NO. 28175

IN THE SUPREME COURT OF THE STATE OF HAWAII

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation, MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated, Petitioners-Plaintiffs-Appellees, vs. STATE OF HAWAII, Respondent-Defendant-Appellant.	CIVIL NO. 05-1-0904-05 EEH APPEAL FROM THE ORDER GRANTING PLAINTIFFS' AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006, filed on September 1, 2006 FIRST CIRCUIT COURT HONORABLE EDEN ELIZABETH HIFO Judge

STATE OF HAWAII'S OPPOSITION TO PETITIONERS-PLAINTIFFS-APPELLEES' APPLICATION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

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Respondent-Defendant-Appellant State of Hawaii respectfully asks that this court DENY Petitioner-Plaintiffs' Application for Writ of Certiorari because it fails to meet the standards set forth in HRS § 602-59(b). For purposes of this opposition, **Class I** accretions refer to land accreted prior to June 4, 1985, the effective date of **Act 221**. **Class II** accretions refer to land accreted after Act 221 became effective, but before May 19, 2003, the effective date of **Act 73**. **Class III** accretions refer to land accreted on or after Act 73's effective date of May 19, 2003.

A. The ICA's ruling finding no Taking with respect to Class III future accretions was correct, and, at minimum, involved no "grave errors of law or of fact," and no "obvious inconsistencies" with decisions of the supreme court, federal decisions, or its own decision."

The ICA correctly ruled that Act 73 effected no taking of Class III future accretions requiring just compensation. Indeed, that ruling was compelled by binding United States Supreme Court, and Hawaii Supreme Court precedent.

1. The U.S. Supreme Court's *Pearsall* decision, and the Hawaii Supreme Court's *Damon* ruling, each required the ICA to conclude that an interest in future accretions is a contingent interest, NOT a vested right, and thus may be legislatively abolished without effecting a taking.

The **United States Supreme Court** in Pearsall v. Great Northern Railway Co., 161 U.S. 646 (1896), and the **Hawaii Supreme Court** in Damon v. Tsutsui, 31 Haw. 678 (1930), both make very clear that expectant or contingent interests are not vested rights, and thus may be legislatively abolished. See Pearsall, 161 U.S. at 673 ("[R]ights are vested, in contradistinction 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 contingent, when they are only to come into existence on an event or condition which may not happen . . . ."); Damon, 31 Haw. at 693-94 (adopting above Pearsall definition of vested rights and contingent interests verbatim, and ruling that such contingent interests "may be enlarged or abridged or entirely taken away by legislative enactment.").

There can be no doubt that an interest in future accretions is not a vested right, but a contingent interest under the binding test set forth in Pearsall and Damon. The interest in future accretions -- i.e., accreted land that does not yet, and may never, exist -- is surely contingent because any such interest in future accretions only comes into existence "on an event or condition which may not happen," Pearsall, Damon, namely, accretions actually forming in the future. The formation of future accretions, of course, is undeniably "an event . . . which may not happen," as accretions are dependent upon the complex interactions of waves and shore.

Although this conclusion is obviously true based upon the simple application of the U.S. Supreme Court's and Hawaii Supreme Court's Pearsall/Damon definition of contingent interest, the Ninth Circuit's decision in Western Pac. Ry. Co. v. Southern Pac. Co., 151 F. 376 (9th Cir. 1907), confirms this conclusion, by explicitly rejecting the notion that the "right to alluvion becomes a vested right before such alluvion actually exists." 151 F.3d at 398-99. Quoting the Pearsall distinction between vested rights and contingent interests, the Ninth Circuit in Western Pac. states that it was "unable to see how one can have a present vested right to that which does not exist, and which may never have an existence," and concludes, therefore, that "there can be no question . . . that the right to future possible accretion could be divested by legislative action." 151 F.3d at 399. Other courts have reached the exact same conclusion. See, e.g., Latourette v. United States, 150 F. Supp. 123, 126 (D. Or. 1957) ("plaintiff had no vested right in the continuance of future accretions"); Cohen v. United States, 162 F. 364, 370-71 (C.C.N.D. Cal. 1908) ("the riparian owner [has] no vested right in future accretions"); Miramar Co. v. City of Santa Barbara, 143 P.2d 1, 3 (Cal. 1943) ("There [is] no vested right in . . . future accretions."); Parmalee v. T.L. Herbert & Sons, 1930 WL 1750 (Tenn. Ct. App. 1932) (adopting view of "several other states [that] hold that one who acquires title to lands on navigable streams and waters obtains no vested right to possible future accretions").

