NO. 28175

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

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,, Plaintiffs-Appellees, vs. STATE OF HAWAI`I, 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

PLAINTIFF-APPELLEES' MOTION FOR RECONSIDERATION

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF LAURA P. COUCH

EXHIBIT "A"

CERTIFICATE OF SERVICE

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PLAINTIFF-APPELLEES' MOTION FOR RECONSIDERATION

Plaintiffs-Appellees Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, Maunalua Bay Beach Ohana 38, individually and on behalf of all others similarly situated ("Appellees"), by and through their attorneys, Alston Hunt Floyd & Ing, respectfully request reconsideration of the Court's December 30, 2009 Memorandum Opinion (hereinafter, the "Opinion").

Appellees respectfully request reconsideration because:

- New, previously uncited, Ninth Circuit case law both undermines the cases underpinning the Opinion and supports Appellees' argument that "boundary fixing" cases are constitutionally distinct from cases, such as those cited in the Opinion, in which the interference with future accretion involves the government exercising its rights as owner of submerged lands.

- Neither H.R.S.§ 1-1 nor the adoption of the Public Trust Doctrine in the 1978 Constitution of the State of Hawai`i can weaken beachfront owners' vested rights to future accretion.
- The Court's statement that there is nothing in the record to indicate that the plaintiffs had (and have) existing accretion was wrong. While the Complaint (consistent with HRCP 8(a)) was couched in general language, the Appellees' Pretrial Statement, which is also in the record, contains exactly what the Court said was lacking.
- The Court's comments about the propriety of class certification—an issue that was not raised, briefed, or argued—were inconsistent with due process and wrong. This Court can reverse class certification (even after briefing and argument) only if the trial court abused its discretion; vague concerns do not suffice to question, much less set aside, class certification.

In light of these problems, the Court should:

- Reverse its holding that the Appellees do not have a vested right to have their seaward boundary follow the shoreline as future accretion occurs.
- Revise its Opinion to delete the incorrect statements regarding H.R.S. §1-1 and the Public Trust Doctrine.
- Correct the inaccurate statements about whether Appellees claimed existing accretion. And,
- Delete any discussion regarding class certification.

This Motion is brought pursuant to Hawai`i Rules of Appellate Procedure Rule 40, and is based on the attached Memorandum, declarations and exhibits and the records and files herein.

DATED: Honolulu, Hawai`i, January 11, 2010.

PAUL ALSTON
LAURA P. COUCH

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiffs-Appellees Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, Maunalua Bay Beach Ohana 38, individually and on behalf of all others similarly situated ("Appellees") respectfully request this Court to reconsider and/or clarify several aspects of its December 30, 2009 Opinion vacating in part and remanding in part the First Circuit Court's *Order Granting Plaintiffs' Amended Motion for Partial Summary Judgment filed February 13, 2006,* filed September 1, 2006 (3 ROA 5)[1] (hereinafter, the "Opinion"). Specifically:

1. The Court's conclusion that the State may freely change beachfront owners' boundaries prospectively is wrong, as demonstrated by the Ninth Circuit's new and

[1] Citations to the Record on Appeal shall be first by volume number, then by ROA, then by page number.

previously decision in *United States v. Milner*, 583 F.3d 1174 (2009) (Exhibit A, attached) ("*Milner*"). There, the Ninth Circuit expressly held that the owners on both sides of a water boundary have a "right to an ambulatory boundary, and each has a **vested right** in the potential gains that accrue from the movement of the boundary line." 583 F.3d at 1188. By this holding, the Ninth Circuit of the twenty-first century has joined the California Supreme Court[2] in repudiating *Western Pac. Ry Co. v. Southern Pac. Co.*, 151 F. 376, 398-99 (9th Cir. 1907). ("*Western Pacific*") in disputes which, like this one, are unrelated to a sovereign's power to occupy or improve its own submerged lands.

2. The Opinion says that H.R.S. § 1-1 and Article XI, §1 of the 1978 Constitution somehow weaken beachfront owners' property rights and "diminishes any expectation" in future accretion. This analysis is flawed for two reasons.

