NO. 30006

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

In the Matter of the Application of TRUSTEES UNDER THE WILL OF THE ESTATE OF JAMES CAMPBELL, DECEASED to register and confirm title to land situate at Kahuku, District of Koolauloa, City and County of Honolulu, State of Hawaii	APPLICATION NO. 1095 L.C. Case No. 08-1-0054 LAND COURT HONORABLE GARY W.B. CHANG, JUDGE

PETITIONER-APPELLEE JAMES CAMPBELL COMPANY LLC'S ANSWERING BRIEF

APPENDICES A - C

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

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I. STATEMENT OF THE CASE

Controlling statutes and case law establish that Appellant State of Hawai`i (the "State") is bound to the same extent as private individuals by a final land court decree vesting title to two parcels in Kahuku *unencumbered* by any flowage easement or reserved right to mine the land for minerals, metals, and geothermal energy. Haw. Rev. Stat. §§ 501-71, 501-82; see also State v. Magoon, 75 Haw. 164, 190, 858 P.2d 712, 725 (1993) (the State is bound by final land court decree "to the same extent as private individuals under like circumstances"); Waikiki Malia Hotel v. Kinkai Prop. Ltd. Partnership, 75 Haw. 370, 392, 862 P.2d 1048, 1061 (1993) (height restriction contained in prior deed extinguished by failure to be noted on the TCT). Hence, land court properly denied the State's request in the proceedings below to recognize encumbrances against the registered title that were not noted in the original decree and subsequent transfer certificates of title ("TCTs"). This court should affirm.

A. NATURE OF THE CASE BELOW.

Petitioner-Appellee James Campbell Company LLC ("Petitioner") and its co-petitioners Appellees Continental Pacific, LLC ("Continental") and James C. Reynolds, Inc. ("Reynolds")[1] filed below in land court an Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements ("Petition") on February 12, 2009. See Record on Appeal ("ROA"), at 28-56. The State filed an answer to the Petition, using it as an opportunity to ask the court to rule that the State had reserved certain previously unregistered encumbrances. ROA 65-67. In its findings of fact, decision and order granting the Petition, land court denied the State's request. ROA 999. The full course of proceedings is discussed in Section I-D, below.

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[1] Undersigned counsel appeared for Petitioner. Continental and Reynolds have separate counsel.

B. LAND COURT APPLICATION NO. 1095 - THE 1938 REGISTRATION.

The subject Land Court Application No. 1095 was filed on July 16, 1934 by the Trustees of Campbell Estate ("Trustees") to register title to nearly 15,000 acres. ROA 120-186, 258 (Petitioner's Exhibits A and I, Application and Map 1). As described by the title examiner:

> The lands sought to be registered constituted originally the Kahuku Ranch, which was started by Charles Gordon Hopkins about 1850 . . . and was ultimately acquired by James Campbell in the year 1876. The nucleus of the ranch was the land known as Kahuku and Kawela, having an aggregate area of over 5,000 acres acquired by Hopkins by deed from Kamehameha III in 1850. Kahuku and Kawela were "Crown Lands" reserved by the King to himself in the great Mahele. The law which carried into effect the division of the lands made by Kamehameha III became effective June 7, 1848, and by its terms a long list of Ahupuaas and Ilis were set aside to the King; "To be the private lands of His Majesty Kamehameha III, to have and to hold, to himself, his heirs and successors forever, and said lands shall be regulated and disposed of according to his royal will and pleasure, subject **only** to the rights of tenants."
>
> . . . .
>
> . . . As Kahuku and Kawela were specifically designated as Crown Lands belonging to the King and to be "disposed of according to his royal will and pleasure", no Award was considered necessary by the Commission.
>
> The title to the Ahupuaas of Kahuku and Kawela comes by complete chain of conveyances from Charles Gordon Hopkins to petitioners.

ROA 192-194 (Pet. Exh. B, pp. 1-3) (emphasis added).[2]

The original deed for the 5,121 acres of crown lands described as the "nucleus" of Kahuku Ranch was signed by King Kamehameha III himself, and provided as follows:

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[2] The State says that all of Lot 1219, and the "top" portion of Lot 1218 (about one-half of the land at issue in this appeal), consisted of such crown lands. See Op. Brief, at p. 4. Although Map 176 does not show the ancient ahupuaa boundaries, Petitioner agrees with the State's description.

> KNOW ALL MEN by these presents that I, KAMEHAMEHA III, King of the Hawaiian Islands, for and in consideration of the sum of Ten Thousand Dollars, the payment of which is hereby secured to me by Charles Gordon Hopkins of Honolulu, Island of Oahu, Hawaiian Islands, by a certain promissory note and mortgage for said consideration money, bearing date on the thirtieth day of April, A.D. 1850, do hereby give, grant, sell and convey unto the said Charles Gordon Hopkins, his heirs and assigns, all those certain tracts or Ahupuaas of land, situated in the district of Koolauloa, Island of Oahu, Hawaiian Islands, known as the Ahupuaas of "Kahuku" and "Kawela," and bounded and described as follows.
>
> [metes and bounds description of Parcel No. 1 totaling 4,466 acres, and Parcel No. 2 totaling 755 acres]
>
> To have and to hold the above granted lands to the said Charles Gordon Hopkins, his heirs and assigns forever **with all the privileges and appurtenances thereunto belonging.**
>
> In witness whereof I have hereunto set my hand and seal this tenth day of September, A.D. 1851, at Honolulu, Island of Oahu.
>
> Kamehameha /s/
>
> [Attestation by witness John Haluli and Registrar of Conveyances Asher B. Bates]

ROA 254-257 (Pet. Exh. H) (emphasis added).

The remaining 9,849 acres of land submitted in this L.C. App. 1095 were claimed by the Trustees based on: (1) descent under the will of James Campbell or deeds from private parties with chain of title in most cases traced to various land commission awards and/or patents issued by the Hawaiian government during the 19th century; (2) grants from the Territory of Hawaii following annexation; and (3) adverse possession. ROA 182-183, 258 (Pet. Exh. A, pp. 62-63; Pet. Exh. I).

As the State correctly observes, some of the parcels submitted for registration, including the lower portion of one of the lots subdivided in the Petition below (Lot 1218), derived their

title from royal patents issued during the 19th century which contained a reservation in favor of the Hawaiian government of "mineral and metallic mines." Op. Brief, at 4; ROA 776 (Collins Decl., ¶6). However, many other lots submitted in the Trustees' application did not trace their title to royal patents that reserved mining rights. These included the above-described crown lands, lands conveyed by the Territory following annexation,[3] and kuleana parcels as to which no patents ever issued. ROA 199-205, 208, 222-223, 227 (Exhibit B, at pp. 8-14, 17, 30-31, 35).

The Territory of Hawaii (the "Territory") was cited and served. ROA 264 (Pet. Exh K). The Territory filed an "Answer and Claim," asserting claims of title to some of the land and certain utility and road easements over the Trustees' lands. ROA 272-279 (Pet. Exh. L). The Territory's claims were settled with the Trustees by agreement or exchange deeds, and a decision and final decree was entered on January 24, 1938 granting the Trustees' application. ROA 282 (Pet. Exh. M, p. 2); ROA 285-710 (Pet. Exh. N). The Territory did not claim any alleged flowage easement or the old mineral rights in the lower portion of Lot 1218. See ROA 272-279 (Pet. Exh. L); Findings of Fact ("FOF"), at ¶¶9, 13, ROA 994. No such encumbrances were noted in the land court's decree. ROA 285-710 (Pet. Exh. N (encumbrances are listed in this voluminous exhibit starting at page 64, ROA 348, et seq.)); FOF ¶19, ROA 995. The Territory did not appeal from the decision or the decree. See FOF ¶20, ROA 996.

C. SUBSEQUENT SUBDIVISIONS AND CONVEYANCES OF LAND IN THIS L.C. APPLICATION NO. 1095 AND IN THE PETITION BELOW.

After the original decree issued, the 14,979.579 acres of land originally registered in this L.C. App. No. 1095 (Map 1, ROA 258) were subdivided, consolidated, and resubdivided numerous times as depicted in scores of maps filed in land court. Leasehold and freehold estates

[3] See, e.g., Appendix A (certified copy of 1910 Land Patent No. 5277). Such "muniments of title," presumably submitted to land court in 1934, are cited in the record (ROA 182-183) but not part of the record itself. Judicial notice is requested for background and context pursuant to Haw. R. Evid. 201 and In re Sanborn, 57 Haw. 585, 589, 562 P.2d 771, 774 (1977).

in the various lots were mortgaged, sold, leased and sublet to hundreds of private individuals and entities, as well as government agencies, in good faith and for value, as recounted in detail in the voluminous record below. See Pet. Exh. N (ROA 352-710).

The first parcel sought to be consolidated and resubdivided in the Petition below was formerly Lot 30, as shown in Map 4. See Appendix B, attached. Lot 30 was a narrow beachfront lot. Id. In August, 2006, the Trustees of Campbell Estate sold for value an undivided 53.58% interest in Lot 30 to Continental, who in turn sold for value a 43.46% interest in its undivided interest in Lot 30 (23.29% of the whole) to Reynolds. ROA 720-739, 743-744, 747-750 (Pet. Exhs. P, Q, S, U, V). Following this conveyance, Petitioner acquired all of the Trustees' estate in this L.C. App. 1095 in 2007 upon trust termination. See ROA 1074 (Transcr. of 6/1/09 Hearing, hereinafter "Tr."), at 16, lines 12-13; ROA 743-744 (Pet. Exh. S). Hence, when the Petition below was filed, Lot 30 was owned in the following undivided interests: Petitioner (46.42%); Continental (30.29%), and Reynolds (23.29%). Id.

The second lot to be consolidated and resubdivided herein was formerly Lot 1198, as shown on Map 157, attached hereto as Appendix C. The Trustees of Campbell Estate sold for value an undivided 74.43% interest in Lot 1198 to Continental. ROA 711-719, 745-748 (Pet. Exhs. O, T, U). As with Lot 30, Petitioner succeeded to the Trustees' interests in Lot 1198 upon trust termination, and owned a 25.57% interest in Lot 1198. ROA 745 (Pet. Exh. T, at 1).

