No. 30006

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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

OPENING BRIEF OF THE STATE OF HAWAII

APPENDICES "A" – "C"

STATEMENT OF RELATED CASES and

CERTIFICATE OF SERVICE

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I. INTRODUCTION

The question presented by this appeal is whether land court registration of private property can extinguish the State of Hawaii's[1] reservations in that property. The answer is no. Land tenure, under Hawaii law, is unique when compared to general western property laws. Its differences are rooted in the system of land tenure that began when the Hawaiian Kingdom owned all land, and title to property granted by the sovereign was subject to reservations in favor of the government. The restrictions on private ownership are restated in the Hawaii State Constitution, statutes, and common law of Hawaii, and are not affected by land court registration. Campbell's predecessor in title could not get any better title to the land simply by registering it in land court. Thus, the land court erred when it ruled that Campbell's land was not subject to the State's: (1) ownership of all minerals and metallic mines of every kind or description on the property, including geothermal rights, and the right to remove the same; and (2) an easement for the free flowage of any waters through, over, under, and across the property. The order and decree of the land court should be reversed and the State's interests noted on the certificate of title.

II. STATEMENT OF THE CASE

A. Historical Background

[1] Parties. This land court proceeding was filed by Petitioner-Appellee James Campbell Company LLC, a Delaware limited liability company, who is the owner of Lot 1219 as shown on Map 176. Petitioners-Appellees Continental Pacific, LLC, a Delaware limited liability company, and James C. Reynolds, Inc., a California corporation, are the owners of Lot 1218 as shown on Map 176. All Petitioners are jointly referred to as Campbell. Respondent-Appellant State of Hawaii is referred to as the State.

Private land ownership in Hawaii is best understood by going back to its beginnings. When King Kamehameha I brought all of the Hawaiian Islands under his control in the beginning of the nineteenth century, he utilized the system of land tenure then in existence. Jon J. Chinen, *The Great Mahele Hawaii's Land Division of 1848* at 6 (1961). He selected the choicest lands for his personal use and distributed the rest to his warrior chiefs. Id. The warrior chiefs retained land for themselves and reallotted the rest to inferior chiefs, and so-on, down to the tenant-commoners. Id. All allotments were on a revocable basis. Id.

By the time Kamehameha III ascended the throne in 1824, there was a large foreign population in Hawaii, many of whom had been accustomed in their homeland to possessing lands in fee simple. Id. at 6-7. Their "vigorous actions ... often supported by the commanders of warships of their homelands" led to the enactment in 1839 of the Declaration of Rights, called Hawaii's Magna Carta, which was followed by the Constitution of 1840. Id. at 7; McBryde Sugar Company, Ltd. v. Robinson, 54 Haw. 174, 185 fn. 8, 504 P.2d 1330, 1338 fn. 8 (1973). The Constitution acknowledged that although the land belonged to Kamehameha I, "it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had management of the landed property." *Fundamental Law of Hawaii* at 3 (1904). It was this acknowledgment, that the people had some form of ownership in the land, which led to the award of lands in fee simple and the abolishment of the ancient land system. *The Great Mahele Hawaii's Land Division of 1848* at 8.

The Board of Commissioners to Quiet Land Titles (Land Commission) was created in 1845[2] to investigate and settle all claims of private individuals, whether native or foreign. Omerod v. Heirs of Kainoa Kupuna Kaheananui, 116 Haw. 239, 247, 172 P.3d 983, 991 (2007). During the first few years, the Land Commission was without power and authority to separate the undivided interests of the King, the chiefs and konohikis, and the tenants, and so it dealt mainly with claims regarding leasehold interests. *The Great Mahele Hawaii's Land Division of 1848* at 12. The Mahele, or division, of lands, was completed in 1848. Id. at 15. Lands were divided among the King, the government, the chiefs and konohikis, and the tenants. Id. at 15-16. This was followed in 1850 by Acts authorizing the sale of lands in fee simple to resident aliens and the award of kuleanas to native tenants. Id. at 12; Application of Robinson, 49 Haw. 429, 436 fn. 7, 421 P.2d 570, 575 fn. 7 (1966). It is within this historical framework that the State claims the ownership of minerals and metallic mines and an easement for the free flowage of water.

B. Original Land Grants

The lands that are the subject of the land court proceeding and this appeal are located in Kahuku, Malaekahana, and Kaena, at Koolauloa, in the northeastern district of Oahu. Campbell's ownership of the lands is derived from four original land grants: (1) Deed of Kamehameha III to Charles Gordon Hopkins, dated September 10, 1851, Liber 5 page 153; (2) Royal Patent Grant No. 550 dated March 12, 1851, to Charles Gordon Hopkins; (3) Land Commission Award 7130 dated October 1, 1852, and Royal Patent No. 5693 dated April 19, 1873, both to Kinimaka; and (4) Land Commission Award 8452

[2] The Land Commission was dissolved in 1855. *The Great Mahele Hawaii's Land Division of 1848* at 13.

Apana 1 dated March 21, 1854, and Royal Patent No. 5616 dated October 15, 1867, both to A. Keohokalole (together "the property"). Copies of these documents are attached as Exhibits 1-6 to the State's Memorandum in Opposition to Petitioner James Campbell LLC's "Reply Memorandum." ROA[3] at 752 (State's Opp'n Mem., Exs. 1-6). Royal Patent Grant No. 550, Royal Patent No. 5693, and Royal Patent No. 5616 expressly reserve to the government all minerals and metallic mines. Id. (Collins Decl. and Exs. 2, 5-6).

A copy of Map 176, which was approved and entered in the land court pursuant to the Decree, is appended to this brief for illustrative purposes. See ROA at 1003 (Decree). The land grants are located on Map 176, moving from top to bottom: Deed of Kamehameha III (all of Lot 1219 and top portion of Lot 1218); Grant No. 550 (top middle portion of Lot 1218); Land Commission Award 7130 and Royal Patent 5693 (top middle portion of Lot 1218); and Land Commission Award 8452 Apana 1 and Royal Patent 5616 (bottom portion of Lot 1218).

C. Land Court Application No. 1095 – the 1938 Registration

The four original land grants, that are described above and which were the subject of the present land court proceeding, were among the more than 70 land grants registered in land court in 1938 by the Trustees under the Will and of the Estate of James Campbell, Deceased (Campbell Trustees). ROA at 88 (Campbell's Supp. Mem., Ex. A at 4). On July 16, 1934, Campbell Trustees filed an application in the land court to register title to approximately 15,000 acres of land comprising most of the land from Laiewai to Pupukea on the Island of Oahu, Territory of Hawaii. ROA at 88 (Campbell's Supp. Mem., Exs. A

[3] Record Citations. The record on appeal from the land court proceeding is referred to as ROA.

and B). In the application, the parcels of land were identified by the original land grants (Royal Patent (R. P.), Land Commission Award (L. C. Aw.), Grant, and Kamehameha III Deed). Id. (Ex. A).

The Territory of Hawaii filed an Answer and Claim to Application 1095 in which it claimed certain interests.[4] Id. (Ex. L).

