

2024 North King Street Suite 200
Honolulu, Hawaii 96819
December 5, 2017

4/30/18
Ryan M. Suzuki Expiration Date
Licensed Professional Land Surveyor
Certificate Number 10059
Land Court Certificate Number 280

OWNER: LAWRENCE M. JOHNSON, TRUSTEE
TRANSFER CERTIFICATE OF TITLE: 1,055,309

I hereby certify that the description of survey and map hereon designating the boundaries of Lot 278 has been checked with shoreline map certified on July 17, 2017 and with aerial photo dated August 22, 1996, pursuant to Section 501-33, H.R.S. and the same found to be in accord.

Honolulu, Hawaii
March 4, 2019

State Land Surveyor

Note:

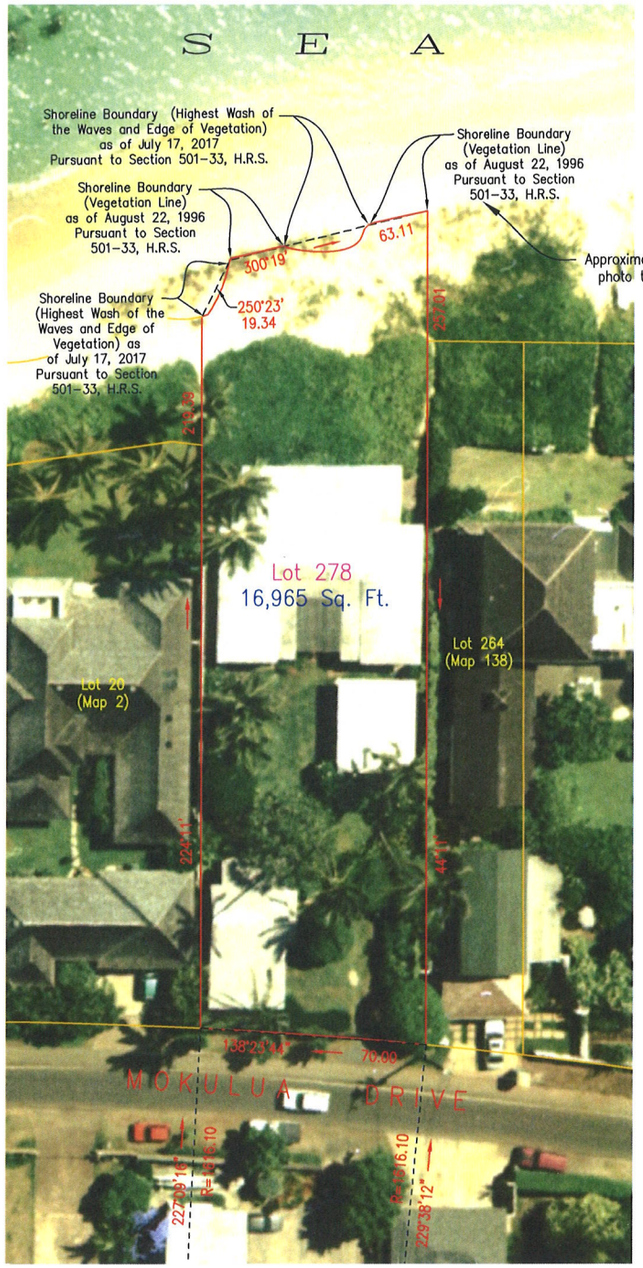
Owners of adjoining lands as shown on plan are from records in the Real Property Mapping Branch.

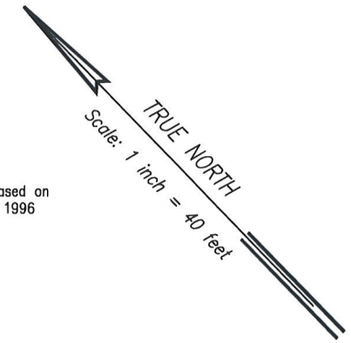
ADVANCE SHEET
Subject to Change

Tax Map Key: (1) 4-3-007: 035

15" x 21" = 2.2 Sq. Ft.