None of the deeds and certificates vesting title in Petitioner, Continental or Reynolds in Lots 30 or 1198 noted the flowage easement or the mineral and metallic mining rights reservation claimed by the State herein. ROA 711-746 (Pet. Exhs. O, P, Q, R, S, T). As the Trustees' land agent testified:

> As part of the sale of the undivided fee simple interests in Lot 1198 and in Lot 30 to Continental Pacific, LLC in August of

> 2006, I and my staff relied on what was on Original Certificate of Title No. 17,854 and on Certificate of Title No. 818,828, respectively, in the course of having the deeds for those lots prepared.

ROA 741 (Pet. Exh. R, Lloyd Haraguchi Decl., at ¶5).

Petitioner has also entered into an unrecorded agreement with the United States Fish and Wildlife Service to sell its new, wholly-owned lot subdivided below (Lot 1219), but the agreement did not include the State's alleged flowage easement or mining rights reservation in the agreed-upon list of encumbrances. ROA 741 (Pet. Exh. R, Haraguchi Decl., at ¶¶6, 7).

D. PETITION FOR CONSOLIDATION AND RE-SUBDIVISION IN L.C. CASE NO. 08-0054.

The Petition below (L.C. Case No. 08-0054) asked land court to consolidate Lots 30 and 1198, re-subdivide them into Lots 1218 and 1219 as shown on Map 176 (Appendix A to State's Op. Brief), and recognize certain easements not at issue in this appeal. ROA 31-33. Petitioner also asked land court to cancel the existing certificates of title and issue new ones showing Petitioner as the sole owner of Lot 1219, and Continental and Reynolds as 86.63% and 13.37% owners, respectively, of Lot 1218. ROA 33-34. Moreover, because Lot 30 bordered the sea, it was necessary to recertify the shoreline boundary to account for land lost to the State by erosion, and to serve the State's attorney general. Haw. Rev. Stat. §§ 501-42, 501-85; L.C. Rules 15, 26.

The State answered the Petition on March 11, 2009, and prayed, in relevant part, that the land court "rule that . . . 1. The State owns all mineral and metallic mines of every kind or description on the property, including geothermal rights, and the right to remove the same; [and] . . . 5. The State has reserved an easement for the free flowage of any waters through, over, under, and across the property." ROA 66-67. As stated above, these two alleged encumbrances were not noted in the original decree, nor were they raised as part of the Petition's prayer for relief (ROA 33-35). Petitioner voiced strong objections to said encumbrances in its papers and at

the hearing. ROA 79, 1074 (Tr. at 14, lines 13-14 ("[T]he petitioner does not consent to have its title impaired as suggested by the State.")).

After both sides submitted briefs, declarations and exhibits on the controversy, land court held a hearing on June 1, 2009. ROA 1074 (Tr.). At the end of the hearing, land court ruled in favor of Petitioner and granted the Petition. Without finding that the State actually had any of the claimed interests or characterizing them in any way, land court found that whatever interests the State had, "if any," were reserved in only two respects: (1) any interests in native tenant rights, and (2) any interests in water rights. ROA 1074 (Tr. at 41). In its decree, land court found that whatever such interests the State had were not an easement or encumbrance against title. ROA 997 (FOF at ¶¶28, 29). The land court also found that the State owned the undisputed acreage lost to erosion. ROA 996 (FOF at ¶24). Except as to these points, land court ruled that the State failed to produce sufficient evidence to prove it had any of the ownership or other reserved interests in the subject property (former Lots 30 and 1198, new Lots 1218 and 1219), including any alleged flowage easement. ROA 998 (FOF ¶32).

At the State's request, land court clarified that it was ruling that the mineral rights formerly reserved by the Hawaiian government in the royal patents that were the source of title for the lower portion of Lot 1218 were extinguished by the 1938 decree. ROA 1074 (Tr. at 42, line 13), ROA 998 (FOF ¶30). The land court found that no mining reservation ever existed in the land originally conveyed by the Kamehameha III deed (Lot 1219 and the upper portion of Lot 1218). Id. ¶31.

II. STANDARDS OF REVIEW

Petitioner generally agrees with the State's recitation of the applicable standards of review, but further expounds upon the clearly erroneous standard, as follows:

> It is not the function of this court to retry cases on appeal. Findings of fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous. An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are clearly erroneous.

Campbell v. DePonte, 57 Haw. 510, 513, 559 P.2d 739, 741 (1977).

III. ARGUMENT

A. THE STATE'S EFFORT TO ASSERT "RESERVED" INTERESTS 70 YEARS AFTER THE FACT CONSTITUTES AN UNTIMELY AND IMPERMISSIBLE COLLATERAL ATTACK ON THE FINAL DECREE.

Since 1903, the established law of Hawai`i has vested and protected land court registered title against any attempts to enforce unregistered easements and encumbrances. This court should follow that established law, and affirm the land court's findings, order and decree.

1. Applicable Provisions of the Land Court Statute

The following provisions of Hawai`i's land court statute were in effect in substantially the same form in 1938 when the original decree herein was entered:

> A court is established, called the land court, which shall have exclusive original jurisdiction of all applications for the registration of title to land *and easements or rights in land* held and possessed in fee simple within the State, with power to hear and determine all questions arising upon such applications . . .. The proceedings upon the applications shall be proceedings in rem against the land, and the decrees shall operate directly on the land *and **vest** and establish title thereto.*

Haw. Rev. Stat. § 501-1 (emphasis added); see also ROA 804-805 (State's Exh. 7, at 279-80).

> 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* . . .. The decree shall not be opened by reason of the absence, infancy, or other disability of any person affected thereby, *nor by any proceeding for reversing judgments or decrees*, except that any person deprived of land or of any estate or interest therein may file a petition for review within one year after

> the entry of the decree, unless an innocent purchaser for value has acquired an interest. If there is any such purchaser, the decree of registration shall not be opened but *shall remain in full force and effect* ***forever****, subject only to the right of appeal herein provided.* Any person aggrieved by the decree in any case may pursue remedy by action of tort against the applicant or any other person for fraud, in procuring the decree.

Haw. Rev. Stat. § 501-71(d) (emphasis added); see also ROA 812 (State's Exh. 7, at 294-5).

> Every decree of registration shall bear the date of the year, day, hour, and minute of its entry, and shall be signed by the registrar. . . . It shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments, and other encumbrances including rights of husband or wife, if any, to which the land or the owner's estate is subject; and may contain any other matter properly to be determined in pursuance of this chapter.

Haw. Rev. Stat. § 501-74; see also ROA 813 (State's Exh. 7, at 297).

> Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, hold the same *free from all encumbrances except those noted on the certificate* in the order of priority of recordation, and any of the following encumbrances which may be subsisting [. . ..].

Haw. Rev. Stat. § 501-82 (exceptions omitted); see also ROA 813 (State's Exh. 7, at 296).

The original decree of registration of title by the land court, once transcribed and certified by the assistant registrar, forms the original certificate of title from which all subsequent TCTs originate. Haw. Rev. Stat. § 501-75. See also ROA 813 (State's Exh. 7, at 297).

The foregoing statutes, and the reported decisions in Magoon and Waikiki Malia, control the outcome of this appeal, and require affirmance of the land court decree below.

2. None of the Statutory Exceptions Applies.

Section 501-82, Haw. Rev. Stat., lists the exceptions to the rule that registered title is held free of any encumbrances not noted in the certificate of title. Neither flowage easements nor reserved mining rights are listed as a recognized exception.

3. The State Speciously Claims Pre-Existing Rights in Land Long *After* the Issuance of the Original Certificate of Title and Countless TCTs, and Long *After* Numerous Bona Fide Purchasers for Value Relied on Them.

The State alleges that its purported interests in Lots 1218 and 1219 "always existed." See Op. Brief, at 13, 17, 26, 28-29. The State failed to prove this assertion. But even if it had, such interests were lost before statehood. Upon admission to the union, the State stepped into the Territory's shoes and became bound by the 1938 decree. Admissions Act, §§ 5(a), 12, 13 and 15.

As described above, innocent purchasers for value have entered into the chain of title for former Lots 30 and 1198 (new Lots 1218 and 1219), and countless purchasers for value acquired interests in land elsewhere in the greater Malaekahana, Kahuku, and Kawela area covered by this L.C. App. No. 1095 since 1938. Such innocent purchasers for value, including but not limited to Continental and Reynolds, are entitled to enhanced protections against unregistered interests. Haw. Rev. Stat. § 501-71(d). It would be frivolous for a private adjoining landowner to appear in land court claiming an unwritten flowage easement "always existed" across his neighbor's lot, or trying to resurrect ancient reserved rights to conduct mining or geothermal operations in his neighbor's yard, seven decades after his predecessor appeared in land court but failed to claim such rights. The State's claims are equally groundless.

4. Registered Owners Hold Title Free from all Encumbrances Not Expressly "Noted" in the Original Certificate of Title or TCTs, Despite any Actual Reference to Such Interests in the Underlying Instruments of Title.

The holding in Waikiki Malia disposes of the State's argument that its mining reservations in a portion of Lot 1218 set out in 19th century royal patents were recognized in the original application. Specifically, the State argues that "[b]y identifying the land by the original land grants, the Campbell Trustees registered only the interests in land that had been conveyed to them by those grants." Op. Brief, at 34. This argument is refuted by the record and the law.

In land court, prior underlying deeds, awards, grants, patents and other "muniments" of title have significance only as evidence of title, and they do not necessarily control the outcome of the application or dictate the terms of the decree. See In re Title of Pelekane, 21 Haw. 175 (1912) (invalidity of claimed source of title does not preclude admission of any evidence in support of claim for absolute title). After registration, the sole and conclusive embodiment of title is the decree, which forms the basis for the original certificate of title and all TCTs. Haw. Rev. Stat. § 501-71. Interests and encumbrances reflected in past grants and deeds, but not noted in the certificates of title, are no longer valid. Haw. Rev. Stat. § 501-82; Waikiki Malia, 75 Haw. at 392, 862 P.2d at 1061. The State's citation to distinguishable cases from other jurisdictions is unavailing, and its argument that the Trustees' 1938 registration of title did not include the interests at issue in this appeal is contradicted by both: (1) the Trustees' 1934 Application, which prayed for registration of "absolute" title (ROA 121), and (2) the law, id.