The land court entered its decision on November 30, 1937. Id. (Ex. M (Decision)). As to the Territory, the land court ruled as follows:

> The Territory of Hawaii also filed an answer. All claims therein set forth have been settled by agreement with the applicants or by exchange deeds filed in the record herein. The application and the map have been amended accordingly.
>
> The matter of rights of way for exclusions out to the government road shall be provided for in the decree in the usual manner.

Id. Original Certificate of Title No. 17,854 was issued on January 24, 1938. Id. (Ex. N). The Original Certificate of Title identifies the land by the original land grants. Id.

D. Land Court Application No. 1095 - L.C. Case No. 08-0054

The present land court proceeding arises from an Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements filed by Campbell on February 12, 2009. ROA at 28 (Campbell's Am. and Restated Pet.). The property consists of the four original land grants. Campbell sought to note erosion to the property, consolidate and resubdivide the four parcels into two lots to be called Lot 1218 and Lot 1219, designate an easement for

[4] The Territory claimed fee simple title to two parcels, and easements over Lot J, Lot C, and Lot D. The Territory also claimed that Exclusions 8, 9, and 10 were not correctly described in the application or delineated on the map, and that the Territory and all kuleanas situated within the lands described in the application were entitled to rights-of-way by necessity to the nearest public highway. Id. (Ex. L). These claims are not pertinent to this appeal.

conservation purposes affecting Lot 1219, and designate an easement for drainage purposes affecting Lot 1218. ROA at 31-32 (Campbell's Am. and Restated Pet.).

The State filed an answer, claiming the following reservations:

> 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;
>
> 2. The State owns the submerged land up to the highest reaches of the wash of the waves, including the 34.113 acre eroded area;
>
> 3. The property is subject to the rights of native tenants;
>
> 4. The State has reserved all right, title, interest, or claim to waters having their source upon or flowing over or under the property;
>
> 5. The State has reserved an easement for the free flowage of any waters through, over, under, and across the property;
>
> 6. The State has reserved its interests in all religious, historical, and archeological sites on the property.[5]

ROA at 66-67 (State's Answer).

Campbell filed a Supplemental Memorandum of Facts and Law Regarding the Defenses Raised in the State's Answer. ROA at 88 (Campbell's Supp. Mem.). Of note, as to the State's reservation of minerals and metallic mines, Campbell acknowledged that "Royal Patent No. 5616 to A. Keohokalole, for the lands in Malaekahana, Royal Patent No. 5693 to Kinimaka for roughly one half of the lands in Keana, and Grant No. 550 to Charles Gordon Hopkins for the remaining one half of the lands in Keana were then subject to a reservation of mineral and metallic mines in favor of the territorial

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[5] This claim is not raised on appeal because, as the State noted in its land court opposition, "[s]hould any religious, historical, or archaeological sites be discovered on the Petitioner's property, HRS chapter 6E will apply, and a reservation is not required." ROA at 771 (State's Opp'n Mem.). Chapter 6E applies equally to all land in Hawaii, whether registered and unregistered. See Haw. Rev. Stat. § 501-81 ("Registered land and the ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land.").

government at that time." ROA at 94 (Campbell's Supp. Mem.); see also ROA at 993 (Findings of Fact, Decision and Order, Finding of Fact No. (FOF) 4).

The State filed a Memorandum in Opposition. ROA at 752 (State's Opp'n Mem.).

Following oral argument, the land court judge ruled from the bench as follows:

> So in balancing what the court believes are some of the priority interests of the people in general as opposed to the private interests of the owner of the land, because they raise a constitutional question of illegal taking without just compensation, although that issue is somewhat obliquely raised primarily during argument, I think that the petition has merit and the court will grant the petition subject to the following two reservations in favor of the State: number one, the State's interest, if any, in water rights; and, number two, State's interest in native tenants' rights.

ROA at 1074 (Tr. June 1, 2009 at 41).

At the land court's request, Campbell drafted and submitted its Findings of Fact, Decision and Order. ROA at 859 (Campbell's Proposed Findings). The State filed its Statement of Objections to Petitioner's Findings of Fact, Decision and Order and a proposed Findings of Fact, Decision and Order. ROA at 905 (State's Objections).

On July 16, 2009, the land court adopted the Findings of Fact, Decision and Order drafted by Campbell. ROA at 990 (Findings of Fact, Decision and Order). The State prevailed on its claims regarding ownership of submerged lands and native tenant rights in the following findings of fact:

> 24. The State of Hawai`i has asserted, and the Court finds that the State of Hawai`i owns the submerged lands up to the highest reaches of the wash of the waves, including the 34.113 acres of eroded land.
>
> 29. The State of Hawai`i has asserted, and the Court finds that the State of Hawai`i has reserved an interest in the rights of native tenants, if any, that may affect the land that is the subject of the Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline

Setback Line, and Designation of Easements, but the interest of the State of Hawaii, if any, is not an easement or encumbrance upon registered title.

ROA at 996-97 (Findings of Fact, Decision and Order). The State prevailed, in part, regarding its claims to water in the following finding of fact:

28. The State of Hawai`i has asserted, and the Court finds that the State of Hawai`i has reserved an interest in water rights, if any, that may affect the land that is the subject of the Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements, but the interest of the State of Hawai`i, if any, is not an easement or encumbrance upon registered title.

ROA at 997 (Findings of Fact, Decision and Order). The land court ruled against the State in the following findings of fact:

30. The reservations of mineral and metallic mines in (i) Royal Patent No. 5616 to A. Keohokalole, for the lands in Malaekahana, (ii) Royal Patent 5693 to Kinimaka for roughly one half of the lands in Kaena, and (iii) Grant No. 550 to Charles Gordon Hopkins for the remaining one half of the lands in Keana were extinguished by issuance of the original decree in Land Court Application No. 1095 in 1938.

31. The land in Kahuku conveyed by Deed of Kamehameha III to Charles Gordon Hopkins dated September 10, 1851, recorded in the Bureau of Conveyance of the State of Hawai`i in Liber 5, Page 153, never was subject to a reservation of mineral and metallic mines in favor of any government or person.

32. Except for the rights described in Findings of Fact No. 24, and except for the reserved rights, if any described in Finding of Fact No. 28 and Finding of Fact No. 29, the State of Hawai`i has not produced sufficient evidence to support its argument that the State of Hawaii has the ownership or other reserved interests described in paragraphs 1, 3, 4, 5, 6, and 7 of the prayer for relief set forth on pages 4-5 of the Answer of the State of Hawai`i filed with this court on March 11, 2009.

ROA at 998 (Findings of Fact, Decision and Order). The land court ruled against the State in the following decision and order:

1. Except for the rights described in Finding of Fact No. 24, and except for the reserved rights, if any, described in Finding of Fact No. 28 and Finding of Fact No. 29, the State of Hawaii's request to have this Court

> rule that the State of Hawai`i has, or has reserved, any ownership interest in or reservation affecting the subject property, including, without limitation, those set forth in paragraphs 1, 3, 4, 5, 6, and 7 of the prayer for relief set forth on pages 4-5 of the State of Hawaii's Answer filed herein on March 11, 209, is denied.