Exhibit F





SHORELINE SURVEY
ACCRETION TO LOT 21
AS SHOWN ON MAP 2
OF LAND COURT APPLICATION 505
AND REDESIGNATION OF SAID LOT 21
WITH ACCRETION AS LOT 278

AT KAILUA, KOOLAUPOKO, OAHU, HAWAII

TAX MAP KEY: (1) 4-3-007: 035

Notes:

Azimuths are referred to Government Survey Triangulation Station "MOKAPU" △.

Boundaries shown are from record data.

Aerial Photograph dated August 22, 1996.

Exhibit G

RMTC Ref No.: 1-22336-1-S

R. M. TOWILL CORPORATION
SINCE 1950

2024 North King Street Suite 200
Honolulu, Hawaii 96819
Tel: (808) 842-1133

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505 1 L.D. 18-1-0775 **ORDER TO SHOW CAUSE**

ORDER TO SHOW CAUSE

TO: CHARLES L. HALL,
Trustee of that certain unrecorded Charles L. Hall
Revocable Living Trust U/A dated August 19, 1996
914 Mokulua Drive
Kailua, HI 96734

XIN LIU, fee owner
MEIYI MA, fee owner
928 Mokulua Drive
Kailua, HI 96734

CITY AND COUNTY OF HONOLULU
c/o Department of the Corporation Counsel
530 S. King Street
Honolulu, HI 96813

STATE OF Hawai`i
c/o Attorney General
425 Queen Street
Honolulu, HI 96813

WHEREAS, LAWRENCE M. JOHNSON, Trustee of the Johnson Family Trust ("Petitioner") has filed in this Court an Amended Petition for Registration of Title to Accretion, in which Petitioner prays for the recognition of accretion to Lot 21 as shown on Map 2 of Land Court Application No. 505 of Helene Irwin Crocker, and the registration of the accretion to such land more

fully described in such petition, said land being all of the land covered by **Certificate of Title No. 1,055,309,** and good cause appearing therefor,

IT IS HEREBY ORDERED that citation is issued to Charles L. Hall, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, Xin Liu, Meiyi Ma, the City and County of Honolulu, and the State of Hawai`i, requiring them to appear in this Court on OCT - 7 2019, 2019 at 9:00 A.m., before the Honorable Gary W.B. Chang, Judge of the Land Court of the State of Hawaii, in his courtroom on the fourth floor of Kaahumanu Hale, 777 Punchbowl Street, at Honolulu, Hawai'i 96813, to show cause, if you have any, why the prayer of Petitioner should not be granted.

IT IS HEREBY FURTHER ORDERED that a certified copy of said petition, exhibits and this Order be forthwith served upon Charles L. Hall, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, Xin Liu, Meiyi Ma, the City and County of Honolulu, and the State of Hawai`i, by certified mail, return receipt requested or by personal service.

DATED: Honolulu, Hawai`i, AUG 2 9 2019.

GARY W.B. CHANG
JUDGE OF THE LAND COURT

Attest:
BESS K. PALMA
By
Registrar of the Land Court

10111386\000001\110483342

IN THE LAND COURT OF THE STATE OF HAWAI'I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505 1 L.D. 18-1-0775 **CITATION**

CITATION

STATE OF HAWAII

TO: CHARLES L. HALL,
Trustee of that certain unrecorded Charles L. Hall
Revocable Living Trust U/A dated August 19, 1996
914 Mokulua Drive
Kailua, HI 96734

XIN LIU, fee owner
MEIYI MA, fee owner
928 Mokulua Drive
Kailua, HI 96734

CITY AND COUNTY OF HONOLULU
c/o Department of the Corporation Counsel
530 S. King Street
Honolulu, HI 96813

STATE OF Hawai`i
c/o Attorney General
425 Queen Street
Honolulu, HI 96813

YOU ARE HEREBY NOTIFIED that LAWRENCE M. JOHNSON, Trustee of the Johnson Family Trust ("Petitioner") has filed in this Court an Amended Petition for Registration of Title to Accretion, in which Petitioner prays for the recognition of accretion to Lot 21 as shown on Map 2 of Land