In Waikiki Malia, our Supreme Court rejected an even stronger argument that a 45-foot height restriction set forth in a deed *actually filed* in land court, but not separately noted in the TCT, somehow survived the extinguishing effect of Haw. Rev. Stat. § 501-82. 75 Haw. at 392, 862 P.2d at 1061. Another fact making the easement holder's argument even stronger in the Waikiki Malia case as compared to this case was that the TCT did specifically note a consent "[b]y Outrigger Hotels Hawaii, to the construction of Bldg, in access [sic] of *height restriction contained in Doc 1148199.*" Id. at 391, 862 P.2d at 1060 (emphasis added). The Supreme Court rejected the easement holder's arguments, stating that:

> The fundamental intent of HRS § 501-82 is to preserve the integrity of titles. We believe that knowledge of an unregistered encumbrance from an inference or obscure reference on a TCT is inadequate and serves only to frustrate the intent of HRS § 501-82. *In order to provide the holder of the transfer certificate of title full*

> *notice of the encumbrance from the face of the TCT, such encumbrance must be separately and clearly noted therein.*
>
> . . . .
>
> In the case before us, we deem the reference to the height restriction on the TCT within the document identified as a "Consent" to be an insufficient notation of an encumbrance under HRS § 501-82. The notation of the Consent document does not specifically indicate the forty-five foot height restriction. Because such restriction was never explicitly and separately noted on the 1988 TCT, we hold that Kinkai is entitled to hold Lot 48 free from such restriction.

Id. at 391-2, 862 P.2d at 1060-1 (emphasis added) (internal quotation omitted).[4]

Here, neither the mining reservations nor any alleged flowage easement was noted in the memorandum of encumbrances in the 1938 decree. FOF ¶19; ROA 348-350. The State raised FOF ¶19 as a point of error, see Op. Brief, at 10 (in part, as to the mining reservation), but made no discernible argument addressing this finding that "[t]he list of encumbrances set forth at pages 64-66 in the Original Certificate of Title No. 17,854 did not contain a reservation of mineral and metallic mines . . .[.]" ROA 995. Hence, the State waived this alleged error. HRAP 28(b)(7). In any case, land court did not err, as is plain from the record. ROA 348-350. Accordingly, the registered title in Lots 1218 and 1219 is held free of the claimed flowage easement and mining reservations. Haw. Rev. Stat. § 501-82; Waikiki Malia, 75 Haw. at 392; 862 P.2d at 1061.

5. The State is Bound by the Final Decree to the Same Extent as Any Private Citizen Would Be.

The Hawai`i Supreme Court's decision in Magoon stands for the principle that the State cannot claim any better treatment for its estates and interests in registered land than any other person would be afforded under the land court statute. In Magoon, the State claimed that it

[4] After Waikiki Malia, the legislature clarified how encumbrances in deeds may be noted. See 1994 Haw. Sess. Laws Act 206. This law does not apply to encumbrances arising before June 21, 1994. Id., sec. 4; Haw. Rev. Stat. § 1-3. At any rate, the ancient mining reservations were not "noted" even under the 1994 law. See Pet. Exhs. N at 3, S, T (ROA 287, 743-746).

owned an interest in or public easement across Old Diamond Head Beach Road, a 50-foot wide public right of way, abandoned in modern times, that used to run along several beachfront lots. 75 Haw. at 168-9, 858 P.2d at 715-6. The State prevailed in one land court proceeding (L.C. App. No. 1768) as to a single beachfront lot, see In re Kelley, 50 Haw. 567, 445 P.2d 538 (1968), but lost in another case (L.C. App. No. 1767) regarding several adjacent beachfront parcels, and then failed to timely appeal the result in L.C. App. No. 1767. Magoon, 75 Haw. at 172-3, 858 P.2d at 717. Although the Kelley case only involved one of the several lots across which the old public road ran, the Hawai`i Supreme Court in Kelley pronounced that the State owned the entire strip, contrary to the decree in L.C. App. No. 1767. 50 Haw. at 574, 445 P.2d at 543.

More than two decades later, the State filed an ejectment proceeding against not only the owner of the lot in Kelley, but also against the landowners who had prevailed against the State in L.C. App. No. 1767. The trial court entered summary judgment against the State, based on the decree in the latter proceeding. The Hawai`i Supreme Court affirmed on appeal, holding that:

> [E]ven assuming that *In re Kelley* (1768) determined that the land court's decision and decree in 1767 was erroneously decided, the State's failure to appeal 1767 precludes it from relitigating that case. *Merely because the litigant in this case is the State of Hawaii, which claims on behalf of the public the enjoyment of the parcels in dispute, we cannot disregard the applicable law. We are compelled to hold the State accountable for its failure to appeal in the same manner and to the same extent as private individuals under like circumstances.*
>
> Based on the foregoing discussion, we hold that the State is precluded from maintaining its ejectment action with respect to [the parcels of land in L.C. App. No. 1767], pursuant to HRS § 501-53. . . .

Magoon, 75 Haw. at 189-190, 858 P.2d at 724-725 (emphasis added).

Here, the Territory (the State's predecessor in interest) answered and asserted various interests in the land in this L.C. App. No. 1095, but failed to assert any alleged flowage easement

or its long-dormant reservation of mineral and metallic mines under any of the land in L.C. App. No. 1095. As in the Magoon case, the Territory in this L.C. App. No. 1095 failed to appeal the decree. Under the land court statute, there is no question that a private individual who appears, answers and claims certain interests in land, but fails to raise others, and then subsequently fails to appeal the decree that omits reference to any such unasserted interests or easements, would -- just like the rest of the world -- be forever bound by the decree. Haw. Rev. Stat. § 501-82. By operation of the express phrase "including the State" contained in Haw. Rev. Stat. § 501-71, and under the Magoon holding, the State is bound "to the same extent" as any such private individual would be. The State has not demonstrated that its interests in digging up any part of Lot 1218 or Lot 1219 to look for minerals or metals, or in acquiring a flowage easement over Lots 1218 and 1219, should be treated differently than the State's interests in assuring public access to Old Diamond Head Beach Road that were lost in the Magoon case. This court should affirm.

B. THE STATE IS BOUND BY RES JUDICATA.

All three elements of res judicata are present. See Op. Brief, at 33-35; see also Magoon, 75 Haw. at 190, 858 P.2d at 725 (reciting three elements of res judicata). First, the issue raised by the State's prayer for relief in its answer to the Petition below is identical to the issue raised by the Trustees of Campbell Estate in their original Application No. 1095, which sought "absolute title" in all of the registered lands and described the known encumbrances. ROA 121, 180-182. The State concedes this element of res judicata has been met. See Op. Brief, at 33-34.[5]

Second, the State's privy, the Territory, joined the issue in this L.C. App. No. 1095 as to all matters of title, interests and encumbrances in the land sought to be registered when it filed its

[5] The State argues that the 1938 decree was *in favor of the State*. The State is wrong. See Section III-A-4, *supra*; see also FOF ¶19; ROA 180-182, 348-350 (Pet. Exhs. A, at 60-62; N, at 64-66).

"Answer and Claim" on February 26, 1937. ROA 272-279. Said answer, in fact, claimed easements and other encumbrances against the land sought to be registered. ROA 273-278.

Third, the original decision (Pet. Exh. M, ROA 280-284) and decree (Pet. Exh. N, ROA 285-351) had the effect of a final judgment on the merits of Application No. 1095. See ROA 806-807 (State Exh. 7, at 283-4, sec. 14); Haw. Rev. Stat. § 501-71. Neither was appealed. ROA 996 (FOF ¶20).

Therefore, separate and apart from the preclusive effect accorded the original decree by the land court statute itself (discussed in Section III-A, above), the State is also foreclosed by general res judicata principles from raising, not only any right or claim that was adversely decided against the Territory, but also any right or claim which *could have been raised* by the Territory in this L.C. App. No. 1095. Magoon, 75 Haw. at 190, 858 P.2d at 725. This is true even if the land court erred in the original decree, as happened in the Magoon case where the land court decree in L.C. App. No. 1767 conflicted with the Supreme Court's holding in Kelley. Id. at 189, 858 P.2d at 724. The State asserts that both of the interests at issue in this appeal "always existed," so it logically follows that the Territory *could have* litigated such alleged claims in the original proceedings in this L.C. App. No. 1095. The State is barred by res judicata, and this court should affirm on this basis alone without needing to reach other issues.

C. LAND COURT DID NOT CLEARLY ERR IN ITS FINDING THAT THE STATE FAILED TO PROVE THAT IT OWNS A FLOWAGE EASEMENT OVER THE SUBJECT PROPERTY.

Even if the 1938 decree could be reopened more than seven decades after it was issued, which cannot be the case, the State did not prove it owns a flowage easement over Lots 1218 and 1219. The State's historical dissertation, while interesting, has not been tied to any concrete facts or conveyances demonstrating that it ever acquired a flowage easement over Lot 1218 or

Lot 1219. The State failed to point to any facts in the record that establish that the land court clearly erred when it found the State has no flowage easement over Lots 1218 and 1219.

1. The State's Request for a Blanket Flowage Easement Over Lots 1218 and 1219 is Unprecedented and Unsupported by the Record on Appeal.

The State overreaches in this case. Not content with the land court's finding that the State has reserved an interest, if any, in water rights affecting Lots 1218 and 1219, the State complains that the land court erred when it ruled that any such interests, if they exist, are not an easement or encumbrance upon the title of Lots 1218 and 1219. See Op. Brief, p. 11. In this appeal, the State insists that it *does* have an easement, and asks this court to reverse the land court with instructions to write its claimed flowage easement onto the new certificates of title issued for Lots 1218 and 1219 in the decree below. Id. at 1, 35.

To date, the State has not said where its alleged flowage easement runs over Lots 1218 and 1219, or described it with any degree of specificity. The State never identified any deed or instrument conveying same. Instead, the State mysteriously argues that "the easement for free flowage of water, both over and under the property, [is] not factually dependent on what can be seen on the Petitioner's property," ROA 764 (5/22/09 Opp. Memo, p. 9); cf. also Op. Brief at 23, and expansively describes its alleged interest as "an easement for the free flowage of *any* waters through, over, under, and across" Lots 1218 and 1219, ROA 67 (Answer, p. 5 at ¶5); Op. Brief at 1 (emphasis added).