ROA at 999 (Findings of Fact, Decision and Order).

The Decree was entered by the Registrar of the Land Court on July 16, 2009. ROA at 1003 (Decree). The State timely appealed on August 14, 2009. ROA at 1007 (State's Notice of Appeal).

III. STATEMENT OF THE POINTS OF ERROR

The land court made two kinds of error. The land court erred when it denied the State's: (1) ownership of all minerals and metallic mines of every kind or description on the property, including geothermal rights, and the right to remove the same; and (2) easement for the free flowage of any waters through, over, under, and across the property. ROA at 66-67 (State's Answer).

1. Minerals and metallic mines: Because 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, the land court erred when it found that:

> 30. The reservations of mineral and metallic mines in (i) Royal Patent No. 5616 to A. Keohokalole, for the lands in Malaekahana, (ii) Royal Patent 5693 to Kinimaka for roughly one half of the lands in Kaena, and (iii) Grant No. 550 to Charles Gordon Hopkins for the remaining one half of the lands in Keana were extinguished by issuance of the original decree in Land Court Application No. 1095 in 1938.

ROA at 998 (Findings of Fact, Decision and Order, FOF 30). The land court also erred when it found that:

> 31. The land in Kahuku conveyed by Deed of Kamehameha III to Charles Gordon Hopkins dated September 10, 1851, recorded in the Bureau of Conveyance of the State of Hawai`i in Liber 5, Page 153, never

was subject to a reservation of mineral and metallic mines in favor of any government or person.

Id. (FOF 31). Other places in the record where the land court made findings against or ruled contrary to the State's interest occurred at the hearing where the judge denied the State's ownership of minerals and metallic mines, ROA at 1074, Tr. June 1, 2009 at 40-42, in the Decree, ROA at 1003, which fails to note the State's ownership of all minerals and metallic mine, and in the Findings of Fact, Decision and Order at FOF 19, 32, and D&O 1, ROA at 995, 998-99, as follows:

> 19. The 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 of every kind or description on the property, including geothermal rights, and the right to remove the same ...
>
> 32. Except for the rights described in Finding of Fact No. 24, and except for the reserved rights, if any, described in Finding of Fact No. 28 and Finding of Fact No. 29, the State of Hawai`i has not produced sufficient evidence to support its argument that the State of Hawai`i has the ownership or other reserved interests described in paragraphs 1, 3, 4, 5, 6 and 7 of the prayer for relief set forth on pages 4-5 of the Answer of the State of Hawai`i filed with this Court on March 11, 2009.
>
> 1. Except for the rights described in Finding of Fact No. 24, and except for the rights, if any, described in Finding of Fact No. 28 and Finding of Fact No. 29, the State of Hawaii's request to have this Court rule that the Stat of Hawai`i has, or has reserved, any ownership interest in or reservation affecting the subject property, including, without limitations, those set forth in paragraphs 1, 3, 4, 5, 6 and 7 of the prayer for relief set forth on pages 4-5 of the State of Hawaii's Answer filed herein on March 11, 2009, is denied.

The State brought its interest to the land court's attention in its Answer, ROA at 66, and in its Memorandum in Opposition, ROA at 752. The State objected to this error at the hearing, ROA at 1074, Tr. June 1, 2009, and in the Statement of Objections to Petitioner's Findings of Fact, Decision and Order, ROA at 906-08, 910-11. The Findings

of Fact, Decision and Order, ROA at 990, the Decree, ROA at 1003, and portions of the transcript, ROA at 1074, are appended to this brief.

2. Easement for the free flowage of water: The land court erred in FOF 28 when it found that the State "has reserved an interest in water rights, if any, ... but the interest of the State of Hawai`i, if any, is not an easement or encumbrance upon registered title[,]" because the finding did not include an easement for the free flowage of any waters through, over, under and across the property. ROA at 997 (Findings of Fact, Decision and Order, FOF 28). Other places in the record where the land court made findings against or ruled contrary to the State's interest occurred at the hearing where the judge failed to find an easement for the free flowage of water in addition to its finding of "water rights," ROA 1074, Tr. June 1, 2009 at 40-42, in the Decree, ROA at 1003, which fails to reserve an easement for the free flowage of water in favor of the State, and in the Findings of Fact, Decision and Order at FOF 19, 32, and D&O 1, ROA at 995, 998-99, as follows:

> 19. The list of encumbrances set forth at pages 64-66 in the Original Certificate of Title No. 17,854 did not contain ... a reserved easement for the free flowage of waters through, over, under, and across the property ...
>
> 32. Except for the rights described in Finding of Fact No. 24, and except for the rights described in Finding of Fact No. 28 and Finding of Fact No. 29, the State of Hawai`i has not produced sufficient evidence to support its argument that the State of Hawai`i has the ownership or other reserved interests described in paragraphs 1, 3, 4, 5, 6 and 7 of the prayer for relief set forth on pages 4-5 of the Answer of the State of Hawai`i filed with this Court on March 11, 2009.
>
> 1. Except for the rights described in Finding of Fact No. 24, and except for the reserved rights, if any, described in Finding of Fact No. 28 and Finding of Fact No. 29, the State of Hawaii's request to have this Court rule that the State of Hawai`i has, or has reserved, any ownership interest in or reservation affecting the subject property, including, without limitation, those set forth in paragraphs 1, 3, 4, 5, 6 and 7 of the prayer for

relief set forth on pages 4-5 of the State of Hawaii's Answer filed herein on March 11, 2009, is denied.

The State brought its interest to the land court's attention in its Answer, ROA at 67, and in its Memorandum in Opposition, ROA at 752. The State objected to this error at the hearing, ROA at 1074, Tr. June 1, 2009, and in the Statement of Objections to Petitioner's Findings of Fact, Decision and Order, ROA at 907-11. The Findings of Fact, Decision and Order, ROA at 990, the Decree, ROA at 1003, and portions of the transcript, ROA at 1074, are appended to this brief.

IV. STANDARDS OF REVIEW

The following standards of review apply to both points of error.

1. The appellate court reviews the land court's written decision and the entire record to determine the correctness of the land court's decision. The land court's findings of fact will not be disturbed unless the appellate court is firmly convinced that a mistake has been made, adopting the "clearly erroneous" standard. The land court's conclusions of law are not binding upon an appellate court and are freely reviewable for their correctness. In the Matter of the Application of W.H. Shipman, Ltd., 84 Haw. 360, 365-66, 934 P.2d 1, 6-7 (Haw. App. 1997).

2. "The interpretation of a statute is a question of law that is reviewed de novo." State v. Mara, 98 Haw. 1, 10, 41 P.3d 157, 166 (2002)(citations omitted). When construing a statute, the court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. The court must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose. State v. Sullivan, 97 Haw. 259, 262, 36 P.3d 803, 806 (2001).

V. SUMMARY OF ARGUMENT

1. None of the four original land grants that make up Campbell's property in the land court proceeding disposed of the government's ownership of minerals and metallic mines. Three land grants expressly reserved minerals and metallic mines in favor of the government. ROA at 752 (State's Opp'n Mem., Exs. 2, 5-6). The fourth land grant was a Kamehameha III deed issued by the King for his own land. Id. (Ex. 1). The King, as an individual landowner, did not own the minerals and metallic mines, and therefore, did not dispose of them when he issued the deed. Whether expressly stated in the land grant or not, the government's reservation of minerals was self-effectuating. Robinson, 49 Haw. at 440, 421 P.2d at 577. This interest included geothermal rights.