Court Application No. 505 of Helene Irwin Crocker, and the registration of the accretion to such land more fully described in such petition, said land being all of the land covered by **Certificate of Title No. 1,055,309**;

YOU ARE HEREBY CITED AND FURTHER NOTIFIED, pursuant to the foregoing Order to Show Cause, to appear before the Honorable Gary W.B. Chang, Judge of the Land Court of the State of Hawai`i, in his courtroom on the fourth floor of Kaahumanu Hale, 777 Punchbowl Street, Honolulu, Hawai`i 96813, on OCT - 7 2019, 2019, at 9:00 a.m. to show cause, if you have any, why the prayer of said Amended Petition should not be granted, and, unless you appear at said Court at the time and place aforesaid, your default will be recorded and the Amended Petition will be granted, and you will be forever barred from contesting said Amended Petition or any judgment, decree or writ entered thereon.

WITNESS, the Registrar of the Land Court of the State of Hawai`i.

DATED: Honolulu, Hawai`i, AUG 2 9 2019.

BESS K. PALMA

REGISTRAR

LAND COURT STATE OF HAWAII

PAUL ALSTON 1126
JANNA WEHILANI AHU 10588

DENTONS US LLP
1001 Bishop Street, Suite 1800
Honolulu, Hawai‘i 96813
Telephone: (808) 524-1800

Attorneys for Petitioner
LAWRENCE M. JOHNSON,
Trustee of the Johnson Family Trust

IN THE LAND COURT OF THE STATE OF HAWAI‘I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai‘i	Application No. 505 1 L.D. 18-1-0775 **FINDINGS OF FACT AND DECISION**

FINDINGS OF FACT, CONCLUSIONS, AND DECISION

The records show that the Amended Petition ("Petition") of LAWRENCE M. JOHNSON, Trustee of the Johnson Family Trust, for registration of title to accretion to Lot 21, as shown on Map 2 of Application No. 505, being the lot described in Certificate of Title 1,055,309 issued to the Petitioner, was filed on August 29, 2019, and it, together with the map showing such accretion filed with said Petition, was referred to the State Land Surveyor, who has approved said map and found said accretion to be natural; that due notices were served on the Attorney General, the adjoining owners and all other interested parties as required by law and the rules of this Court; therefore the Court finds and concludes:

(1) That the high-water mark which is the seaward boundary of said lot as of May 24, 2017, the date of the map filed with said Petition, later certified on July 17, 2017, is as shown on said map, and that said lot together with said accretion has been designated as new Lot 278;

(2) That the change in location of the seaward boundary has been due entirely to natural accretion to said original lot on the seaward side; and that said accretion is "permanent," as defined in H.R.S. § 501-33;

(3) That the land accreted before or on May 20, 2003;

EXHIBIT K

(4) That the Petitioner is the owner of said new Lot 278; subject however, to the following:

a. Reservation in favor of the State of Hawai‘i of all minerals and metallic mines of every kind or description, including the rights to remove same.

b. With respect to the accreted lands portion of the new lot, the provisions of H.R.S. § 7-1, as amended, apply.

c. The restrictions of H.R.S. § 183-45, as amended, which provide that no structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion, shall be permitted on said accreted land.

d. H.R.S. § 501-33, as amended, which includes the provision that said accreted lands shall be considered within the Conservation District.

A decree shall be entered in conformity herewith and the Assistant Registrar of this Court is authorized and directed to endorse on said certificate of title a reference to said decree.

DATED: Honolulu, Hawai‘i, April 6, 2021.