In sum, the ICA, bound by the U.S. Supreme Court's and Hawaii Supreme Court's distinction between vested rights and contingent interests set forth in Pearsall and Damon, respectively, reached the only conclusion it could properly reach: that the interest in future accretions is a contingent interest, not a vested right, and thus may be legislatively abrogated without effecting a taking requiring just compensation.[1]

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[1] Plaintiffs also mischaracterize the interest in accretions as one involving "maintaining their makai boundary at the shoreline in the event of future accretion." Pl. Pet. at 2. The Hawaii courts have never construed the accretion interest as one rooted in a desire to maintain a littoral owner's boundary with the shoreline. Rather, the accretion doctrine in Hawaii is simply about assuring access to the ocean, not maintaining contact with the ocean. See Zimring, 58 Haw. at 119, 121 ("basic justification for [accretion] doctrine . . . [is to] assur[e] the upland owners **access** to the water;" "the accretion doctrine is founded on the public policy that littoral **access** should be preserved where possible; "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 ocean"); Application of Banning, 73 Haw. 297, 303, 832 P.2d at 728 ("[T]he accretion doctrine is founded on the public policy that littoral **access** should be preserved where possible").

2. *Milner* and other cited decisions provide no support to Petitioner's application.

Petitioners rely heavily upon the Milner **Ninth Circuit** decision. That decision, however, provides absolutely no support to their position. The particular portion of that decision they rely upon -- saying "[t]he riparian right to future alluvion is a vested right" -- is simply a verbatim quotation of dicta in the U.S. Supreme Court's 1874 decision in County of St. Clair v. Lovingston, 90 U.S. 46 (1874). That particular quotation, however, was already rejected by the **Ninth Circuit** as **dicta**, and as **incorrect dicta** in the Western Pac. case discussed above, as the ICA correctly noted. 122 Haw. at 53, 222 P.3d at 460. The Ninth Circuit held:

> But it is said that [landowners] had a vested right to future alluvion . . . and that this right is sustained by the **dictum** [in] County of St. Clair v. Lovingston, 23 Wall 46 [where the Court] said: 'The riparian right to future alluvion is a vested right.[]' **The controversy in that case did not even remotely relate to the right to future alluvion, but related only to alluvion then existing. 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., 151 F.3d at 398-99. Western Pac. then quotes the U.S. Supreme Court's definitions for "vested" versus "contingent" rights in Pearsall, 161 U.S. at 673 -- the exact same test the **Hawaii** Supreme Court adopted in Damon, 31 Haw. at 693-94, and which we applied above, supra at 1-2 -- and concludes:

> [Given] 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.** To say that one who acquires from the state title to tide lands acquires therewith a vested right to all possible future accretion is to impose a restriction on the power of the state to occupy or improve for the public benefit the adjacent submerged lands. ["**W**]**e are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence.**"

Western Pac., 151 F.3d at 399 (citations omitted).[2] The Ninth Circuit's decision in **Milner** did

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[2] Plaintiffs' attempt to distinguish Western Pac. is without merit. They assert a false distinction (as the case does involve legislative narrowing of accretion law), and do not undermine the essential point Western Pac. stated: that any interest in future accretions, not yet existing, is not a vested right and may be divested by legislative action. That critical point formed the basis for the **holding** in the case, which rejected the argument that the change in California accretion law (effected by Cal. Civil Code §1014, and Cal. Const. art. 15, sec. 3) unconstitutionally took away a vested right to future alluvion. See 151 F.3d at 396-400.

Plaintiffs also frivolously claim that the above principle is contrary to Hughes v. Washington, 389 U.S. 290 (1967). But the Hughes majority did not even reach any Takings issue, and the concurring opinion of Justice Stewart specifically noted that the "difficult" issue of whether "a prospective change in state property law [denying riparian owners future accretions would]

not refute, nor intend to refute, the Ninth Circuit ruling in Western Pac. Indeed, because it was a three-judge panel ruling, not an *en banc* ruling, Milner could not have overturned the Western Pac. holding even had it desired to. See Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc) (allowing three-judge panel to overrule prior circuit decision only where intervening Supreme Court decision "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable"). Of course, no such intervening Supreme Court decision is present in this case.