2. The government's easement for the free flowage of water has always existed on the property. The ownership of water in their natural watercourses remains in trust for the people of Hawaii. In re Water Use Permit Applications, 94 Haw. 97, 129, 9 P.3d 409, 441 (2000) (Waiahole I). Case law has recognized this duty as an exception to land court registration. Application of Sanborn, 57 Haw. 585, 593, 562 P.2d 771, 776 (1977).

3. The government's easement for the free flowage of water has always existed on the property and Campbell Trustees did not own the minerals and metallic mines on the property at the time of the 1938 land court registration (or at any time). Campbell Trustees could not gain any better title to the land simply by registering it in land court. Thus Campbell, as successor to the Campbell Trustees, also does not have title to the water and minerals.

4. Alternatively, laws imposing reservations of minerals and metallic mines and easements for the free flowage of water in favor of the government are burdens and

incidents imposed upon the property pursuant to Haw. Rev. Stat. § 501-81 of the land court registration statute. Land court registration preserved, rather than eliminated, these reservations.

5. Moreover, issues decided by the Land Commission at the time of the original land grants were binding on Campbell in land court under the doctrine of issue preclusion. Campbell cannot now challenge Land Commission Award 7130 and Royal Patent No. 5693, both to Kinimaka, and Land Commission Award 8452 Apana 1 and Royal Patent No. 5616, both to Keohokalole, which were subject to the government's reservations of minerals and metallic mines and easement for the free flowage of water.

6. And finally, issues decided in the 1938 land court registration proceeding were binding on Campbell in the present land court proceeding under the doctrine of issue preclusion. Campbell cannot now challenge the original land grants registered in land court in 1938 by its predecessor in title, which were subject to the government's reservations of minerals and metallic mines and easement for the free flowage of water.

For all of these reasons, the land court should have ruled that 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 that the State has reserved an easement for the free flowage of any waters through, over, under and across the property. ROA at 66-67 (State's Answer). The land court's order and decree should be reversed and the State's interests noted on the certificate of title. ROA at 990, 1003.

VI. ARGUMENT

A. The original land grants did not dispose of the government's ownership of minerals and metallic mines, including geothermal rights

1. Under the four original land grants, the State owns all minerals and metallic mines

The State owns all minerals and metallic mines, including geothermal rights, on the property. The land court erred in ruling that the 1938 land court registration extinguished this interest, or that it never existed in the first place. ROA at 998-99 (FOF 30-32 and D&O 1). As to the State's claim for minerals and metallic mines, the land court found that:

> The reservations of mineral and metallic mines in (i) Royal Patent No. 5616 to A. Keohokalole, for the lands in Malaekahana, (ii) Royal Patent 5693 to Kinimaka for roughly one half of the lands in Kaena, and (iii) Grant No. 550 to Charles Gordon Hopkins for the remaining one half of the lands in Keana were extinguished by issuance of the original decree in Land Court Application No. 1095 in 1938.

ROA at 998 (Findings of Fact, Decision and Order, FOF 30). The land court further found that:

> The land in Kahuku conveyed by Deed of Kamehameha III to Charles Gordon Hopkins dated September 10, 1851, recorded in the Bureau of Conveyance of the State of Hawai`i in Liber 5, Page 153, never was subject to a reservation of mineral and metallic mines in favor of any government or person.

Id. (FOF 31).

Three of the four original land grants, Royal Patent No. 5693, Royal Patent No. 5616, and Royal Patent Grant No. 550, except and reserve to the government all mineral and metallic mines. ROA at 752 (State's Opp'n Mem., Collins Decl.; Exs. 2, 5-6). Campbell acknowledges that "Royal Patent No. 5616 to A. Keohokalole, for the lands in Malaaekahana, Royal Patent No. 5693 to Kinimaka for roughly one half of the lands in Keana, and Grant No. 550 to Charles Gordon Hopkins for the remaining one half of the

lands in Keana were then subject to a reservation of mineral and metallic mines in favor of the territorial government at that time." ROA at 94 (Campbell's Supp. Mem.).

In Robinson, 49 Haw. 429, 421 P.2d 570, the Hawaii Supreme Court confirmed the validity of a mineral or metallic mines reservation set forth in a royal patent and held that the land court decree of registration should have provided for the notation of the reservation. The Court explained that royal patents, by law, were subject to the reservation of mineral or metallic mines of every description. The Court recognized that in "An Act to Organize the Executive Departments of the Hawaiian Islands," S.L. 1845-1846, pp. 100-101 [2 Rev. Laws of Haw. 2191 (1925)], effective February 7, 1846, a form for the royal patents was prescribed and that form required "excepting and reserving to the Hawaiian government, all mineral or metallic mines, of every description." Robinson, 49 Haw. at 430-31, 421 P.2d at 572-73. The Court further recognized that **the form of the royal patent governed Land Commission Awards as well as other dispositions of land**. Id., 49 Haw. at 436, 421 P.2d at 575. The Court explained that the Land Commission could not have disposed of the reservation:

> This was a time of formulation of land titles. Claimants before the Land Commission could receive no better title than was offered pursuant to law. There is nothing to show that the government was offering such claimants a better title than it was willing to sell.

Id., 49 Haw. at 437, 421 P.2d at 576.

> The power over government property thus bestowed on the Land Commission was not unregulated by law, and the Land Commission so recognized. It was within the framework of the governing laws that the Land Commission was to fix the 'terms' of the awards.* * *
>
> **As part of the framework within which the Land Commission operated mineral or metallic mines could not be disposed of, by virtue of the prescribed form of patent. The effect of this prescribed form of patent was to make the mineral rights reservation self-effectuating.**

Id., 49 Haw. at 440, 421 P.2d at 577 (citations omitted, emphasis added).

This holding – longstanding Hawaii precedent – shows that the 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. ROA at 995, 998 (Findings of Fact, Decision and Order, FOF 19, 30-31). This reservation has always existed.

In prior land court registrations the reservation may not have been claimed by the Territory or the State because, as in Robinson, there had been no reason to focus on it.

> It is contended that from and after 1900 land patents were issued on Land Commission Awards without the mineral rights reservation, and that there have been Land Court registrations prior to this one in which such reservation has not been claimed by the Territory or the State. From the contentions made at the oral argument, disinterest in the mineral rights on the part of government officials appears to have been at a time when there was no 'reason to focus attention on the question.' At all events, the matters referred to could not affect the result in this case, in which the mineral rights reservation does appear in the patents.

Robinson, 49 Haw. at 441, 421 P.2d at 577-78 (citation omitted).