3. The Opinion incorrectly focuses only on the Complaint in concluding there was no allegation that Appellees have existing accretion. In fact, the Appellees' pretrial statement contains precisely the references to existing accretion that the Opinion said were lacking. And,

4. The Court's comments about the class certification are improper and should be stricken, as fundamental fairness precludes the Court from taking up an issue that was not appealed without any notice, much less an opportunity to brief or argue in support of class

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[2] The Opinion ignores the fact that, in *Strand Improv. Co. v. Long Beach*, 173 Cal. 765, 161 P.975 (1916), the California Supreme Court **expressly repudiated** the reading of California law on which the decision in *Western Pacific* was founded. The Opinion also ignores the fact that the upland owners' boundary was **never** moveable (*Western Pacific*, 151 F. at 401-402), so the entire discussion of accretion was unnecessary dicta that violated the doctrine of constitutional avoidance. *See, e.g. Vernon v. City of Los Angeles*, 27 F.3d 1385, 1391-1392 (9th Cir. 1994 (citing rule that an appellate court should avoid adjudication of constitutional claims when alternative grounds are available); *Tyars v. Finner*, 709 F.2d 1274 (9th Cir. 1983) (same).

certification. And, the vague expression of "concerns" is entirely inappropriate when class certification decisions may be overturned only if there is an abuse of discretion and class actions are routine in cases, like this one, that involve common legal principles and formulaic damages.

II. ARGUMENT

A. The Opinion Wrongly Applies *Western Pacific*, Which Does Not Apply to Boundary Changing Legislation

Every case the Opinion relies on for the principle that upland owners have no vested right to future accretion concerns disputes involving government development of abutting submerged land - - not outright boundary changing. *Western Pacific* involved filled land, not accretion, and a dispute over government improvements in a public harbor. *Cohen v. United States,* 162 F. 364, 370 (C.C. N.D. 1908) involved the diversion of a creek in connection with public harbor improvements which ended a pattern of accretion. And, *Latourette v. United States,* 1550 F.Supp. 123, 126 (D. Ore. 1957) involved the alleged adverse effects of a government jetty that was built in aid of navigation. All of these cases reflect the unremarkable and undisputed principle that the rights of every upland owner are subject to the rights of the government to take action that promotes navigation and commerce - - even if it blocks riparian access or interferes with future accretion. *See, e.g., Gibson v. United States,* 166 U.S. 269 (1897).

This is not such a case; the State is not taking any action to promote navigation or developing its submerged lands. Rather, the State is only changing the long-established boundary from one that "ambulates" to one that is fixed in order to expand the beaches and, conversely, to keep the accreted lands out of private hands.

Every other court presented with the question whether government can change boundaries freely has said "no." *Hughes v. Washington,* 389 U.S. 290, 293 (1967); *Purdie v.*

Attorney General, 143 N.H. 661, 666-667, 732 A.2d 442, 447 (1999) ("Although the legislature has the power to change or redefine the common law to conform to current standards and public needs, [citations omitted], property rights created by the common law may not be taken away legislatively without due process of law"); *Board of Trustees v. Medeira Beach Nominiee, Inc.,* 272 So.2d 209, 211-212 (Fla. Ct. App. 1973); *Soo Sand & Gravel v. M. Sullivan Dredging Co.,* 259 Mich. 489, 498, 244 N.W. 138, 140-141 (1932). And, those decisions are significantly strengthened by the Ninth Circuit's October 2009 decision in *Milner*.

Milner involved a dispute between upland owners and the United States, in its role as trustee for the Lummi Nation of Indians, which owned the adjoining semi-submerged tidal lands. Faced with chronic erosion (which served to expand the Lummi Nation's holdings), the upland owners built structures that halted the erosion and blocked the expansion of the Lummi Nation's land. Both the District Court and the Ninth Circuit held that the upland owners had no right to block further erosion and their defensive structures trespassed on the Indians' land. *Milner,* 583 F.3d at 1190.

The Ninth Circuit explained that "both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line." The *Milner* court said that littoral owners rights to future accretion are vested and "rest in the law of nature." Specifically:

> The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not civil one. The maxim 'qui sentit onus debet sentire commodum' ['he who enjoys the benefit ought also to bear the burdens') lies at its foundation. The owner takes the chances of injury and the benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.

As *Milner* makes clear, beachfront owners have a right to maintain their waterfront boundary. That right does not mean the State cannot develop the submerged lands or otherwise act in the public interest in ways that block future accretion. To the contrary, a beachfront owner's rights are unquestionably subject to the sovereign's right to use and develop its own submerged lands for public benefit. Here, however, nothing like that has occurred; the State only seeks to change the common boundary for its own gain and without just compensation.

B. The Public Trust Doctrine Has No Impact on Littoral Owners' Title

As the Court correctly points out, Article XI, section 1 of the Hawai`i State Constitution provides that "...the State ... shall conserve and protect Hawai`i's natural beauty and all natural resources, including land, water, ... and shall promote the development and utilization of these resources in a manner consistent with their conservation." To this end, the State and its subdivisions have enacted extensive measures to regulate the use of both public and private natural resources. Further, the Hawai`i Constitution states specifically:

> All ***public*** natural resources are held in trust by the state for the benefit of the people.