On the face of its own pleadings and papers, the State claims the perpetual right to flood Petitioner's land with "any" waters at any time, as well as the right to forever bar Petitioner and its privies from using or controlling "any" waters existing on or under their land, including but not limited to the following lawful pursuits: impounding water in a reservoir or catchment tank; grading land to improve drainage; irrigating fields to grow food; pumping or channeling water

out of unwanted areas; digging a well; making a pool or pond for swimming, aquaculture or a garden; and stacking sandbags against floodwaters. On the state of the record below, there is no basis to construe the State's alleged easement more narrowly without amending the State's pleadings and supplementing the record on appeal. The State's arguments are without precedent and utterly without merit, both on the facts and under the law.

2. Imposing a Flowage Easement on Lots 1218 and 1219 is not Necessary for the State to Discharge its Duties Under the Public Trust.

The State argues that, "[u]nder Hawaii law, an easement for the free flowage of water has always existed on the property." Op. Brief, at p. 21. But the State does not cite to any Hawai`i law that says so. Instead, the State merely engages in a general discussion of land tenure and water rights in Hawai`i, including the public trust protecting waters in rivers and natural watercourses for the common good. Op. Brief, at 21-22.

Petitioner agrees with the State that it owes a duty to all the people throughout Hawai`i to conserve public trust resources, including water. Petitioner, and its assigns, are among the *beneficiaries* of that public trust. The subject property, after all, has a public municipal golf course under lease with improvements, including one or more residences. ROA 71; 846. Petitioner's land thus has its own existing appurtenant and/or correlative rights to consume water resources for beneficial, approved, high-priority public trust purposes such as drinking, cooking, bathing, and public recreation, if such water were to exist on the land. See In re Water Use Permit Applications (Waiahole I), 94 Haw. 97, 137, 9 P.3d 409, 449 (S. Ct. 2000) (use of water for domestic purposes is "among the highest uses"); Haw. Rev. Stat. § 174C-2(c) (water code requires adequate provision for municipal uses and public recreation). Like the State, Petitioner is interested in the ongoing beneficial use and protection of water resources for future

generations. None of this proves a flowage easement has "always existed" over Lots 1218 or 1219 in favor of the State.

The State's only advanced rationale to imply an easement that has always existed on the subject property is hard to fathom. In its Opening Brief, the State argued -- without factually distinguishing Lots 1218 or 1219 from any other land in Hawai`i -- as follows:

> The public trust includes all waters, ground water, surface water, and all other water. Thus, the State's reservation of an easement for the free flowage of water, both over and under the property, is not factually dependent on what can be seen on the land. Hand-in-hand with the right to use water is the responsibility for ensuring that water is not wasted or used in a manner contrary to the public good. *An easement for the free flowage of water is necessary to prevent the improper diversion or impediment of water in its natural water course.*

Op. Brief, at 23-24 (citation omitted) (emphasis added).

The State does not explain why a permanent flowage easement over Lots 1218 and 1219 is needed to perform its sovereign public trust duties. Furthermore, the State fails to identify any surface or subterranean water feature on or under Lots 1218 or 1219, much less one whose free flowage has been impeded or threatened. Because the State cites no distinguishing facts particular to Lots 1218 and 1219, its argument is tantamount to saying that the State must have a recorded, perpetual flowage easement over all private property that has or may have surface waters or groundwater flowing over or under it, which means virtually all land everywhere in Hawai`i.

The sole case cited for this remarkable proposition is Kahookiekie v. Keanini, 8 Haw. 310 (1891). Op. Brief, at 24. That case was an appeal from the water commissioner's order to remove a flume that had been used to divert water from its natural watercourse to irrigate an adjacent field in derogation of the prescriptive water rights of downstream taro farmers. Id. at 311-312. The Kahookiekie court did not give the King an easement for the free flowage of

waters over the offending parcel, much less over all parcels everywhere situated. Rather, the case was a straightforward adjudication of competing private water rights. Hence, the State has no legal authority to support its alleged flowage easement over Petitioner's land.

3. The State's Alleged Flowage Easement is Contrary to Applicable Law.

Not only does the applicable law *not* mandate a flowage easement over Lots 1218 and 1219, it positively militates against the imposition of any such easement. Hawai`i law encourages the beneficial use and development of water resources. Haw. Const. art. XI, sec. 7. See also Haw. Rev. Stat. § 7-1 (springs and running waters are "free to all," except for "wells and watercourses that individuals have made for their own use"). The State wants this court to order the imposition of an involuntary easement forever barring all present and future occupiers of Lots 1218 and 1219 from diverting, impounding or otherwise taking water from wells, springs, streams, or other waters on or under Lots 1218 and 1219 for their beneficial use. As set forth above, the State's pleadings offer no basis to narrow the scope of the alleged easement. This court should decline the State's invitation to so radically curtail individual rights.

In addition to their established rights as members of the water-consuming public, the law generally promotes and protects Petitioner's and its privies' vested rights *as landowner* to exercise reasonable use and control over surface waters and groundwater on or under his or her land to harvest water for beneficial use (appurtenant, riparian or correlative use rights) or to repel unwanted water to avoid flooding or causing other damage (the reasonable use rule). See Waiahole I, 94 Haw. at 178-180, 9 P.3d at 490-492 (discussing landowner's rights to use underlying groundwater for existing correlative and riparian uses); Haw. Rev. Stat. § 174C-63 ("Appurtenant rights are preserved.");[6] Rodrigues v. State, 52 Haw. 156, 164-5, 472 P.2d 509,

[6] "Appurtenant" or "usufructory" water rights include the right to the amount of water used as of the Great Mahele. Robinson v. Ariyoshi, 65 Haw. 641, 668-9, 658 P.2d 287, 307 (1982).

516 (1970) ("We hold that each possessor of land may interfere with the natural flow of surface water for the development of his land so long as such interference is not unreasonable under the circumstances of the particular case.").

Hence, albeit such activities may be subject to regulation, it is lawful for landowners to build, maintain and/or operate dams, drains, levees, embankments, pumps, water pipelines, ponds, canals, reservoirs, wells, lo`i, ditches, and other means of controlling, diverting, or exploiting fresh water on their land for beneficial purposes such as agriculture, aquaculture, domestic uses, and flood control. See, e.g., Haw. Rev. Stat. Chs. 165 (Right to Farm); 169 (Private Agricultural Parks); 174C, Part VII (Wells) and Part VIII (Stream Diversion Works); 179D (Dams); 183B (Fishponds). The very existence and ongoing vitality of these laws prove that no broad flowage easement is implied by operation of law against Petitioner's land or any other parcel in Hawai`i.

4. The Water Commission Has Primary Jurisdiction to Allocate Competing Uses of Water Resources Under the Public Trust Doctrine.

In 1978, the people of Hawai`i commanded the legislature to create an agency to decide how best to allocate water resources within the public trust while simultaneously assuring appurtenant rights and existing correlative and riparian uses of water. Haw. Const. art. XI, sec. 7. In response, the legislature enacted Haw. Rev. Stat. Ch. 174C, and established the Commission on Water Resource Management (the "Water Commission") as the "primary guardian of public rights under the trust." Waiahole I, 94 Haw. at 143, 455. It is the Water Commission, and not land court or the attorney general, that has both the primary original jurisdiction and the expertise to quantify, define and/or adjudicate competing water rights (if any there be), including all appurtenant, riparian or other correlative rights to use surface waters or groundwater on or under Lots 1218 and 1219.

Land court, by contrast, is a court of limited jurisdiction. In re Campbell's Estate, 66 Haw. 354, 358, 662 P.2d 206, 208 (1983). In this case, land court properly declined to delve, in the first instance, into the complex area of water rights without any factual context supplied by the State, and ruled simply that the State reserved an interest, "if any," in whatever water rights affected the subject property, which did not constitute an easement or encumbrance against the registered title. ROA 997. The State has not shown that land court erred in that regard.

5. Tenant Rights Are Not Government Flowage Easements.

In footnote 7 of its Opening Brief, at pp. 22-23, the State obliquely cites native tenant rights in an effort to bolster its allegation that it owns a flowage easement over Lots 1218 and 1219. This argument is wholly without merit. Neither the authority cited, nor any evidence in the record, supports the notion that a tenant's rights traditionally recognized in ancient times included a broad flowage easement over his chief's land as described in the State's prayer for relief. In land court below, the State conceded that it was not representing any native tenants, and did not identify any who had such rights in Lot 1218 or Lot 1219. ROA 771 (State's Opp. Memo, at 16). The State did not even establish that the lands are not already "fully developed" within the meaning of PASH v. Hawai`i County Planning Comm'n, 79 Haw. 425, 903 P.2d 1246 (S. Ct. 1995), cert. denied, 517 U.S. 1163 (1996). The record is far too sparse to disturb the land court's findings, especially when based on mere conjecture about the existence, nature or extent of any native tenant rights on Lots 1218 or 1219. Whatever native tenant rights exist that may involve or affect waters flowing on or under Lots 1218 or 1219, they are not the same thing as "an easement for the free flowage of any waters through, over, under, and across" Lots 1218 and 1219 in favor of the State. There never was any such flowage easement. This court should affirm.

D. LAND COURT DID NOT CLEARLY ERR WHEN IT FOUND THAT NO MINING RIGHTS RESERVATION EVER EXISTED OVER LOT 1219 AND THE TOP PORTION OF LOT 1218 CONVEYED BY KAMEHAMEHA III.

The State offers no evidence that Kamehameha III ever gave the government any mining rights in the ahupuaas of Kahuku and Kawela before he conveyed those lands "with all privileges and appurtenances thereunto belonging" to Charles Gordon Hopkins on September 10, 1851. ROA 257. The 5,121 acres of land thus originally conveyed by the Kamehameha III deed encompasses Lot 1219 and the upper portion of Lot 1218. Op. Brief, at 4.

The State wrongly (and repeatedly) assumes in its briefs without any supporting evidence that King Kamehameha III somehow never owned, or silently gave the government at some undefined point in time, the right to mine minerals and metals on his private crown lands. See, e.g., Op. Brief, at 13 ("The King . . . did not own the minerals and metallic mines."), 18 ("There is no indication of an express intent on the part of the King to transfer the government's rights to minerals and metallic mines to himself.").