The fact that Milner, also a Ninth Circuit case, quotes the same incorrect Lovingston dicta does NOT in anyway contradict Western Pac.'s HOLDING that the right to future accretions cannot be a vested right for purposes of the Takings Clause. This is true for three reasons: 1) nothing in Milner explicitly rejects Western Pac.'s conclusion that the Lovingston quote is mere dicta, 2) the particular quotation in the **Milner** case regarding the interest in future accretions being a "vested right" was using the term "vested right" in a way that has absolutely nothing to do with Takings doctrine, and 3) as just noted in the prior paragraph, Milner was only a three-judge panel ruling and thus could not have overturned the prior Ninth Circuit precedent set by Western Pac.

Point 1 is obvious on its face, as Milner does not discuss, much less refute, Western Pac.'s conclusion that the Lovingston quote is mere dicta in the Lovingston case. It simply requotes the Lovingston dicta (using it to reach a conclusion having nothing to do with Takings doctrine, as shown below).

Point 2 is true for the following reasons. The Court in Milner was not faced with a question even remotely related to Takings doctrine, much less the Takings issue presented by the

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constitute a compensable taking" was not at issue. Hughes was an easy case for Justice Stewart as the state high court effected a taking by changing accretion law retroactively as to pre-existing accretions. See 389 U.S. at 295-98 (Stewart, J., concurring). Act 73, of course, involves not a retroactive, but a prospective change to accretion law as to Class **III** accretions, and thus falls fully within the Western Pac. holding.

Second, that a California state court in Strand Improvement v. Long Beach, 161 P.2d 975 (Cal. 1916) subsequently concluded that Western Pac. misinterpreted the California statute's coverage does not in any way undermine the federal constitutional holding in Western Pac. that "the right to future possible accretion could be divested by legislative action." The subsequent state case meant only that no such divesting was intended, not that Western Pac. was wrong in concluding that a statute that did divest would be constitutional.

case at bar where the state changes the law prior to Class III accretions even existing. Milner simply decided whether or not an upland owner, whose seawall originally resided above the mean high water line (and thus on the upland owner's property at the time it was built) **could raise a defense to a trespass action** after the mean high water line had risen above the seawall location due to erosion (thus placing the seawall on the tideland owner's property) based on the fact that the seawall was a defensive action to prevent further erosion. See Milner, 583 F.3d at 1190 ("We hold only that the Homeowners have no defense to a trespass action because they are seeking to protect against erosion."). The Court concluded the seawall's defensive purpose did not provide a valid defense to trespass in part because both sides (the upland owner and the tideland owner) had a "vested right" in the ambulatory boundary (accretions accruing to the upland owner, and erosion adding land to the tideland owner). But this use of the term "vested right" had absolutely nothing to do with the term "vested right" as used in the Takings context where the government changes the law. Unlike the clear Takings context discussed in Western Pac., where the Ninth Circuit said that given the Pearsall "definition of vested rights, there can be no question, we think, that the right to future possible accretion **could be divested by legislative action**" -- the latter bolded language makes clear the vested rights language there was being employed in the Takings context of governmental changes in law -- the vested rights language in Milner had nothing to do with Takings doctrine or governmental changes in law. Milner involved a far different issue that had nothing to do with whether **legislative action** could divest upland or tideland owners of property interests impacted by accretion or erosion. Neither the state nor the federal government was trying to change accretion/erosion law in Milner.

Moreover, even if Milner had involved legislative action to change accretion/erosion law to adjust the existing upland/tideland boundary (which it clearly did not), it would have only involved changing the law as to past already-existing accretion/erosion. Thus, any statement in Milner regarding future accretion/erosion interests being vested is dicta at best. The question of whether the legislature could have changed accretion/erosion law prior to the erosion was simply never presented. **Western Pac.** remains, therefore, the only dispositive Ninth Circuit Takings case regarding legislative abrogation of interests in future accretions.

In any event, even if there were some doubt about the Ninth Circuit's position, the ICA was required to follow the binding precedent set by the **U.S. Supreme Court**'s Pearsall decision, and the **Hawaii Supreme Court**'s Damon ruling. Both **binding** rulings make unambiguously

clear that an interest in future accretions is a contingent interest, not a vested right, and thus may be legislatively abolished without effecting a taking. See subsection A.1, supra. Unlike Ninth Circuit decisions on federal law, which are not binding on Hawaii appellate courts,[3] United States Supreme Court rulings and Hawaii Supreme Court rulings on federal law are binding upon Hawaii appellate courts.