/s/ Gary W. B. Chang

JUDGE OF THE LAND COURT OF THE
STATE OF HAWAI‘I

APPROVED AS TO FORM:

/s/ Denise W.M. Wong
DENISE W.M. WONG
Attorney for Respondent
CITY AND COUNTY OF HONOLULU

/s/ Colin J. Lau
COLIN J. LAU
Attorney for Respondent
STATE OF HAWAII

NOTICE OF ELECTRONIC FILING

An electronic filing was submitted in Case Number 1LD181000775. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: 1LD181000775
Title: LAWRENCE M JOHNSON
Filing Date / Time: TUESDAY, APRIL 6, 2021 10:33:37 AM
Filing Parties:
Case Type: Land Court
Lead Document(s):
Supporting Document(s): 44-Findings/Fact and Decision
Document Name: 44-FINDINGS OF FACT AND DECISION

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:
Denise Wong *(denise.w.wong@honolulu.gov)*
Colin J. Lau *(colin.j.lau@hawaii.gov)*
Clare Connors *(clare.e.connors@hawaii.gov)*
Paul S. Aoki *(paoki@honolulu.gov)*
Janna Wehilani Ahu *(janna.ahu@dentons.com)*
Paul Alston *(Paul.Alston@dentons.com)*
The following parties need to be conventionally served:
MEIYI MA
XIN LIU
CHARLES S HALL

PAUL ALSTON 1126
JANNA WEHILANI AHU 10588

DENTONS US LLP
1001 Bishop Street, Suite 1800
Honolulu, Hawai‘i 96813
Telephone: (808) 524-1800

Attorneys for Petitioner
LAWRENCE M. JOHNSON,
Trustee of the Johnson Family Trust

IN THE LAND COURT OF THE STATE OF HAWAI‘I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505 1 L.D. 18-1-0775 **DECREE**

DECREE

In conformity with the Decision entered herein on April 6, 2021, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) The map of new Lot 278 of the above application be and the same is hereby approved;

(2) The high-water mark, being the seaward boundary of said new Lot 278, as of July 17, 2017, is as shown on said map;

(3) That the accretion is “permanent,” as defined in H.R.S. § 501-33;

(4) That the land accreted before or on May 20, 2003;

(5) LAWRENCE M. JOHNSON, Trustee of the Johnson Family Trust, the petitioner herein, is the owner of said new lot as shown on said map; subject however, to the following:

a. Reservation in favor of the State of Hawai‘i of all minerals and metallic mines of every kind or description, including the rights to remove same.

b. With respect to the accreted lands portion of the new lot, the provisions of H.R.S. § 7-1, as amended, apply.

EXHIBIT L

c. The restrictions of H.R.S. § 183-45, as amended, which provide that no structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion, shall be permitted on said accreted land.

d. H.R.S. § 501-33, as amended, which includes the provision that said accreted lands shall be considered within the Conservation District.

(6) The Assistant Registrar of the Land Court is hereby authorized and directed to endorse on said certificate of title a reference to this decree and to said map.

DATED: Honolulu, Hawai‘i, April 6, 2021.

/s/Bess K. Palma
REGISTRAR OF THE LAND COURT

APPROVED AS TO FORM:

/s/ Denise W.M. Wong
DENISE W.M. WONG
Attorney for Respondent
CITY AND COUNTY OF HONOLULU