The State forgets that it bears the burden to show land court committed clear error in its FOF ¶31 that the 5,121 acres of land Kamehameha III sold Mr. Hopkins in 1851 "never was subject to a reservation of mineral and metallic mines in favor of any government or person." ROA 998. In the Great Mahele, *in this order,* the King first, divided his land with his chiefs and konohikis, second, reserved his own private lands unto himself, and *third,* ceded his interest in the remaining land in Hawai'i to the government. Jon J. Chinen, Original Land Titles in Hawaii, at 15 (1961); The Great Mahele Hawaii's Land Division of 1848, at 20, 25 (1958). Thus, at the "big bang" moment of the genesis of western-style private land titles in Hawai`i, no part of the crown lands, including the ahupuaas of Kahuku and Kawela, was ever given to the government. Instead, the crown lands were withdrawn from the public domain at the very point in time that Hawai`i entered the age of the recognition of private titles and estates in real property. See State

v. Zimring, 58 Haw. 106, 112, 566 P.2d 725, 730 (1977) (Kamehameha III was motivated by his "anxious desire to free his lands from the burden of being considered public domain, . . . and also his wish to enjoy complete control over his own property.").

The House of Nobles and Representatives, sitting in legislative council, gratefully conceded as much in the Great Mahele of 1848. See An Act Relating to the Lands of His Majesty the King and of the Government of June 7, 1848, cl. 3, reprinted at 2 Rev.L.Haw. (1925), Appx., at 2152 ("Whereas, it hath pleased His Most Gracious Majesty Kamehameha III., the King, *after* reserving certain lands to himself *as his own private property*, to surrender and forever make over unto his Chiefs and People, the greater portion of his Royal Domain; . . .") (emphasis added). Therefore, as of 1851, when Mr. Hopkins purchased 5,121 acres of land in Kahuku and Kawela from Kamehameha III for $10,000, the law of the land was that the King's personal crown lands were absolutely his own, to be "regulated and disposed of according to his royal will and pleasure, subject **only** to the rights of tenants." Id. at 2156; see also ROA 193 (Pet. Exh. B, p. 2) (emphasis added).[7]

Moreover, according to the law and conveyancing usages established at the time and still prevailing now, neither Kamehameha III, nor Hopkins, nor any other successor, had to get a land commission award or government patent in order to confirm his title. See Zimring, 58 Haw. at 114, 566 P.2d at 731 (Kamehameha deed is a sufficient source of original title). Thus, contrary to the State's argument, crown lands were not subject to the laws governing the required form of government patents, one of which was in effect for 13 years (repealed in 1859) and prescribed an

[7] Years later, a law was passed making crown lands inalienable, and then crown lands were taken by the Republic of Hawaii in 1893. Zimring, 58 Haw. at 113, 566 P.2d at 730-1.

exception for reserved mining rights. See Op. Brief, at 18 (quoting "2 Rev. Laws of Haw. 2191 (1925)").[8] As the Hawai`i Supreme Court observed in an early case:

> . . . No one would seriously contend that the King was obliged to go to the Land Commission for awards or patents of his own lands, even for commutation purposes, when we bear in mind that he had surrendered to the Government by far the greater portion of the lands that remained his, which extinguished completely the Government commutation in what was left.

Harris v. Carter, 6 Haw. 195, 204 (1877), overruled on other grounds, Galt v. Waianuhea, 16 Haw. 652 (1905). In short, the "King's title . . . was perfect," subject only to tenant rights. Id. at 204-205. The title examiner made the same finding in this L.C. App. No. 1095. ROA 194 (Pet. Exh. B, at 3). If for no other reason, Application of Robinson, 49 Haw. 429, 421 P.2d 570 (1966), upon which the State heavily relies, is distinguishable.

The State conceded in open court that its mining reservations were not part of the tenant rights that comprised, if and to the extent they existed, the sole limitation on Kamehameha III's absolute prerogative to dispose of his private estates "according to his royal will and pleasure." ROA 1074 (Tr. at p. 29, lines 11-12). The State fails to overcome the presumption -- rebuttable only by clear and convincing proof -- that Kamehameha III owned full beneficial title over his lands, including the right to mine minerals or metals, when he conveyed such title to Hopkins, including that right. Haw. R. Evid. 304(c)(1). Cf. Cade v. Holt, 32 F.2d 257 (S.D. Tex. 1927) (title to land was not subject to beneficial reservation of mineral rights). When asked what proof it had that Kamehameha III reserved mining rights from the lands he sold to Hopkins, the State said:

> [DEPUTY ATTORNEY GENERAL]: If you look at the Kamehameha deed, it doesn't reserve anything. It's just -- it's

[8] The State cited and excerpted an *appendix* to the 1925 Revised Laws of Hawaii, which reprinted old laws. A footnote omitted from the page copied in the State's Appendix B cautioned that the law was repealed in 1859, nearly *80 years before* the 1938 decree herein.

> almost like a quitclaim deed. And what's interesting is that there's other case law that basically says that the king -- water wasn't for the king's to give away so he couldn't give that away. The rights of native tenants weren't his to give away so he didn't give that away. Similarly, the mineral metallic mines were not his to give away based on -- you know, and he also did not give that away so just because it's in the Fourth Amendment --
>
> THE COURT: You started to say based on and then you didn't say. Based on what did he have these metallic and mineral mines rights?
>
> [DEPUTY ATTORNEY GENERAL]: I was going to say that based on -- well, there are not a lot of historical documents that live on to this day but we do have some of his speeches to his -- to the legislature at that time and in that time the interest was basically we're going to be giving away this -- we're going to be selling land or giving it away so that we can encourage agriculture. Agriculture was the focus and it was not the focus to give away the mineral or metallic mines. Therefore, in all of the Land Commission award lands, mineral or metallic mines was not given away, and I think just because the Kamehameha deed did not include that, as it did not include water or the rights of native tenants, it still was intended for the sovereign to hold.
>
> THE COURT: Anything else?
>
> [DEPUTY ATTORNEY GENERAL]: No, your honor. We just respectfully request that the court find that the property is subject to the State's reservations. Thank you.

ROA 1074 (Tr., at pp. 33-35).

The record below does not support the State's speculation. The lands Mr. Hopkins acquired from Kamehameha III in 1851 were not part of a government grant at all, much less a grant for homestead purposes. Mr. Hopkins paid $10,000 (a substantial sum of money at the time) for the 5,121 acres of the King's own private lands conveyed by deed, along with all of the appurtenant privileges. ROA 254, 257. Furthermore, even *if* the State had adduced evidence that Kamehameha III intended to give the government the right to mine his own private crown lands for metals and minerals before he deeded those lands to Mr. Hopkins, *which it did not*, the

evidence, inferences and presumptions tending in the opposite direction, identified in this brief and in the record below, provide ample support for the land court's finding in FOF ¶31 that the King did not intend to do so. The phrase "with all privileges and appurtenances thereunto belonging" in the 1851 Kamehameha III deed, by itself, provides sufficient substantial evidence of intent to bar the State from showing that the land court clearly erred. Accordingly, the State has not met its burden of showing that FOF ¶31 is clearly erroneous.

E. THE LAND COURT DID NOT ERR WHEN IT RULED THAT THE MINERAL RIGHTS RESERVATION IN A PORTION OF LOT 1218 WAS EXTINGUISHED BY THE 1938 DECREE.

The land court ruled in FOF ¶30 that the government's mineral and metallic mining rights formerly reserved in three government patents covering a portion of Lot 1218 were extinguished by the issuance of the original 1938 decree. ROA 998. In addition to the discussion, above, in Sections III-A and III-B about the binding effect of land court decrees as a matter of law, there is ample support in the record on appeal for this finding.

1. The Territory Succeeded to the Mineral Rights Reserved in the Royal Patents Issued in the 19th Century as to a Portion of Lot 1218, but not to Some Amorphous Government Reservation that "Always Existed."

The State asserts that the mineral rights reservation in favor of the government "has always existed." Op. Brief, at 17. Once again, the State relies on *ipse dixit* with no citation to any Hawai`i law or judicial precedent that says so. Critically, the State fails to cite any authority prevailing at the dawn of land titles in Hawai`i that said that the government owned the mineral rights under all lands everywhere, including Kamehameha III's private crown lands, or that such alleged interests "always existed."

The State repetitively misconstrues the observation in Application of Robinson that the mining rights reservation at issue in that case was "self-effectuating." See Op. Brief, at 13, 16, 32. The Robinson court used that phrase in rejecting the significance of the mining reservation's

omission from the *land commission award* (not the patent, which contained it). The point being made was that the statutory scheme in effect at the time of the land commission award was subject to a law prescribing the form of the patent that would -- and did, in that case -- reserve the government's mining rights without needing to be passed on by the land commission. Id. at 440, 421 P.2d at 577 ("We recognize that the Land Commission had judicial powers. No such powers were called into play here.") (internal citation omitted). Robinson did not hold that the government's mining rights "always existed" by operation of law in the absence of an actual reservation set forth in the royal patent.

Robinson also did not hold that the Territory could not lose its mining reservations by failing to assert them in an original land court application or by not appealing an original land court decree that fails to note them. In fact, the court in Robinson expressly refrained from addressing a similar alienability issue because the patent in that case contained the reservation, so it was a point that the court did not need to address. 49 Haw. at 443, n.14, 421 P.2d at 578, n.14.

2. The Territory's Dormant Rights to Mine for Minerals or Metals Under a Portion of Lot 1218 were Alienable in 1938.

The State implies that the Territory's ancient and defunct mineral rights reservation in a portion of what is now Lot 1218 could not have been lost by the Territory in the course of the land court registration process that culminated in the 1938 decree. See Op. Brief, at 17 ("land court was wrong to determine that because the Territory did not claim the reservation in 1938, it was extinguished by the land court registration."). The rationale for this assertion is the unsupported and conclusory statement that the mineral rights allegedly "always existed" in favor of the government, or that the Trustees "never had" them. Id. at 17-18, 28. In this clever and subtle manner, the State stops short of asking this court to expand the scope of the inalienable

public trust retroactively to January 24, 1938 beyond its recognized parameters, but seems to wish to lead the court in that direction. This court should not be misled into believing that the Territory in 1938 was somehow precluded by any public trust or similar concept from losing its reserved mining rights during the land court registration process. In fact, it could and did.