Therefore, the ICA was bound by Pearsall and Damon to conclude that an interest in future accretions was not a vested right, but a contingent interest that may be "entirely taken away by legislative enactment." Damon, supra. Petitioners thus patently fail to meet the criteria established under HRS § 602-59(b), as the ICA's decision on future accretions involved no "[g]rave errors of law or of fact," and no "[o]bvious inconsistencies . . . with that of the supreme court, federal decisions, or its own decision." To the contrary, the ICA's decision followed the Hawaii Supreme Court's Damon decision, the United States Supreme Court's Pearsall decision, and the Ninth Circuit's Western Pac. decision (the only Ninth Circuit case dealing with legislative abrogation of interests in future accretions). It also followed other federal decisions (cited by the ICA) concluding that an interest in future accretions is not vested. See Latourette, 150 F. Supp. at 126 ("plaintiff had no vested right in the continuance of future accretions"); Cohen, 162 F. at 370-71 ("the riparian owner [has] no vested right in future accretions").[4] Plaintiffs' attempt to distinguish these two latter cases is meritless. None of the distinctions do anything to undercut the explicit rulings just quoted. Plaintiffs cannot say those federal courts did not say what they said. And what they said -- that there is no vested right in future accretions -- directly supports the ICA's decision.[5]

Plaintiffs' citations to Halstead v. Gay, State v. Zimring, and In re Sanborn, of course, merely reiterate the basic common law of accretions. They do not say anything to support the notion that interests in future accretions are vested and may not be taken away prior to the

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[3] See e.g., Magourik v. Phillips, 144 F.3d 348, 361 (5th Cir. 1998) ("state courts are not bound by [their own federal] Circuit precedent when making a determination of federal law"); Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992) ("the Supremacy Clause did not require the Illinois courts to follow Seventh Circuit precedent interpreting the Fifth Amendment.").

[4] Other state courts reach the same conclusion. See, e.g., Miramar, Parmalee, quoted supra at 2.

[5] These explicit rulings, contrary to plaintiffs' false claim, are not limited to the proposition that "littoral owner's rights are subject to the government's right to develop its adjoining submerged lands and to take other action to promote navigation and commerce." Pl. Pet. at 5 Rather, they say broadly and without limitation that interests in future accretions are not vested, period.

accretion forming. Indeed, the only Hawaii Supreme Court decision that bears upon that critical issue is Damon (which follows the U.S. Supreme Court's Pearsall ruling), which explicitly ruled that "contingent interests" -- which, as demonstrated above, necessarily include interests in future accretions -- "may be enlarged or abridged or entirely taken away by legislative enactment."[6]

Plaintiffs cite cases that are clearly distinguishable. In Soo Sand & Gravel v. M. Sullivan Dredging, 244 N.W. 138, 495-96 (Mich. 1932), the court ruled only against the State taking control over **already-existing** gravel owned by landowner; **it did not make any ruling with respect to a state's ability to prospectively control future accretions or gravel.** Purdie v. Attorney General, 732 A.2d 442 (N.H. 1999), held only that a State cannot change existing beachfront owner's boundary line to take property **previously owned by that owner; it did not involve a state stripping away an interest in future accretions.** Finally, in Bd. of Trustees v. Medeira Beach Nominee, 272 So.2d 209, 212, 214 (Fla. App. 1973), the court's repeating of Lovingston's vested rights dicta was itself dicta, as the case made no Takings ruling at all, but merely declared who owned, under existing accretion law, certain accreted lands; **it did not address whether a state could change accretion law prospectively as to future accretions.**[7]

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[6] Plaintiffs' claim that Damon actually supports their position is absurd. Pl. Pet. at 7 n.5. An interest in future accretions that do not yet exist, and that may never exist, is not a vested right. It fits to the tee Damon's definition of a contingent interest, which is an interest that "only ... come[s] into existence on an event or condition which may not happen." Because future accretions "may not happen," the interest in them is plainly a contingent interest, which Damon specifically states may be "entirely taken away by legislative enactment." **Plaintiffs' attempt to fit an interest in future, not yet (and perhaps never) existing, accretions into the "vested" rights category by claiming that such an interest is an existing property right to prospective enjoyment is specious. If that view were correct, there would never be a "contingent" interest. A true existing right to prospective enjoyment would be something like a non-contingent future interest -- e.g., where one unconditionally owns a future remainder interest after a 10-year interest in somebody else expires. There is no contingency in that case, as once the 10 years pass, the enjoyment necessarily begins. With future accretions, however, the accretions may NEVER form, and thus the right to enjoy such accretions in the future may never come to pass; it is contingent upon the accretions forming in the first place.**