The fourth original land grant is the Deed of Kamehameha III to Charles Gordon Hopkins, dated September 10, 1851, Liber 5 page 153, which is known as a Kamehameha Deed. ROA at 752 (State's Opp'n Mem., Ex. 1). On March 8, 1848, a day after the completion of the Mahele, Kamehameha III signed and sealed two instruments dividing the lands he had reserved for himself into two parts, one for his personal use (which later became known as Crown Lands), and one for the chiefs and people (which became known as Government Lands). *The Great Mahele Hawaii's Land Division of 1848* at 25-26. Kamehameha Deeds were executed by the King in selling portions of the King's lands from 1848 until 1865 when the King's lands became inalienable. Jon Jitsuso Chinen, *Original Land Titles in Hawaii* at 23 (1961). The form of a Kamehameha Deed

did not expressly reserve minerals or metallic mines to the government. See id. at 23-24 (setting forth the form of a Kamehameha Deed).

The Kamehameha Deed, however, did not dispose of the government's ownership of minerals and metallic mines. The King, when selling his personal lands, was acting as an individual landowner. These are the lands that the King had awarded to himself as part of the Mahele. See supra. 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. In the absence of an expressed intent, mineral and metallic mine rights remain in the government. See McBryde, 54 Haw. at 183, 504 P.2d at 1337 (absent the King's express intent, the Mahele did not transfer to the konohikis of the ilis kupono of Koula and Manuahi the King's right to surplus water). Additionally, at that time, all land was being awarded by the government subject to a reservation to the government of "all mineral or metallic mines, of every description." See 2 Rev. Laws of Haw. 2191 (1925). Moreover, the Records of the Legislature, *Journal of the House of Nobles*, 1845-1847, Vol. II, pp. 109-115, shows that the intent of Kamehameha III in awarding land was to encourage agriculture in the kingdom, and not to part with the land's minerals and metallic mines. In a speech by the King to the Nobles on July 31, 1846, the King stated:

> **I trust that the labors of the Land Commissioners will result in rendering the titles to land clear and fixed, and thus lay a foundation for agricultural enterprise.** It is my special wish that the laws be such as to offer the most efficient encouragement to profitable industry.

Id. at 112-113 (emphasis added). The Nobles and Representatives responded on that same day to the King in a report from Nobles A. Paki and J. Kapena, and Representative F. P. Kaumaea stating as follows:

> **To encourage agriculture so as to increase the amount of exportable products, will be a desideratum.** The way being already prepared to secure allodial titles to the soil, and a profitable market being already open to its products, and persons possessing those titles being wholly freed from all personal service, we trust that industry will not only increase but become more and more productive and profitable.

Id. at 114 (emphasis added). The King, in his individual capacity, did not own the minerals and metallic mines, and did not convey greater title than he had. See Kekiekie v. Dennis, 1 Haw. 42 (Haw. 1851) (even if the King had not made a reservation, ahupua`a tenant's rights were not conveyed away because they were secured by the Constitution and laws of the Kingdom). Campbell, the present landowner, could only receive the ownership interests held by its predecessor, the King, as an individual. See infra. Section C. Thus, the State's ownership of minerals and metallic mines for all four original land grants continues to exist to this day.

The land court erred when it ruled that the State's ownership of minerals and metallic mines was either extinguished by the 1938 land court registration or never existed in the first place. ROA at 998 (Findings of Fact, Decision and Order, FOF 30, 31). The land court's order and decree should be reversed. ROA at 990, 1003.

2. Minerals and metallic mines includes geothermal rights

The State's ownership of minerals and metallic mines includes geothermal rights. In U.S. v. Union Oil Co. of California, 549 F.2d 1271, 1274 (9th Cir. 1977), the federal government had issued patents to land located in Sonoma, California, to landowners under the Stock-Raising Homestead Act of 1916. The patents issued pursuant to the Homestead Act contained a specific reservation of mineral rights as follows:

> Excepting and reserving, however, to the United States of all coal and other minerals in the lands so entered and patented, together with the right

to prospect for, mine and remove the same pursuant to the provisions of the Stock-Raising Homestead Act.

43 C.F.R. § 3814.2(a)(1976).[6] The court reasoned that a plain reading of the Homestead Act showed the intent of Congress to limit the property rights being transferred to the grantees to be restricted to surface uses as the intent of the Act was to provide homesteaders with agricultural pasture land. Thus, the court found that "[t]he purposes of the Act will be served by including geothermal resources in the statute's reservation of 'all coal and other minerals.'" Union Oil, 549 F.2d at 1279. The purposes underlying the Mahele, as set forth in the history above, and Homestead Act appear to be substantially similar. Both acts have as their basis the transfer of public land to private landowners with the intent of encouraging agricultural pursuits. Both acts reserved minerals and metallic mines rights in favor of the sovereign. Like the Homestead Act, the Mahele's reservation of minerals and metallic mines should be deemed to include geothermal rights. "[T]he established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." Union Oil, 549 F.2d at 1274 fn.5 (citations omitted). Geothermal resources were never conveyed to Campbell or its predecessors. Thus, they remain the property of the State.

The government's ownership of minerals and metallic mines includes geothermal rights. The land court erred in failing to recognize the State's ownership of minerals and metallic mines of every kind or description on the property, including geothermal rights, and the right to remove the same. ROA at 998-99 (Findings of Fact, Decision and Order,

[6] Unlike the Homestead Act (1916), no express reservation is needed under Hawaii law because minerals and metallic mines were never included within land title under Hawaii law.

FOF 30-32 and D&O 1). The land court's order and decree should be reversed. ROA at 990, 1003.

B. The government's easement for the free flowage of water has always existed on the property and constitutes an exception to land court registration

Under Hawaii law, an easement for the free flowage of water has always existed on the property. As to the State's claims to water, the land court found that:

> The State of Hawai`i has asserted, and the Court finds that the State of Hawai`i has reserved an interest in water rights, if any, that may affect the land that is the subject of the Amended and Restated Petition for consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements, but the interest of the State of Hawai`i, if any, is not an easement or encumbrance upon registered title.

ROA at 997 (Findings of Fact, Decision and Order, FOF 28). Although the land court recognized the State's "water rights," it erred in failing to recognize an easement for the free flowage of water on the property. ROA at 997-99 (Findings of Fact, Decision and Order, FOF 28, 32, D&O 1). This was incorrect because under Hawaii law, water, and the easement for its free flowage, are public trust resources, and exceptions to land court registration.

Private land tenure in Hawaii is unique. Hawaii law has long recognized that private land ownership is limited and subject to certain reservations in favor of the government. The Hawaii courts have recognized that "the western concept of exclusivity [in land ownership] is not universally applicable in Hawai`i. . . . In other words, the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property." Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Haw. 425, 447, 903 P.2d 1246, 1268 (1995) (citations omitted) (PASH). In the case of Waiahole I, the Hawaii

Supreme Court recognized that, "in granting land ownership interests in the Mahele, the Hawaiian Kingdom expressly reserved its sovereign prerogatives '[t]o encourage and even to enforce the usufruct of the lands for the common good.'" Waiahole I, 94 Haw. at 128-29, 9 P.3d at 440-41 (citing with approval McBryde, 54 Haw. at 184-86, 504 P.2d at 1337-39). Thus, Hawaii courts have recognized that private ownership is limited by reservations in favor of the sovereign which include minerals and metallic mines, Robinson, 49 Haw. 429, 421 P.2d 570, the right of native tenants to access private land to pursue traditional activities, PASH, 79 Haw. 425, 903 P.2d 1246, the rights of the people to access lands below the high water mark, County of Hawaii v. Sotomura, 55 Haw. 176, 183-84, 517 P.2d 57, 63 (1973), and the rights of the people to use water resources of the State, Waiahole I, 94 Haw. 97, 9 P.3d 409.