After annexation, the Territory succeeded to the title to all government property formerly held by the Republic of Hawaii, including whatever reserved mineral and metallic rights the Republic still owned in the land that became Lot 1218. Territory v. Kapiolani Estate, 18 Haw. 640, 642 (1908). The State has cited no law in effect from annexation until January 24, 1938 which addressed mineral and metallic mining reservations at all. Certainly, no law existed in 1938 which rendered the Territory's long dormant and unused mining reservations inalienable. The State does not contend otherwise, under a public trust or other legal theory. After annexation, the Territory was authorized to dispose of public lands and other public property. Organic Act § 73. Indeed, some of the lands registered in this L.C. App. No. 1095 were conveyed to the Campbell Estate Trustees by the Territory by territorial land grant or exchange deed without any reservation of mineral or metallic mines. See, e.g., Appendix A. Therefore, whatever dormant mining reservations the Territory held in 1938 were alienable and subject to being relinquished in the course of the land court registration process.

3. The Territory Lost its Reservations of Mineral and Metallic Mines in Lot 1218 by Failing to Claim them in its Answer, and Also by Failing to Appeal the Original Decree.

Inasmuch as the Territory could lawfully dispose of its mining reservations in 1938, the land court statute answers the further question of whether it did so in this case. In 1903, the Territory passed the Torrens Act (State's Exh. 7, ROA 804-831), as amended Haw. Rev. Stat. Ch. 501, providing a process for adjudicating and establishing conclusive, vested title in real property upon the payment of a fee, which is in the nature of a title insurance premium backed

by the government. Pae v. Stevens, 41 Haw. 490, 497 (1956), remanded on other grounds, 256 F.2d 208 (9th Cir. 1958). Then, as now, the government agreed to be bound by all decrees issued by land court. ROA 812 (State's Exh. 7, pp. 294-295); Haw. Rev. Stat. § 501-71. The Torrens Act then, as now, said that a land court certificate of title vests absolute title in the registered owner subject to all easements or encumbrances noted in the land court certificate of title, but free of any and all encumbrances not noted therein. ROA 812, 813 (State's Exh. 7, pp. 294-297); Haw. Rev. Stat. §§ 501-1, 501-74, 501-82. Then, as now, the attorney general was required to be served, and authorized to appear, in any case where the land bordered a river, or the seashore, or a "great pond," or where the Territory otherwise appeared to possibly have adverse interests in the land. ROA 811 (State's Exh. 7, p. 292); Haw. Rev. Stat. § 501-42.

As described above, the Territory was cited, appeared, and answered with claims of easements and other interests in the land sought to be registered in this L.C. App. No. 1095, but did not claim mineral and metallic mining rights in the subject property, and did not appeal from the final decree that failed to note them. ROA 993-994, 996 (FOF ¶¶6, 7, 8, 9, 20). The State does not appeal these findings of fact, and is now bound by them. There is, therefore, ample support in the record for the challenged FOF ¶30 (ROA 998) that the Territory's mineral and metallic mine reservations in that portion of Lot 1218 covered by the three patents were extinguished by the 1938 decree, which omitted any reference to such interests.

The only reported Hawai`i case on the subject of mineral rights reservations, Application of Robinson, 49 Haw. 429, 562 P.2d 771, suggests that such rights, when shown to exist, must be duly noted in the original certificate of title at the insistence of the government so they bind the land and provide notice to subsequent purchasers for value and the world. The court in Robinson did not hold that such reservations were immune from loss when omitted from the original

decree. If it had so held, then the court would have had no reason to remand the case back to land court "for entry of a modified decree in conformity herewith." 49 Haw. at 443, 421 P.2d at 579. The disposition in Robinson strongly suggests that, if the State had not appealed the original decree in that case, then its mining reservations would have been lost by operation of the land court statute and/or res judicata, as in Magoon. Thus, Robinson actually supports land court's conclusion in FOF ¶30 that the mining reservations in Lots 1218 were extinguished.

F. BURDENS AND INCIDENTS OF GENERAL LAW SHOULD NOT BE WRITTEN INTO THE CERTIFICATE OF TITLE AS ENCUMBRANCES.

The State argues, in the alternative, that its interests are "burdens and incidents imposed by law" preserved by the 1938 decree. Op. Brief, at 13-14, 29-30. But the State cites no law existing on January 24, 1938 that imposed the claimed encumbrances upon Lots 1218 and 1219.[9] As shown above, Hawai`i law then, as now, precluded a blanket involuntary flowage easement against Petitioner's title, and no law then addressed, much less required, a mining reservation.

The State's claimed interests cannot be other than "easements" or "encumbrances" that the State belatedly asks this court to write onto the certificate of title. By law, original land court decrees must contain, not only a description of the land being registered, but also must state the estate of the owner, and *all* particular estates, mortgages, *easements*, liens, attachments and *other encumbrances* to which the land or the owner's estate is subject. Haw. Rev. Stat. §501-74. Any and all interests that are not so noted in the decree are extinguished. See Section III-A, above.

Petitioner agrees with the State that generally applicable "restrictions on private land . . . in the Hawaii State Constitution, statutes and common law of Hawaii . . . are not affected by land

[9] The State does not contend that constitutions or statutes enacted after statehood created its mining reservations. Instead, the State claims such reserved rights "always existed." Op. Brief, at 17, 28-29. In the proceedings below, the State relied heavily on post-statehood constitutional and statutory provisions, but has abandoned those arguments on appeal, in apparent recognition that it cannot take vested property rights without just compensation. See section III-H, below.

court registration." Op. Brief, at p. 1; see also id. at 6 n.5 (quoting Haw. Rev. Stat. § 501-81). But the converse is equally true: General laws are not "encumbrances" or "easements" that may be registered. Potentially applicable burdens of laws are not recorded against the title of either registered *or unregistered lands*, and should not be noted in Petitioner's title without its consent. Otherwise, the statutory requirement of Haw. Rev. Stat. §501-74 that all encumbrances affecting the estate of the owner seeking land court registration must be noted in the original decree would be violated if restrictions imposed by general laws and not excepted by Haw. Rev. Stat. § 501-82 are deemed to be encumbrances that need not be noted in the original decree, or can be noted at a later date. For the State to say its interests are *recordable* as encumbrances -- as it does in this appeal -- is a tacit admission that it lost all pre-existing encumbrances that were omitted from the original certificate of title. Haw. Rev. Stat. § 501-82. By the same token, when the State argues in the alternative that its interests are actually "burdens and incidents" of general law preserved by Haw. Rev. Stat. § 501-81, the State must find its solace in that statute alone.

Furthermore, the State's argument that "burdens and incidents" must be noted by land court in the registered title as "reservations" is refuted by the State's own statement that "a reservation [of its interests in historic sites] is not required" because "Chapter 6E [Haw. Rev. Stat.] applies equally to all land in Hawaii, whether registered or unregistered." Op. Brief, at 6, n.5 (emphasis added). Petitioner agrees with the State's footnote 5. It is precisely because burdens and incidents of general laws are preserved by Haw. Rev. Stat. § 501-81 that it serves no purpose to try to inventory all of them and then fix them in perpetuity as encumbrances against registered title. Worse, to single out Petitioner's land for such an adjudication would unfairly harm Petitioner's vested rights. Burdens of general laws, including the water resources public trust, depend on future facts and conditions and apply, if at all, on a "case-by-case basis."

Waiahole I, 94 Haw. at 152, 9 P.3d at 454. The burdens of general laws ebb and flow over time as laws are enacted, repealed and amended. This court should avoid issuing an advisory opinion on such wholly abstract questions, much less affixing them for all time into the certificate of title. Wong v. Bd. of Regents, Univ. of Hawaii, 62 Haw. 391, 395, 616 P.2d 201, 204 (1980).

The land court already recognized the State's reserved interests, if any, in waters and native tenant rights as they pertain to the subject Kahuku land, but concluded that such interests, if any there be, do not constitute an "easement" or "encumbrance." ROA 997. The State is not satisfied with that ruling, and says, no, the State's alleged interests *are* easements and encumbrances that need to be recorded now, 72 years after issuance of the original certificate of title and after good faith purchasers for value relied on subsequent TCTs. See Op. Brief, at 1. To reverse land court in this appeal, this court must disregard Haw. Rev. Stat. §§ 501-71 and 501-82, as well as Magoon and Waikiki Malia. This court should not take that unwarranted step. Instead, this court should affirm the land court's findings, order and decree.

G. THE PUBLIC POLICY IN THE STABILITY OF LAND TITLES OUTWEIGHS ANY PUBLIC INTEREST IN DIGGING UP PRIVATE LANDS TO LOOK FOR AND EXTRACT MINERALS AND METALS.

When the government enacted the Torrens land statute in 1903, it agreed to *guarantee and be bound by* land court's conclusive decrees of vested title "forever." ROA 812 (State's Exh. 7, at 295). The State continues to be so bound today. Haw. Rev. Stat. § 501-71. This reflects a public policy in favor of the integrity of land titles that overrides any reserved interest the Territory once had to mine a portion of Lot 1218 for minerals and metals. In re Application of Bishop Trust, 35 Haw. 816, 825 (1941); Waikiki Malia, 75 Haw. at 391, 862 P.2d at 1060; Honolulu Mem. Park v. City & Co. of Honolulu, 50 Haw. 189, 193, 436 P.2d 207, 210 (1967). This public policy in favor of the certitude and reliability of registered land titles would dictate

affirming the land court even if this were a close case. As set forth above, this is not a close case on the facts or under the law. Petitioner and many others relied on the certificates of title.[10]

H. RECOGNIZING THE STATE'S ALLEGED FLOWAGE EASEMENT AND MINING RIGHTS WOULD EFFECT AN UNCONSTITUTIONAL TAKING OF VESTED PROPERTY RIGHTS WITHOUT JUST COMPENSATION.