[7] The ICA correctly noted that the public trust doctrine "clearly diminishes any expectation that oceanfront owners in Hawai'i had and may have in future accretions to their property." 122 Haw. at 54, 222 P.3d at 461. Petitioners claim that the common law of accretions pre-dated article XI, section 1. First, that is not relevant because **the public trust doctrine**, which is embodied in article XI, section 1, **pre-existed the constitutional enactment**, and was itself rooted in the common law. See In re Water Use Permit Applications, 94 Haw. 97, 127 n.25, 128, 9 P.3d 409, 439 n.25, 440 (2000) ("**The doctrine traces its origins to the English common law and**

Although the above analysis is conclusive, all the additional reasons provided in our 4/26/10 certiorari application, at 11-12, explaining why there was no Penn Central taking as to **Class II** accretions, apply with equal, if not greater, force to the Class **III** accretions.

B. The ICA did not misstate the record regarding the absence of allegations that accretions to plaintiffs' lands existed **as of the enactment of Act 73**; there is no need for certiorari in any event, as the ICA authorized the trial court to determine "whether Plaintiffs have accreted lands that existed when Act 73 was enacted."

The ICA was correct in stating that "Plaintiffs have not alleged specific accretions which the State has taken from them by the enactment of Act 73," and thus the ICA properly remanded the case "for a determination of whether Plaintiffs have accreted lands that existed when Act 73 was enacted." 122 Haw. at 57, 222 P.3d at 464. None of plaintiffs' recitations in their certiorari application in any way contradict the ICA's observation. Plaintiffs' recitations at most suggest

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ancient Roman law." The Hawaii Supreme Court explicitly "endorsed the public trust doctrine" in an 1899 case). Second, even if the adoption of article XI, section 1 in 1978 had created a brand new doctrine, it would have effectively changed the common law of accretion to preclude accretion doctrine from ever diminishing the public trust. Because petitioners in this suit are not challenging the constitutionality of article XI, section 1 (they only challenge Act 73) -- and would be barred by the statute of limitations from doing so in any event -- petitioners' argument is beside the point.

Plaintiffs' argument that Palazzolo v. Rhode Island undermines the ICA's reliance in part upon the public trust doctrine is just wrong. Nothing in Palazzolo contradicts the basic principle that it is necessary to understand what rights, if any, littoral owners held in Class III accretions immediately **prior** to the enactment of Act 73 in 2003. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (an inquiry into the "nature of the owner's estate" before the alleged taking is "logically antecedent" to finding a taking). Because the public trust doctrine, as explained above, dates from ancient common law, any accretion rights an owner of land held were always subject to the inherent limitations of the public trust doctrine.

Indeed, Palazzolo actually provides a separate and independent reason (not relied upon by the ICA) for rejecting plaintiffs' takings claim. The named plaintiffs in this case purchased their property after Act 73 was enacted. See 1 R. 126, 141, 181, 221, 312, 314; 2 R. 24. Consequently, they should have had absolutely no expectation of ever owning Class III accreted lands. See Palazzolo, 533 U.S. at 633-36 (O'Connor, J., concurring) ("the regulatory regime in place at the time the claimant acquires the property . . . helps to shape the reasonableness of those expectations" and "Courts [must] consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred"). Simply put, because the named plaintiffs all purchased their parcels after Act 73 had been enacted, and that law plainly denied littoral oceanfront landowners any interests in Class III accretions, those plaintiffs could have had no reasonable expectation of ever asserting control over such accretions. (O'Connor's position is controlling law because a majority of at least 5 justices in Palazzolo subscribed to it. See 533 U.S. at 654 n.3.).

that there may be accretions (**of unknown date of formation**) to plaintiffs' lands, **but they do not indicate that any of those accretions formed prior to the effective date of Act 73,** which is the key.[8] That is critical because the ICA only found a taking with respect to accretions that pre-existed Act 73. If all of the accretions to plaintiffs' lands formed after Act 73, plaintiffs have no Takings claim because the ICA correctly held that Act 73 effected no taking as to future (i.e., occurring after Act 73's effective date) Class III accretions. Thus, the ICA was correct in its assessment of the record.