The Hawaii Supreme Court has confirmed that the right to water is among the rights reserved to the sovereign:

> "**The right to water,**" [the Hawaii Supreme Court] explained, is one of the most usufruct of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and **definitely reserved for the people of Hawaii for their common good in all of the land grants.** Thus by the Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not transferred to the awardee, and **the ownership of water in natural watercourses and rivers remained in the people of Hawaii for their common good.**

Waiahole I, 94 Haw. at 129, 9 P.3d at 441 (citation omitted).[7] Thus, the State's easement for the free flowage of water encompasses water in natural watercourses, over and under the property, and in rivers.

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[7] The State's claim to an easement for the free flowage of water is also based upon the rights of native tenants. The 7th section of the Kuleana Act of 1850, providing for the rights of native tenants, states as follows:

"In Hawai`i, this court has recognized, based on founding principles of law in this jurisdiction, a distinct public trust encompassing all the water resources of the state."[8] Waiahole I, 94 Haw. at 133, 9 P.3d at 445 (citation omitted). The public trust includes all waters, ground water, surface water, and all other water. Id., 94 Haw. at 133-36, 9 P.3d at 445-448. 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

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> 7. When the landlords have taken allodial titles to their lands, the people on each of their lands, shall not be deprived of the right to take firewood, house timber, aho chord, thatch or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.

2 Rev. Laws Haw. 2141-2142; ROA at 752 (State's Opp'n Mem., Ex. 8). A footnote adds: "This s. was amended by L. 1851, p. 98, by striking out the second sentence and also the words 'should they need them' twice, and slightly modified, it is C. C. 1859, s. 1477; Cp. L. s. 1477; C. L. s. 2136, s. 576 of this Revision."

[8] These limitations on ownership and the concomitant duty of the sovereign with regard to the natural resources of the State are further recognized and set forth in Article XI, section 1 of the Hawaii Constitution:

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

Article XI, section 7 of the Hawaii Constitution further states as to water resources:

> The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

Article XI, section 1 and Article XI, section 7 have adopted the public trust doctrine as a fundamental principle of constitutional law in Hawaii. Waiahole I, 94 Haw. at 132, 9 P.3d at 444.

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. See Kahookiekie v. Keanini, 8 Haw. 310 (Haw. King. 1891) (the court ordered a landowner with springs on his land to take down a flume that was diverting water from its natural water course).

In what the Hawaii Supreme Court has called "the seminal modern expression of the public trust doctrine," the U.S. Supreme Court stated:

> The control of the state for purposes of the trust can never be lost. . . . The State can no more abdicate its trust over property in which the whole people are interested. . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Waiahole I, 94 Haw. at 127-128, 9 P.3d at 439-40 (quoting Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892)). The legislature cannot abdicate and extinguish the public trust by statute. Id., 94 Haw. at 130-31, 9 P.3d at 443. Accordingly, the Hawaii Supreme Court has found the public trust doctrine to be an exception to the land court statute. Sanborn, 57 Haw. at 593, 562 P.2d at 776.

In Sanborn, the issue before the Court involved determination of the Sanborns' beachfront title line and the "primary question" was whether the line was "to be determined according to Hawaii's general law of ocean boundaries, or whether certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration" were "to prevail." Id., 57 Haw. at 588, 562 P.2d at 773. The Court found that the State was bound by the land court decree to the extent that the title was fixed as along the high water mark at seashore, but that the specific distances and azimuths given for the high water mark in the decree were not conclusive, but were merely prima facie descriptions of the high water mark that are presumed accurate until proven otherwise. The Sanborns

had contended that Haw. Rev. Stat. § 501-71 gave binding effect to the specific distances and azimuths set out in the land court decree no matter what kind of boundary is being described. The Court responded to this contention as follows:

> Literally, § 501-71 states in general terms that a land court decree of registration shall bind the land and be conclusive. **The section does not say that every aspect of a land court decree is always conclusive.**
>
> The underlying purpose of a land court registration under the Torrens system is to afford certainty of title, but it is unrealistic to expect the system to afford absolute certainty. Our statute explicitly states certain exceptions to the conclusiveness of land court decrees, both in HRS § 501-82 and in HRS § 501-71. . . . Such stated exceptions are not necessarily the sole limitations upon a Torrens decree of registration.

Id., 57 Haw. at 591, 562 P.2d at 775 (emphasis added).

The Court went on to declare as follows:

> **In Hawaii, the public trust doctrine, recognized in our case law prior to the enactment of our land court statute, can similarly be deemed an exception to our land court statute, thus invalidating any purported registration of land below high water mark.** Although the instant case is decided on narrower grounds, infra, we approve this court's analysis in Sotomura, supra, 55 Haw. at 183-184, 517 P.2d at 63, where it is stated, with reference to land courted property, that land below high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes.

Id., 57 Haw. at 593-94, 562 P.2d at 776 (footnote deleted and emphasis added).

Hawaii was not the first to recognize exceptions to land registration. In Swan Island Club, Inc. v. Yarbrough, 209 F.2d 698 (4th Cir. 1954), a dispute arose between a private club and hunters who had placed duck blinds over underwater shoal lands that were registered by the club under the North Carolina Torrens Act, which is their land registration law. The court found:

> that the title to lands under navigable waters is held by the state in trust for the use of the public and grants for such lands have been forbidden throughout the state's history.

Id., 209 F.2d at 699-700. The court concluded that:

> In light of the public policy thus declared, we do not think that the legislature of the state in the passage of the Torrens Act . . . could have intended that title should be vested by a judgment . . . with respect to land under navigable waters. . . . (I)t is but reasonable to read into (the Torrens Act) an exception with respect to lands lying under navigable waters.***
>
> The purpose of a proceeding under the Torrens law is to remove clouds from title and resolve controversies with regard thereto, not to validate title to lands which under the law of the state . . . are not subject to private ownership.

Id., 209 F.2d at 701-02.

An easement for the free flowage of water has always existed on the property, and that easement, as a public trust resource, is an exception to land court registration. Thus, the land court erred in failing to find an easement for the free flowage of any waters through, over, under, and across the property. ROA at 997 (Findings of Fact, Decision and Order, FOF 28). The land court's order and decree should be reversed. ROA at 990, 1003.