Petitioner's registered title has been free from any alleged flowage easement and mining rights reservation for over 72 years. Petitioner's unencumbered title is a vested property right which cannot be impaired without equal protection of the law, due process, and payment of just compensation under the federal and state constitutions. Haw. Rev. Stat. § 501-1; Haw. Const. art. I, secs. 2, 5, 8, 20; U.S. Const. am. V, XIV; Sotomura v. Hawaii County, 402 F. Supp. 95, 100-101 (D. Hawaii 1975) (Hawai`i Supreme Court opinion adopting the vegetation line versus the limu line to mark seaward boundary supports a claim for an unconstitutional taking of vested property rights where the law in effect at the time of the decree used a different standard).

By seeking to have unregistered encumbrances endorsed onto Petitioner's certificate of title without its consent and over its objections, the State seeks to enlist this court's assistance to take or permanently damage vested interests in land without just compensation, due process, or equal protection of the laws. Sotomura, 402 F. Supp. at 101; cf. also Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 55, 222 P.3d 441, 462 (Ct. App. 2009) (recognizing a taking of existing accreted lands by legislative act). This court should well consider the practical impact the State's requested relief would have on vested rights elsewhere in this L.C. App. No. 1095 and throughout the state of Hawai`i, as well as on the State's coffers. Ironically, the State insures all

[10] If this court were to impose an easement for the free flowage of water in favor of the State over the entirety of Lot 1218 and Lot 1219 (a total land area of approximately 235 acres), and a reservation of mineral and metallic mines over all or a portion of Lot 1218 and Lot 1219, because the four original sources of title for these two lots include much larger ahupua`a or other smaller land divisions, the State's claimed easements could by extension be interpreted to encumber and burden these much larger portions of L.C. App. 1095, leading to further uncertainty as to title.

land court titles, including the Petitioner's registered title that the attorney general is attacking in these proceedings. Haw. Rev. Stat. § 501-212; Pae, 41 Haw. at 497.

I. THE ATTORNEY GENERAL IS NOT AUTHORIZED TO SEEK A FLOWAGE EASEMENT OVER LOTS 1218 AND 1219.

The people of Hawai`i by constitutional and legislative mandate entrusted the Water Commission with primary jurisdiction over water resources. The Water Commission has been authorized to "acquire real property *and easements* by purchase, gift, devise, lease, eminent domain, or otherwise for flood control, water management, or water and water-related resource conservation." Haw. Rev. Stat. § 174C-14 (emphasis added). This statute would be superfluous if all lands were already subject to the broad flowage easement sought by the State.

In addition, all government agencies and officials must secure the Water Commission's written approval *before* condemning any private property that would materially affect water resources. Haw. Rev. Stat. § 174C-4. In this case, although the attorney general is generally authorized to appear in land court on behalf of the State, he seeks to use that authority to effect a judicial taking of a flowage easement. Sotomura, 402 F. Supp. at 101. The State, through the attorney general, says that a flowage easement is "necessary" in order to perform its public trust duties. Op. Brief, at 23-24. The State offers no facts particular to Lots 1218 and 1219 to support this alleged necessity.

To Petitioner's knowledge, the Water Commission has not made any particularized findings about water resources located on or under Lots 1218 and 1219 or the alleged need for a flowage easement to conserve them. The Water Commission must hold public hearings under Haw. Rev. Stat. Ch. 91 to designate specific lands as conservation management areas. Haw. Rev. Stat. § 174C-42. Here, the department of the attorney general has usurped for itself the unilateral, standardless power to determine that an even more onerous restriction is needed, and

asks that the court help it by ordering that the vague and boundless "free flowage of any waters" easement be written into the title of Petitioner's land forever. The relief requested by the State through its attorney general is *ultra vires*. See Territory v. Achi, 29 Haw. 62, 69 (1926) (standardless laws are *ultra vires* and void). This court should disregard the State's unauthorized and unsupported assertion that a flowage easement is needed over Lots 1218 and 1219.

J. THE STATE'S REMAINING ARGUMENTS ARE WITHOUT MERIT.

The State's arguments premised on "issue preclusion," see Op. Brief at 31-35, lack merit. The State is the losing appellant, not the prevailing appellee. As shown above, land court's 1938 decision and decree were not in the State's favor either, and they bar this appeal. In addition, the very holding in Robinson cited by the State, Op. Brief at 32, discussed in Section III-E, forecloses any argument that the *land commission* made a relevant adjudication in any of its awards.

That Petitioner may not have addressed each point in the State's Opening Brief does not indicate agreement therewith. The land court's rulings should be affirmed in all respects.

IV. CONCLUSION

For the reasons set forth above and based upon the entire record on this appeal, Petitioner and Appellee James Campbell Company LLC respectfully requests that this court affirm the land court's findings of fact, decision, order and decree in Case No. 08-1-0054 below.

DATED: Honolulu, Hawaii, April 6, 2010.

Respectfully submitted,

MARK K. MURAKAMI
CHRISTOPHER J. COLE
Attorneys for Petitioner-Appellee
JAMES CAMPBELL COMPANY LLC

Land Patent No. 5277

(Grant.)

On LAND EXCHANGE

By this Patent the Governor of the Territory of Hawaii, in Conformity with the Laws of the United States of America and of the Territory of Hawaii, makes known to all men that he has this day granted and confirmed unto

CECIL BROWN, H. M. von HOLT and A. N. CAMPBELL,
as Trustees of the Estate of James Campbell, deceased.

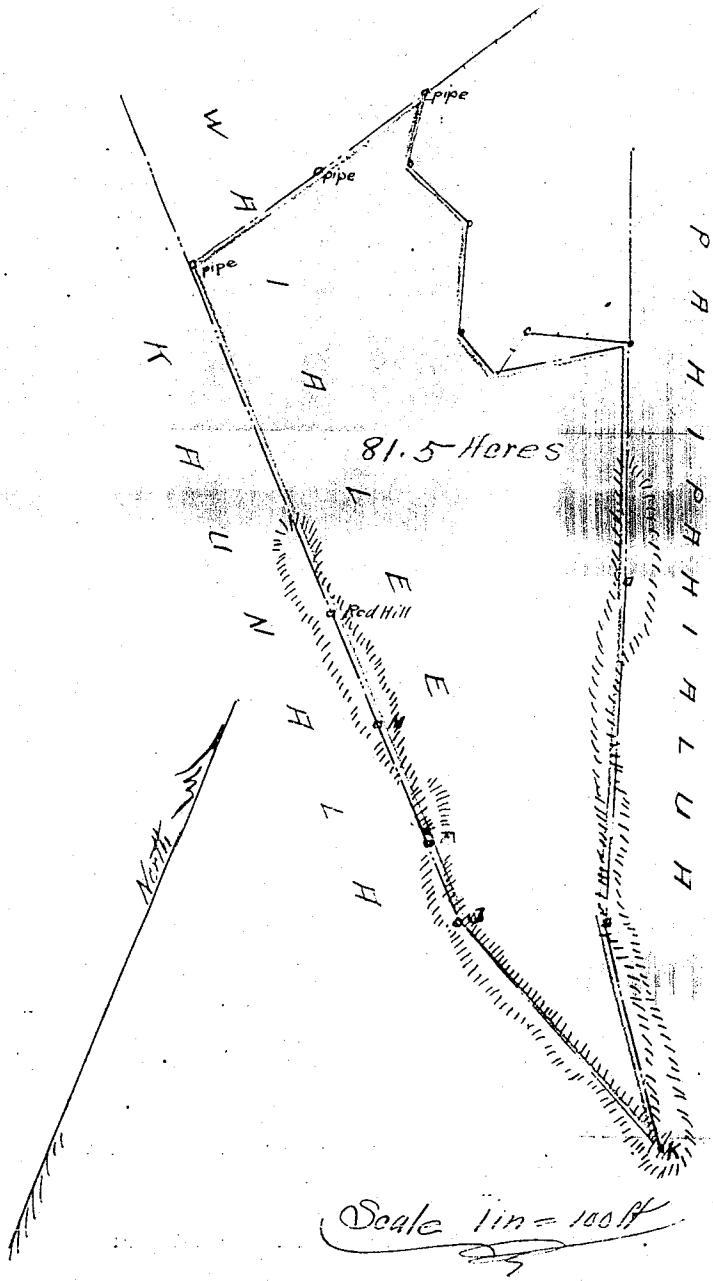
~~*for the consideration of* ~~ ~~*Dollars, $* ~~
~~*paid into the Treasury.*~~

For and in consideration of the conveyance to the Territory by said Trustees by deed of even date and intended to be delivered simultaneously herewith, of certain kuleanas and other tracts of land situate in the District of Koolauloa, Island of Oahu, Territory of Hawaii.

all of the land situate at WAIALEE
in the District of KOOLAULOA *Island of* OAHU *bounded and described as follows:*

Beginning at a pipe at fence corner at the North corner of this piece, the true azimuth and distance to boundary point "H" on the Waialee-Pahipahialua boundary(marked by a on set stone) being 261° 05' 899.5 feet and the true azimuth and distance from said point "H" to Government Survey Trig. Station "Waialee" is 141° 29' 30" 4932.0 feet, as shown on Government Survey Registered Map No. 2184, and running by true azimuths:-

1- 346° 10' 273.0 feet along fence along Waialee remainder;
2- 296° 00' 341.0 feet along fence along Waialee remainder;
3- 341° 55' 456.0 feet along fence along Waialee remainder;
4- 293° 45' 219.0 feet along fence along Waialee remainder;
5- 235° 45' 583.0 feet along Waialee remainder to fence corner;
6- 337° 32' 992.0 feet along the land of Pahipahialua;
7- 341° 13' 1390.0 feet along land of Pahipahialua;
8- 322° 50' 940.0 feet along land of Pahipahialua;
9- 116° 30' 1238.0 feet along land of Kaunala;
10- 137° 30' 351.0 feet along land of Kaunala;


Pipe
Pipe
Pipe
W H I K A L U A
81.5 Acres
P A H I A L U A
L E E E
Red Hill
H A L E
North
Scale 1in = 100ft

11- 134° 00' 552.0 feet along land of Kaunala;

12- 135° 00' 440.0 feet along land of Kaunala;

13- 135° 19' 1565.0 feet along land of Kaunala to pipe;

14- 210° 08' 1122.0 feet along Waialee remainder to point of beginning.