Moreover, even if the ICA were wrong, and there had been allegations of pre-existing accretions, because the ICA is giving plaintiffs a chance on remand to establish with evidence that they "have accreted lands that existed when Act 73 was enacted," 122 Haw. at 57, 222 P.3d at 464, there is plainly no need for certiorari. That remand direction means that plaintiffs suffer absolutely no adverse consequence as a result of the ICA's conclusions regarding the record.

C. Certiorari is inappropriate based upon mere "comments," not rulings, made by the ICA regarding class certification; in any event, the ICA's comments were appropriate.

Because the ICA's comments on class certification were in no way actual rulings or decisions, but simply expressions of concern that were not resolved one way or the other -- the ICA merely saying "we have questions about whether the class certification was proper;" 122 Haw. at 55-56, 222 P.3d at 462-63 -- the ICA could not, by definition, have committed a "grave error of law" or created an "inconsistency" in "decisions," warranting certiorari.

In any event, the ICA's concerns about the propriety of class certification were appropriate and spot-on, because an essential requirement of all class certifications is that the claims of the representative parties be typical of the claims of the class. See HRCP 23(a)(3); Kemp v. State of Hawaii CSEA, 111 Hawai'i 367, 385-86, 141 P.3d 1014, 1032-33 (2006) ("A class representative must 'possess the same interest and suffer the same injury' as the class members." Certification is improper where named plaintiff's claim is "not 'essentially similar' to the claims of the [putative class members]."). The ICA thus wisely expressed doubts about the propriety of class certification where "each littoral owner's factual situation regarding existing accretions would be different and not conducive to class adjudication." 122 Haw. at 55-56, 222 P.3d at 462-63.

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[8] The conveyance document language for the "Makai Land" plaintiffs mentioned at the bottom of p.8 of their certiorari application does not indicate that any accreted lands actually exist; it simply means that if there are any accreted lands, they are to be conveyed as well.

D. The ICA properly rejected plaintiffs' frivolous fee request based on the Private Attorney General Doctrine.

Although the State gave the ICA multiple other reasons to reject plaintiffs' fee request -- including the fact that plaintiffs were not, in fact, "prevailing parties," and the State's sovereign immunity, see State of Hawaii's Opposition to [fee request], filed 2/12/10, at 1-2, 7-8 -- plaintiffs' fee request was utterly baseless because it rested on the private attorney general doctrine. As demonstrated below, that doctrine only applies in limited circumstances where **public** rights are vindicated. Here, private rights of private beachfront landowner's were asserted, not public rights. Even worse, these private rights were asserted against the public's interest in the public enjoyment of, or access to, Hawaii's beaches, and against the public trust doctrine. Plaintiffs' fee claim, therefore, is frivolous.

> [T]he purpose of the private attorney general doctrine "is to promote vindication of important **public** rights."

Sierra Club v. Dep't of Transportation, 120 Haw. 181, 219, 202 P.3d 1226, 1264 (2009); see also In re Water Use Permit Applications ("Waiahole II"), 96 Haw. 27, 30, 25 P.3d 802, 805 (2001) ("The doctrine is an equitable rule that allows courts in their discretion to award attorneys' fees to plaintiffs who have 'vindicated important **public rights**;'" and quoting California Supreme Court explaining need for private attorney general doctrine based upon fact that "government offices and institutions . . . whose function it is to represent **the general public** . . . [do] not always adequately [do so], rendering some sort of private action imperative."). Under no stretch of the imagination can the assertion of private property rights be construed as vindicating "public rights." This is especially so here, when the private property rights are being asserted against the public interest in preserving or maximizing public beach ownership and access, and against the Public Trust doctrine, encapsulated in article XI, section 1 of the Hawaii Constitution. See 122 Haw. at 53-54, 222 P.3d at 460-61. Although the ICA ruled against the State with respect to certain past accretions, that in no way means that the plaintiffs' position (with respect to past accretions) is somehow converted from a private right into a public right.