/s/ Colin J. Lau
COLIN J. LAU
Attorney for Respondent
STATE OF HAWAII

1 L.D. 18-1-0775; Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai‘i; Application No. 505; **DECREE**

NOTICE OF ELECTRONIC FILING

Electronically Filed
FIRST CIRCUIT
1LD181000775
06-APR-2021
10:34 AM
Dkt. 47 NEF

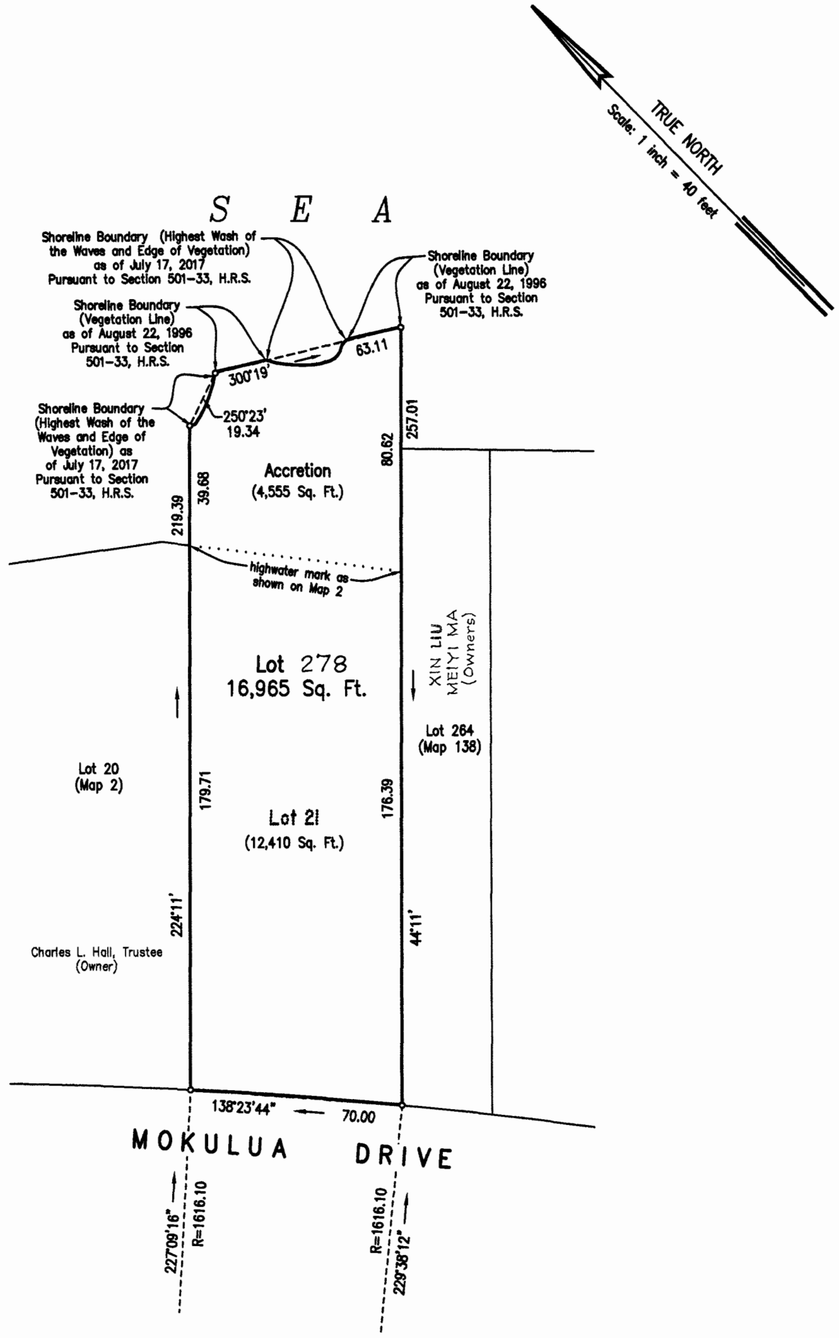
An electronic filing was submitted in Case Number 1LD181000775. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: 1LD181000775
Title: LAWRENCE M JOHNSON
Filing Date / Time: TUESDAY, APRIL 6, 2021 10:34:00 AM
Filing Parties:
Case Type: Land Court
Lead Document(s):
Supporting Document(s): 46-Decree
Document Name: 46-DECREE

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:
Denise Wong *(denise.w.wong@honolulu.gov)*
Colin J. Lau *(colin.j.lau@hawaii.gov)*
Clare Connors *(clare.e.connors@hawaii.gov)*
Paul S. Aoki *(paoki@honolulu.gov)*
Janna Wehilani Ahu *(janna.ahu@dentons.com)*
Paul Alston *(Paul.Alston@dentons.com)*
The following parties need to be conventionally served:
MEIYI MA
XIN LIU
CHARLES S HALL