Containing 81.5 *Acres, more or less.*

To Have and to Hold *the above granted Land unto the said*

CECIL BROWN, H. M. von HOLT and A. N. CAMPBELL, as Trustees of the Estate of James Campbell, deceased.

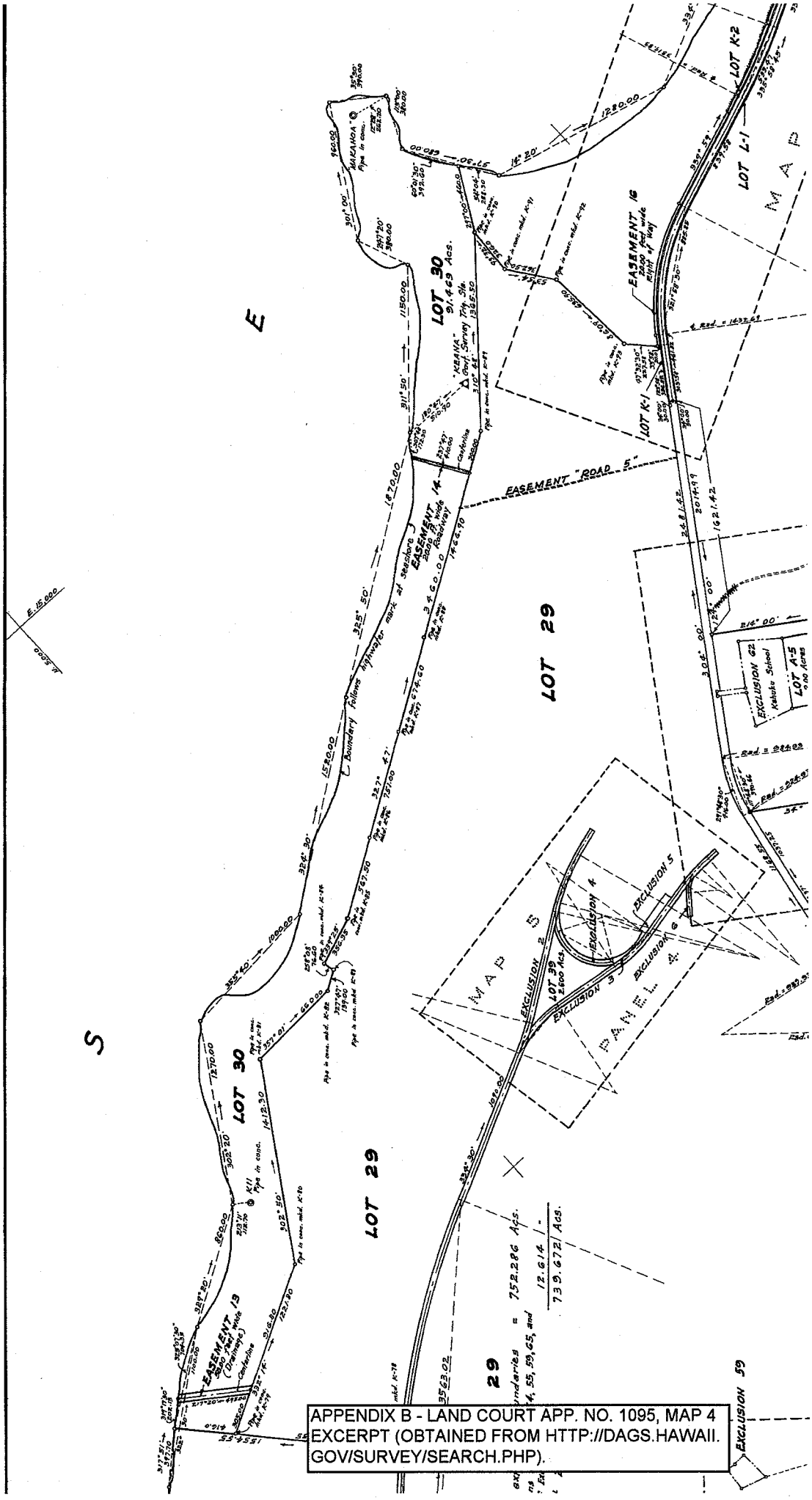
and their *heirs and assigns forever.*

In Witness Whereof, *The Governor of the Territory of Hawaii has hereto set his hand and caused the Great Seal of the Territory to be hereunto affixed, this* 19th. *day of* MAY *A. D. 1910.*

(GREAT SEAL) (S) W. F. FREAR

BY THE GOVERNOR:

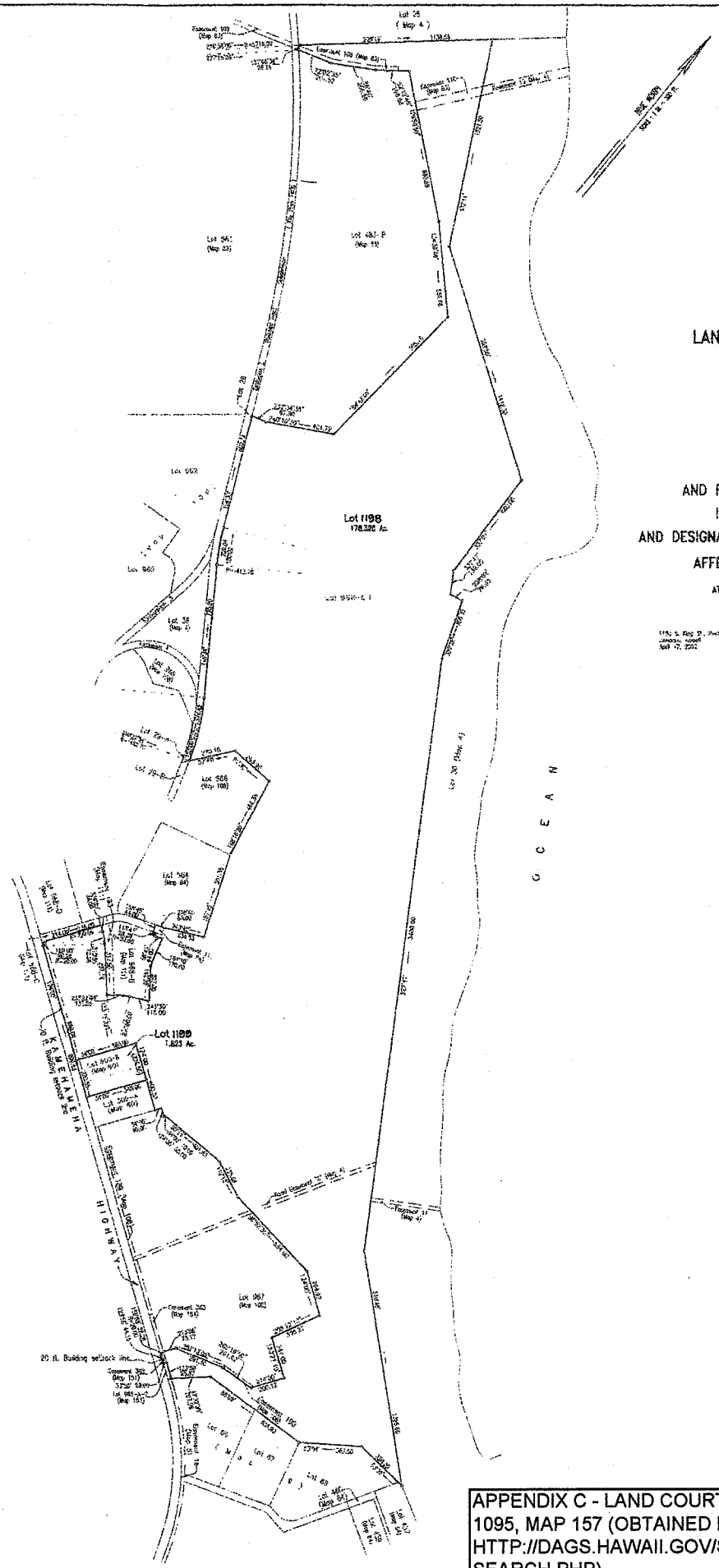
(S) MARSTON CAMPBELL
Commissioner of Public Lands.



APPENDIX B - LAND COURT APP. NO. 1095, MAP 4 EXCERPT (OBTAINED FROM HTTP://DAGS.HAWAII.GOV/SURVEY/SEARCH.PHP).

APPENDIX B

MAP 157



LAND COURT

STATE OF HAWAII

LAND COURT APPLICATION 1095

CONSOLIDATION OF

LOT 968-A-1

AS SHOWN ON MAP 151

AND LOT 309-B

AS SHOWN ON MAP 60

AND RESUBDIVISION OF SAID CONSOLIDATION

INTO LOTS 1198 AND 1199

AND DESIGNATION OF 20-FOOT BUILDING SETBACK LINE

AFFECTING LOTS 1198 AND 1199

AT MALAEKAHANA AND KAENA, KOOLAULOA, OAHU, HAWAII

CONTROLPOINT SURVEYING, INC.

OWNER: TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED

TRANSFER CERTIFICATES OF TITLE: 257,683 (LOT 968-A-1)
17,854 (LOT 309-B)

AUTHORIZED AND APPROVED BY ORDER OF THE JUDGE OF THE LAND COURT DATED DECEMBER 2, 2002
BY ORDER OF THE COURT.

Deputy REGISTRAR OF THE LAND COURT

APPENDIX C - LAND COURT APP. NO. 1095, MAP 157 (OBTAINED FROM HTTP://DAGS.HAWAII.GOV/SURVEY/SEARCH.PHP).

Filed October 10, 2002
Jonah Shiroma, Clerk

APPENDIX C

STATEMENT OF RELATED CASES

Petitioner James Campbell Company LLC is not aware of any related case.

NO. 30006

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

In the Matter of the Application of TRUSTEES UNDER THE WILL OF THE ESTATE OF JAMES CAMPBELL, DECEASED to register and confirm title to land situate at Kahuku, District of Koolauloa, City and County of Honolulu, State of Hawaii	APPLICATION NO. 1095 L.C. Case No. 08-1-0054 LAND COURT HONORABLE GARY W.B. CHANG, JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a true and correct copy of the foregoing document was duly served via U.S. mail, prepaid postage, upon the following as indicated below:

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DATED: Honolulu, Hawaii, April 6, 2010.

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