Unlike the clear public interest vindicated in Sierra Club -- the one and probably only Hawaii appellate case to award fees under the private attorney general doctrine -- in which environmental rights designed to protect the environment for the benefit of the public were at stake, see Sierra Club, 120 Haw. at 220, 202 P.3d at 1265 (finding the first prong of the test satisfied because the "litigation is responsible for . . . clarifying the importance of addressing the

secondary impacts of a project in the environmental review process"), plaintiffs' suit here benefits only the private interests of beachfront landowners. And those private interests are in opposition to the public interest in preserving public beach ownership and access, and in opposition to the public's interest under the Public Trust doctrine. Again, the mere fact that the private plaintiffs may have defeated (in part) the public interest as to certain past accretions does not convert their private financial or property interests into public rights.

Because plaintiffs fail the "public rights" element that forms the entire basis for the private attorney general doctrine, attorney's fees were properly denied. There is no need to even address the other elements of the doctrine. But plaintiffs also fail those elements as well.

1. Strength or societal importance of the public policy vindicated by litigation.

Because plaintiffs asserted no "public rights," they also fail the first prong of the doctrine, which is "the strength or societal importance of the public policy vindicated by the litigation." Sierra Club, 120 Haw. at 218, 202 P.3d at 1263. As made clear in Sierra Club, the first prong's reference to vindication of "public policy" includes only that public policy vindicating the general public's interests, and not the property interests of private parties. See 120 Haw. at 219, 202 P.3d at 1264 ("the purpose of the private attorney general doctrine 'is to promote vindication of important **public** rights.'"); Waiahole II, 96 Haw. 27, 30, 25 P.3d 802, 805 (2001) ("Simply stated, 'the purpose of the doctrine is to promote vindication of important **public** rights.' "). Seeking to promote private property rights in opposition to the public interest in public beach ownership and access is the antithesis of vindicating public rights.

Contrast plaintiffs' private property interests with the public constitutional right recognized in Waiahole II as satisfying the first prong. Waiahole II, 96 Haw. at 31, 25 P.3d at 806. In Waiahole II, the constitutional right vindicated was the **public trust** doctrine of article XI, section 1. See In re Water Use Permit Applications ("Waiahole I"), 94 Haw. 97, 130-33, 9 P.3d 409, 442-44 (2000). The case at bar, however, presents the exact opposite situation! Here, plaintiffs are seeking to have their private interests trump that very same public trust doctrine, and to diminish the scope of the public's rights in general.

2. the necessity for private enforcement and the magnitude of the resultant burden on the plaintiffs.

There is simply no need for plaintiffs' attorneys fees to be paid by the public (via the State being held liable for fees) in order for the private enforcement to come about. Regardless

of whether plaintiffs' counsel receives an award of fees, they will be paid their fees by their private clients. There is no allegation by plaintiffs' attorneys that they would not be paid by their clients if fees are not awarded. Indeed, plaintiffs here own valuable beachfront property and stand to gain either valuable land or monetary compensation from the litigation. It is therefore very unlikely, and there is no allegation, that plaintiffs' suit would not have been brought had it been known that fees would not be awarded. In short, plaintiffs have failed to demonstrate that failure to award fees would impose a significant "burden on the plaintiff" private beachfront landowners. Indeed, because plaintiffs have brought a class action, the obligation to pay fees (without recompense from the public) is even less burdensome. In sum, not awarding fees to persons greatly financially benefitting from the suit would never have prevented their lawsuit.

3. number of people standing to benefit from the decision.

Because the ICA has already determined that up to this point, there may be no persons at all that benefit from the portion of its ruling finding a Taking -- "[n]otably absent from Plaintiffs' complaint is any allegation that Plaintiffs have ownership rights in accreted lands that existed at the time Act 73 was enacted;" 122 Haw. at 56, 222 P.3d at 463 -- it is clear that plaintiffs fail to satisfy the third prong looking to numerous people standing to benefit. Zero is obviously not numerous. Even if one were to assume, *arguendo*, that one or more private beachfront owners own pre-Act 73 accreted land, and thus may benefit, plaintiffs have wholly failed to show that a significant number own such accretions and thus would benefit. Compare with Waiahole II, 96 Haw. at 31, 25 P.3d at 806 ("all of the citizens of the state, present and future, stood to benefit from the decision").

For all of the above reasons, therefore, the private attorney general doctrine is patently inapplicable here. The ICA, therefore, properly rejected plaintiffs' fee request in toto.

CONCLUSION

For the above reasons, the State of Hawaii respectfully asks that this Court DENY Petitioners-Plaintiffs-Appellees' Application for Writ of Certiorari.

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