MAP 148



LAND COURT

STATE OF HAWAII

LAND COURT APPLICATION 505

ACCRETION TO LOT 21
AS SHOWN ON MAP 2
AND REDESIGNATION OF SAID LOT 21
WITH ACCRETION AS LOT 278

AT KAILUA, KOOLAUPOKO, OAHU, HAWAII

NEW SHORELINE BOUNDARY AS SHOWN HEREON IS ESTABLISHED AT THE HIGHEST WASH OF THE WAVES AND EDGE OF VEGETATION AND IS FROM AN ACTUAL SURVEY ON THE GROUND LOCATED ON MAY 24, 2017 AND CERTIFIED ON JULY 17, 2017 AND AT THE VEGETATION LINE AS DEPICTED ON THE AERIAL PHOTO DATED AUGUST 22, 1996, PURSUANT TO SECTION 501-33, H.R.S. MADE UNDER THE DIRECT SUPERVISION OF THE UNDERSIGNED AND MAY BE CHECKED BY THE STATE LAND SURVEYOR WITH SAID MAP AND AERIAL PHOTO ON FILE AT THE STATE SURVEY DIVISION.

RYAN M. SUZUKI
LICENSED PROFESSIONAL LAND SURVEYOR
No. 10059
HAWAII, U.S.A.

R. M. TOWILL CORPORATION

4/30/18
Ryan M. Suzuki Expiration Date
Licensed Professional Land Surveyor
Certificate Number 10059
Land Court Certificate Number 280

2024 North King Street Suite 200
Honolulu, Hawaii 96819
December 5, 2017

OWNER: LAWRENCE M. JOHNSON, TRUSTEE
TRANSFER CERTIFICATE OF TITLE: 1,055,309

I hereby certify that Decree re-establishing highwater mark as of July 17, 2017 and August 22, 1996 of new Lot 278 for the herein application has been entered on April 6, 2021 and the same has been noted on Transfer Certificate of Title No. 1,055,309.

Honolulu, Hawaii
May 1, 2021

Registrar of the Land Court

I hereby certify that the description of survey and map hereon designating the boundaries of Lot 278 has been checked with shoreline map certifed on July 17, 2017 and with aerial photo dated August 22, 1996, pursuant to Section 501-33, H.R.S. and the same found to be in accord.

Honolulu, Hawaii
March 4, 2019

State Land Surveyor

Note:

Owners of adjoining lands as shown on plan are from records in the Real Property Mapping Branch.

EXHIBIT M

Filed March 7, 2018 by Maciana Shimabukuro, Clerk

Tax Map Key: (1) 4-3-007: 035

15" x 21" = 2.2 Sq. Ft.

IN THE LAND COURT OF THE STATE OF HAWAI`I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505 1 L.D. 18-1-0771 **ORDER TO SHOW CAUSE**

ORDER TO SHOW CAUSE

TO: AMELIA O. ANDRADE, Trustee
908 Mokulua Drive
Kailua, HI 96734

LAWRENCE M. JOHNSON,
Trustee of the Johnson Family Trust
922 Mokulua Drive
Kailua, HI 96734

CITY AND COUNTY OF HONOLULU
c/o Department of the Corporation Counsel
530 South King Street
Honolulu, HI 96813

STATE OF HAWAII
c/o Attorney General
425 Queen Street
Honolulu, HI 96813

WHEREAS, Petitioner CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as amended and restated ("Petitioner") has filed in this Court a Second Amended Petition for Registration of Title to Accretion, in which Petitioner prays for the recognition of accretion to Lot 20 as shown on Map 2 of Land Court Application No. 505 of Helene Irwin Crocker, and the registration of the

accretion to such land more fully described in such petition, said land being all of the land covered by **Certificate of Title No. 1,051,902,** and good cause appearing therefor,

IT IS HEREBY ORDERED that citation is issued to Amelia O. Andrade, Trustee, Lawrence M. Johnson, Trustee of the Johnson Family Trust, the City and County of Honolulu, and the State of Hawai`i, requiring them to appear in this Court on December 9, 2024 at 8:30 a.m., before the Honorable Kevin Morikone, Judge of the Land Court of the State of Hawai`i, in his courtroom on the fourth floor of Kaahumanu Hale, Courtroom 18, 777 Punchbowl Street, Honolulu, Hawai‘i 96813, to show cause, if you have any, why the prayer of Petitioner should not be granted.