C. Land court registration could not extinguish the government's ownership of minerals and metallic mines, and an easement for the free flowage of water to give Campbell's predecessor greater title

Land court is a court of limited jurisdiction created by the legislature for the purpose of carrying into effect the Torrens title system of land registration. In re Estate of James Campbell, 66 Haw. 354, 358, 662 P.2d 206, 208 (1983). Named for Sir Richard Torrens, a nineteenth century reformer of Australian land laws, the Torrens title system was initially adopted in Hawaii in 1903. Id. The land court derives all of its power from

statutes relating to it, and can exercise no power not found within the statutes. Id. The statutory foundation for land court, Haw. Rev. Stat. § 501-1, provides in relevant part:

> 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, and also have jurisdiction over such other questions as may come before it under this chapter, subject to the rights of appeal under this chapter. The proceedings upon the application shall be proceedings in rem against the land, and the decrees shall operate directly on the land and vest and establish title thereto.

Thus,

> Every application for registration of title filed in the land court presents to the court the duty to determine whether or not the applicant is the owner of such a title as is proper for registration but where there is more than one answering defendant, the court is without power to adjudicate title as between them[.]

In re Kaimuki Land Co., Ltd., 35 Haw. 254 (1939), overruled on other grounds by State v. Magoon, 75 Haw. 164, 858 P.2d 712 (1993).

Not even in land court can a grantor give a grantee greater title than that of its grantor. Marsh v. Carlson, 390 N.W.2d 897, 901 (Minn. Ct. App. 1986)(fact that reservation of riparian rights did not appear on a lakefront property owner's warranty deed or on its vendor's certificate of title did not invalidate the reservation as grantor could not give the grantee greater title than it had).

> Registration is not meant to make land more valuable by extinguishing nontitleholders' right in it; it is intended to make title more marketable by making title more certain. . . . "the best guide in determining the limits of the conclusiveness of the register" is the "general principle ... that registration of title is not intended to change the substantive law of property, or interfere with rights under that law except so far as is necessary for the carrying out of its professed objects-facility in dealing with land and security of title to land."

Triangle Center, Inc. v. Department of Public Works, 438 N.E.2d 798, 803 (Mass. 1982) (citations omitted) (the government's right to drain a *de minimis* quantity of water onto private land is not a part of the bundle of sticks traditionally associated with ownership of land, so the government's right was not extinguished when not noted on registration certificate).

Nor can an erroneous land court certificate of title create an interest in land. Estate of Koester v. Hale, 211 N.W.2d 778, 782 (Minn. 1973). In Estate of Koester, a certificate of title erroneously included surrounding lands that the titleholders had not purchased. Id. at 780. The titleholders argued that their certificate of title gave them an enforceable interest in the surrounding lands because the time within which to amend the certificate of title had passed, and the plaintiff's predecessor had been served with notice of the registration proceedings and chosen to default. Id. at 781. Rejecting this argument, the court stated:

> No person holding a certificate of title to registered land ought to acquire title to land not intended to be purchased and conveyed, and for which no consideration was paid, solely on the ground that the basic purpose of the Torrens registration procedure precludes a challenge to the title of lands described in the certificate of registration except in cases of land of jurisdiction or fraud. This case represents no more than a correction of an error admittedly committed during the registration proceedings. To permit [titleholders] to maintain their registered title to the disputed tract would exploit the title registration law and would accomplish a manifest injustice.

Id. at 782.

The land court erred because it effectively gave title to Campbell that Campbell never had. The Campbell Trustees never owned the minerals or metallic mines, or public trust rights to water on its property, and Campbell, as their successor in title, does not have them now. As set forth above, those interests have always remained in the

government. Thus, the land court erred in rejecting the State's claim to an easement for the free flowage of waters through, over, under, and across the property, and ownership of the minerals and metallic mines of every kind or description on the property, including geothermal rights, and the right to remove the same. ROA at 997-99 (Findings of Fact, Decision and Order, FOF 28, 30-32 and D&O 1). The land court's order and decree should be reversed. ROA at 990, 1003.

D. The State's ownership of minerals and metallic mines, and an easement for the free flowage of water, are burdens and incidents imposed by law on the property by Haw. Rev. Stat. § 501-81

Additionally, the State's ownership of minerals and metallic mines and an easement for the free flowage of water are burdens and incidents imposed on the property by Haw Rev. Stat. § 501-81. Haw. Rev. Stat. § 501-81 provides that, "Registered land, and ownership therein, shall in all respects be subject to the burdens and incidents which attach by law to unregistered land." The provisions of Haw. Rev. Stat. § 501-81 were a part of the initial enactment of the Land Registration Act, which was Act 56, Session Laws of 1903 (Act 56). See ROA at 752 (State's Opp'n Mem., Ex. 7). Haw. Rev. Stat. § 501-81 has remained very similar to Section 70 of Act 56. See id. Significantly, in both Haw. Rev. Stat. § 501-81 and Section 70 of Act 56, the above-quoted sentence remains the same. Furthermore, the same sentence appears in the law from the time of the Campbell Trustees' 1938 land court registration. Rev. L. Haw. § 5040 (1935).

The plain language of § 501-81 has been confirmed by the Hawaii Supreme Court. Registered land is subject to the same burdens and restrictions:

> **We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81.** Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains

> conclusive; however, the precise location of the high water mark on the ground is subject to change and may always be altered by erosion.

Sotomura, 55 Haw. at 180, 517 P.2d at 61 (emphasis added).

Justice Marumoto's concurring and dissenting opinion in Sotomura, in setting forth his concurrence with the holding, affirms this reading of Sotomura:

> In every land court decree, HRS § 501-81 is impliedly incorporated as a part thereof. HRS § 501-81 provides: 'Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land.' Accretion and erosion are incidents which attach by law to unregistered land.
>
> **Thus, in the case of a land court decree, the doctrine of res judicata applies to the decree with the provision of HRS § 501-81 read into it by implication.**

Id., 55 Haw. at 188, 517 P.3d at 65 (emphasis added).

Furthermore, this Court found the existence of unregistered burdens on land court registered land in Henmi Apartments, Inc. v. Sawyer, 3 Haw. App. 555, 558-59, 655 P.2d 881, 884-85 (1982):

> We recognize that HRS § 501-82 (1976) evidences a policy against unregistered encumbrances upon Land Court registered land. However, we disagree with the Sawyers' contention that such encumbrances may never arise. It is well-settled in this jurisdiction that a valid unregistered easement on Land Court registered land may be implied under certain facts and circumstances.

Laws imposing reservations for mineral and metallic mines in favor of the government and the State's easement for the free flowage of water are burdens and incidents imposed upon the property pursuant to Haw. Rev. Stat. § 501-81. The land court erred when it ruled that the property was not subject to the State's reservations. ROA at 997-98 (Findings of Fact, Decision and Order, FOF 28, 30-32 and D&O 1). The land court's order and decree should be reversed. ROA at 990, 1003.

E. The doctrine of issue preclusion prevents Campbell from claiming that the State's property interests have been extinguished

1. Issues decided by the Land Commission were binding on Campbell in land court

Two of the four original land grants were awarded to Campbell's predecessors in title by the Land Commission. The reservations that are a part of Land Commission Award 7130 dated October 1, 1852, and Royal Patent No. 5693 dated April 19, 1873, both to Kinimaka, and Land Commission Award 8452 Apana dated March 2, 1854, and Royal Patent No. 5616 dated October 15, 1867, both to A. Keohokalole, were binding on Campbell in land court. ROA at 752 (State's Opp'n Mem., Exs. 3-6).