Article XI, section 1 (emphasis provided). It does not say "all public ***and private*** natural resources" are held in trust.

Appellees do not dispute that their property may be affected by regulations which limit its use. But reasonable regulations do not translate into a change of land ownership, *i.e.*, they do not result in changing upland owners' boundary whenever the State thinks it would be advantageous to do so.

Further, it is incongruous to say the Hawai`i Constitution "diminishes" any expectation because, as the Court recognizes in its extensive analysis of the common law, the law regarding seaward boundaries and property rights predated the adoption of the Hawai`i State

Constitution in 1978. Since the nineteenth century, property owners have enjoyed an ambulatory boundary marked by the ocean's edge. That right to accretion has been (and, in the words of *Milner* remains) "an inherent and essential attribute of the original property."[3] *Milner,* 583 F.3d at 1187.

C. The Opinion Misstated the Record of this Case Regarding Appellees' Ownership Rights in Existing Accreted Lands

In the Opinion, the majority observed:

> Notably absent from Plaintiffs' complaint is any allegation that Plaintiffs have ownership rights in accreted lands that existed at the time Act 73 was enacted. Moreover, the deeds by which Plaintiffs acquired the beach-reserve lots suggest that there were seawalls built on the lots, raising questions concerning the existence of any accretions. Because Plaintiffs have not alleged specific accretions for which the State has taken from them by the enactment of Act 73 and, more damagingly, have not alleged that any accreted land even exists, the circuit court, on remand, must determine whether Plaintiffs have been injured by the enactment of Act 73.

Because the Court's observations are at odds with the record, correction of the Opinion is necessary.

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[3] H.R.S. § 1-1 and *Damon v. Tsutsui,* 31 Haw. 678, 693 (1930) are also irrelevant. It is undisputed that "background principles" of law which preclude or narrow takings claims are not created by laws that impinge on existing property rights. *Palazzolo v. Rhode Island,* 533 U.S. 606, 629 (2001). As reflected in *Halstead v. Gay,* 7 Haw. 587 (1889), beachfront owners' vested rights in ambulatory boundaries were well established ***before*** the current Hawai`i State Constitution was adopted in 1978 and H.R.S. § 1-1 was adopted in 1982. Later-adopted laws do not weaken Appellees' property rights. *Id.*; *see also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1030 (1992).

Damon v. Tsutsui is also irrelevant. In that case, the disputed fishing rights were created by statute and it is indisputable that no one has a vested right in the continued existence of any statute. *Id.*; *see also United States v. Darusmont,* 449 U.S. 292, 298 (1981) (holding there is no vested right in the rate of taxation which may be changed by Congress); *Gardens at West Maui Vacation Club v. County of Maui,* 90 Hawai`i 334, 344, 978 P.2d 772, 782 (1999) (holding appellant had no vested right in a time share classification for tax purposes).

First, the Appellees' pretrial statement contains precisely the allegations which the Opinion says is missing in the record. In the pretrial statement - - which under the Rules of the Circuit Courts of the State of Hawai`i, Rule 12(b)(1) is to contain a statement of all claims - - Appellees said:

> Plaintiffs expect that the evidence in this case will largely go to issues of damage, *i.e.*, evidence regarding the amount and value of land taken by the State and the resulting damage to the remaining property held by Plaintiffs. Issues of liability are largely questions of law for this Court, but Plaintiffs intend to present evidence showing their status as owners of oceanfront property and the historical accretion rights attended thereto.

(2 ROA 177-78). Appellees also advised the Court and the State that they would be calling witnesses who would testify to "...the historical existence ... of accreted land adjacent to their individual parcels and/or the present existence of accreted land adjacent to their individual parcels." (2 ROA 178-179).

Additional support for Appellees' claim to existing accretion is found in the briefing related to the State's *Motion for Summary Judgment,* filed October 14, 2005 (1 ROA: 289-294). Specifically, in Appellees' *Memorandum in Opposition to Defendant State of Hawai`i's Motion for Summary Judgment,* filed November 15, 2005 (2 ROA: 19-47), Appellees stated in the present tense:

> Each Plaintiff owns land which is appurtenant to accreted shorefront land. In 1988 or thereabouts, Plaintiffs' members purchased the Bishop Estate's leased fee interests in the mauka lands appurtenant to the land described in Document Nos. 2005-090884, 2005-090885, and 2005-090886 recorded in the Bureau of Conveyances (hereinafter, the "Makai Land") [footnote omitted].

The conveyance documents for the Makai land (Exhibits "F", "G", and "H" of the State's Memorandum in Opposition to Plaintiffs' initial Motion for Class Certification) provided that the

Makai Property was conveyed to Appellees "...TOGETHER WITH all accreted lands and all rights with respect thereto, including the right to assert the existence of such lands."