IT IS HEREBY FURTHER ORDERED that a copy of the Second Amended Petition, exhibits and this Order be forthwith served upon Amelia O. Andrade, Trustee, Lawrence M. Johnson, Trustee of the Johnson Family Trust, the City and County of Honolulu, and the State of Hawai`i, by certified mail, return receipt requested or by personal service.

DATED: Honolulu, Hawai`i, _____.

_____
JUDGE OF THE LAND COURT

Attest:

By_____
Registrar of the Land Court

IN THE LAND COURT OF THE STATE OF HAWAI'I

In the Matter of the Application of Helene Irwin Crocker, to register and confirm title to land situate at Kailua, District of Koolaupoko, City and County of Honolulu, State of Hawai`i	Application No. 505 1 L.D. 18-1-0771 **CITATION**

CITATION

STATE OF HAWAII

TO: AMELIA O. ANDRADE, Trustee
908 Mokulua Drive
Kailua, HI 96734

LAWRENCE M. JOHNSON,
Trustee of the Johnson Family Trust
922 Mokulua Drive
Kailua, HI 96734

CITY AND COUNTY OF HONOLULU
c/o Department of the Corporation Counsel
530 South King Street
Honolulu, HI 96813

STATE OF HAWAII
c/o Attorney General
425 Queen Street
Honolulu, HI 96813

YOU ARE HEREBY NOTIFIED that Petitioner CHARLES L. HALL, Trustee of that certain unrecorded Charles L. Hall Revocable Living Trust U/A dated August 19, 1996, as

amended and restated ("Petitioner") has filed in this Court a Second Amended Petition for Registration of Title to Accretion, in which Petitioner prays for the recognition of accretion to Lot 20 as shown on Map 2 of Land Court Application No. 505 of Helene Irwin Crocker, and the registration of the accretion to such land more fully described in such petition, said land being all of the land covered by **Certificate of Title No. 1,051,902**;

YOU ARE HEREBY CITED AND FURTHER NOTIFIED, pursuant to the foregoing Order to Show Cause, to appear before the Honorable Kevin Morikone, Judge of the Land Court of the State of Hawai`i, in his courtroom on the fourth floor of Kaahumanu Hale, Courtroom 18, 777 Punchbowl Street, Honolulu, Hawai`i 96813, on December 9, 2024, at 8:30 a.m. to show cause, if you have any, why the prayer of said Second Amended Petition should not be granted, and, unless you appear at said Court at the time and place aforesaid, your default will be recorded and the Second Amended Petition will be granted, and you will be forever barred from contesting said Amended Petition or any judgment, decree or writ entered thereon.

WITNESS, the Registrar of the Land Court of the State of Hawai`i.

DATED: Honolulu, Hawai`i, _____.

_____
REGISTRAR

NOTICE OF ELECTRONIC FILING

Electronically Filed
FIRST CIRCUIT
1LD181000771
23-JUL-2024
01:40 PM
Dkt. 105 NEF

An electronic filing was submitted in Case Number 1LD181000771. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID:	1LD181000771
Title:	CHARLES LAYTON HALL VS AMELIA O. ANDRADE ET AL
Filing Date / Time:	TUESDAY, JULY 23, 2024 01:40:03 PM
Filing Parties:	Paul Alston
	Janna Ahu
Case Type:	Land Court
Lead Document(s):	
Supporting Document(s):	103-Amended Petition
	104-Document
Document Name:	103-SECOND AMENDED PETITION FOR REGISTRATION OF TITLE TO ACCRETION; DECLARATION OF JANNA WEHILANI AHU; DECLARATION OF RYAN SUZUKI; DECLARATION OF CHARLES HALL; EXHIBITS "A" - "M"; ORDER TO SHOW CAUSE; CITATION
	104-LAND COURT INFORMATION SHEET

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:
Brianna Weaver *(brianna.weaver@honolulu.gov)*
Janna Wehilani Ahu *(janna.ahu@dentons.com)*
Colin J. Lau *(colin.j.lau@hawaii.gov)*
Paul Alston *(Paul.Alston@dentons.com)*
The following parties need to be conventionally served:
LAWRENCE M JOHNSON