In sum, it is simply untrue that Appellees never asserted that they have existing accretion which was taken by Act 73. While the precise boundaries of the accreted land remains for trial (assuming the State proceeds to "take" all existing accretion), there can be no doubt that the Appellees have been, and are, seeking compensation for the loss of existing accretion.

D. The Court Should Revise the Opinion to Eliminate any Expression of "Concerns" Regarding the Class Certification Because that Was Not Before the Court and Never Briefed Nor Argued. Due Process Precludes Ambush Rulings.

Lastly, Appellees respectfully request that the majority reconsider and remove from the Opinion any statements regarding the appropriateness of class certification. As the Opinion correctly notes, the Circuit Court's Class Certification Order was not appealed and, therefore, was not before the Court. H.R.S. § 641-2. The issue was not briefed nor argued by the parties.

Class certification rulings are subject to reversal **only** if the certification ruling was an abuse of discretion. *See, e.g., Life of the Land v. Land Use Commission,* 63 Haw. 166, 623 P.2d 431 (1981). Trial courts have broad discretion in deciding whether to certify a class and that authority is "normally undisturbed on appeal," *Id.* at 180, 623 P. 2dd at 443.

Here, the Opinion expressed the majority judges' "concerns" about class certification without acknowledging the correct standard of review, much less identifying any abuse of the trial court's discretion. Unless and until the issue is properly appealed, briefed, and argued, it is an abuse of discretion for the majority to address an issue without notice to the parties. *See, e.g., Armentero v. I.N.S.,* 412 F.3d 1088 (9th Cir. 2005); *C. Miller Chevrolet, Inc. v. Willoughby Hills*, 38 Ohio St. 2d 298, 313 N.E.2d 400 (1974); *State v. Daizell*, 282 Conn. 709,

923 A.2d 809 (2007) (barring appellate courts from "reaching out" and deciding issue that was never briefed or argued without notice to parties and an opportunity for briefing or argument).

There is ample authority for class actions in inverse condemnation cases. *See, e.g., Mattoon v. City of Norman,* 633 P.2d 735 (Okla. 1981); *Seven Hills, Inc. v. Bentley,* 848 So.2d 345, 353 (Fla. Dist. Ct. App. 1st Dist. 2003); *Ario v. Metro. Airports Comm'n,* 367 N.W.2d 509, 513 (Minn. 1985).

Moreover, class actions involving individualized damage calculations are commonly certified when, as here, liability is determined the damages are simple and formulaic (here: square footage of accretion times a regionally--determined fair market value).[4] This rule has been applied by the U. S. Court of Federal Claims to allow certification in a state wide class action inverse condemnation action involving potentially more than 2,000 members. The case involved landowners who sought damages based upon the government's decision to impose a recreational 225 mile-long recreational trail across their lands. The Court found that the need for calculation of individual damage awards was no impediment to certification because the process "should be relatively formulaic." *Moore v. U.S.*, 41 Ct. Cl. 394, 297-99 (1998). The parallels to this case are obvious.

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[4] "It uniformly has been held that differences among the members [of a class] as to the amount of damages incurred does not mean that a class action would be inappropriate." 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1781 (2d ed. 1986) (collecting cases); *see Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977)(noting that where proving damages is a mechanical task, "the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); *Brown v. Pro Football, Inc.*, 146 F.R.D. 1 (D.D.C. 1992) (finding a proposed damages formula, based on individual contracts entered into by various plaintiff, adequate to calculate antitrust damages); *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, (N.D. Ga. 1997) (permitting class certification in an antitrust price-fixing case where the plaintiffs proposed to use regression analysis to estimate class members' damages).

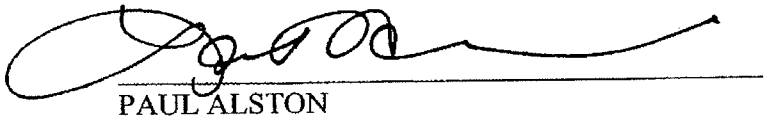
At worst, the damages calculations could be based upon regional subclasses (e.g., Urban Honolulu, North Shore, Kailua, etc.). When only a few dozen members is presumptively sufficient to establish numerosity, this approach still justifies class certification.

There is every indication that the Circuit Court carefully considered and applied the elements of HRCP 23 after extensive briefing and argument (2 ROA 74-81). As such, Appellees respectfully request that the Court delete any criticism of class certification from the majority Opinion.

III. CONCLUSION

Based on the foregoing reasons, Appellees respectfully request that the Court reconsider and/or clarify the language and determinations of its Opinion.

DATED: Honolulu, Hawai`i, January 11, 2010.



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