Collateral estoppel, or issue preclusion applies to a subsequent suit between the parties or their privies on a different cause of action and prevents them from relitigating any issue that was actually litigated and finally decided in the earlier action. Bremer v. Weeks, 104 Haw. 43, 54, 85 P.3d 150, 161 (2004).

> The party asserting issue preclusion must establish that: (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom [issue preclusion] is asserted was a party or in privity with a party to the prior adjudication.

Id. (citation omitted).

By the Mahele of the mid-1800s, Kamehameha III proclaimed that he would share lands in the Hawaiian Kingdom with his people. McBryde, 54 Haw. at 184-85, 504 P.2d at 1337-38.

> In 1845, the Board of Commissioners to Quiet Land Titles (Land Commission) was established to facilitate the transition from the traditional landholding scheme to a more western system, while preserving the traditional concept of joint ownership. Its initial purpose was to investigate and settle all land claims of private individuals whether native

> or foreign. It was the Land Commission's responsibility to ascertain or reject claims of interests in land brought before it.

Omerod, 116 Haw. at 247, 172 P.3d at 991 (quotations and citations omitted). The Land Commission was a court with full jurisdiction to settle all claims to land. Dowsett v. Maukeala, 10 Haw.166, 169 (1895). "Both LCAs and Boundary Commission[9] judgments *were judicial determinations*, and were the only legal mode of confirming and fixing boundaries, and when pursued were *binding upon the whole world.*" Omerod, 116 Haw. at 248, 172 P.3d at 992.

In Omerod, the Court held that issue preclusion stopped the plaintiffs in a proceeding to quiet title from challenging the original grants of land issued by the Boundary Commission in 1877. Even though the first proceeding was framed as a boundary question and the second was presented as an issue of ownership, they shared a common issue because the Boundary Commission determined, by metes and bounds, what land the petitioners owned. Id., 116 Haw. at 265-66, 172 P.3d at 1009-10.

The same issue was presented to the Land Commission and the land court, that issue being, what interests in the property did Campbell and its predecessors own. The reservation of mineral rights was self effectuating in Land Commission awards. Robinson, 49 Haw. at 440, 421 P.2d at 577. Campbell acknowledges that "Royal Patent No. 5616 to A. Keohokaloke, for the lands in Malaekahana, [and] Royal Patent No. 5693 to Kinimaka for roughly one half of the lands in Keana, [...] were then subject to a reservation of mineral and metallic mines in favor of the territorial government at that

[9] "When Mahele awards were presented to the Land Commission, many LCAs were made without survey, that is, by name only. Thus, the Boundary Commission was created to enable those who had been awarded lands by name only to afterward procure an authentic description of their land." Omerod, 116 Haw. at 248, 172 P.3d at 992 (quotations and citations omitted).

time." ROA at 94 (Campbell's Supp. Mem.) The Land Commission Awards were also subject to a reservation of water to the people of Hawaii for their common good in all land grants. See Waiahole I, 94 Haw. at 129, 9 P.3d at 441. The decision by the Land Commission constituted a final judgment on the merits. The issue addressed by the Land Commission was essential to the judgment in that it was part of the central claim presented, that being, the awarding of the land grants. **These Land Commission Awards and corresponding Royal Patents are the same documents that were registered in the land court by the Campbell Trustees in 1938.** ROA at 88 (Campbell's Supp. Mem., Ex. N). Petitioner James Campbell Company LLC obtained title to the property in 2007 following termination of the trust, and the Campbell Trustees obtained title before 1934. ROA at 1074 (Tr. June 1, 2009 at 16). As the successor in title to the property, Campbell was in privity with the parties before the Land Commission. Thus, issue preclusion applies to bar Campbell from claiming the minerals and metallic mines and the free flowage of water that were reserved to the government by two of the land grants, Land Commission Award 7130 and Land Commission Award 8452. The land court erred when it ruled otherwise. ROA at 998-99 (Findings of Fact, Decision and Order, FOF 28, 30, 32, D&O 1). The land court's order and decree should be reversed. ROA at 990, 1003.

2. Issues decided in the 1938 land court proceeding were binding on Campbell in the present land court proceeding

The same issue was presented in both land court proceedings, that issue being, what interests in the property did Campbell and the Campbell Trustees, its predecessor in title, own. See ROA at 88 (Campbell's Supp. Mem., Ex. M (Decision)). Then, as now, all that was required to identify the land in a land court application was "a description of

the land with a statement of the estate or interest of the applicant in the land." Rev. L. Haw. § 5014 (1935); Haw. Rev. Stat. § 501-23 (2006). The application and the certificate of title in the 1938 land court registration proceeding described the parcels of land by their original land grants. ROA at 88 (Campbell's Supp. Mem., Ex. A. and Ex. N). By 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. See Marsh, 390 N.W.2d at 901 (boundaries of land conveyed with reference to a subdivision plat are, as a general rule, limited to those designated by the plat, and plat notation was sufficient to put purchaser on notice of the limitation). Those interests did not include minerals and metallic mines or the free flowage of water. See supra. Sections A and B. The fact that the Territory of Hawaii did not claim the minerals and metallic mines or an easement for the free flowage of water in the 1938 proceeding is not a waiver because the Territory would have had no objection to the registration of the land grants, together with all of their reservations. See Robinson, 49 Haw. at 430, 421 P.2d at 572 (asking but leaving open the question of whether the land could even be registered without a reservation of mineral rights, and proceeding to find that the reservation was and is valid). "The final decree of the land court constitutes the final judgment in a land court action and is akin to a final judgment in a civil case." See Magoon, 75 Haw. at 179, 858 P.2d at 720. The 1938 land court decision states, in relevant part, that:

> The court upon the record herein and the evidence adduced at the said hearings finds and holds that the applicants are the owners in fee simple as Trustees under the Will and of the Estate of James Campbell, deceased, of all the lands described in the application, excepting Apana 1, L. C. A. 2744 above mentioned, but subject to the existing encumbrances set forth in the application and conveyances by the applicants during the pendency of these proceedings, which matters shall be appropriately provided for in this decree.

ROA at 88 (Campbell's Supp. Mem., Ex. M (Decision)). Campbell is the successor in title to the Campbell Trustees. See supra. Section E1. Accordingly, issue preclusion applies to the minerals and metallic mines and the free flowage of water that were not owned by Campbell Trustees in the 1938 registration proceeding. The land court erred when it ruled that the property was not subject to the State's ownership of minerals and metallic mines and an easement for the free flowage of water. ROA at 997-99 (Findings of Fact, Decision and Order, FOF 28, 30-32, D&O1). The land court's order and decree should be reversed. ROA at 990, 1003.

VII. CONCLUSION

The land court's order and decree should be reversed. The State of Hawaii respectfully requests that this Court find that Campbell's property is subject to the State's: (1) ownership of minerals and metallic mines of every kind or description on the property, including geothermal rights, and the right to remove the same; and (2) an easement for the free flowage of any waters through, over, under or across the property. The State further requests that this Court order the case be remanded to the land court, and that the land court be directed to note the State's interests on the certificate of title.

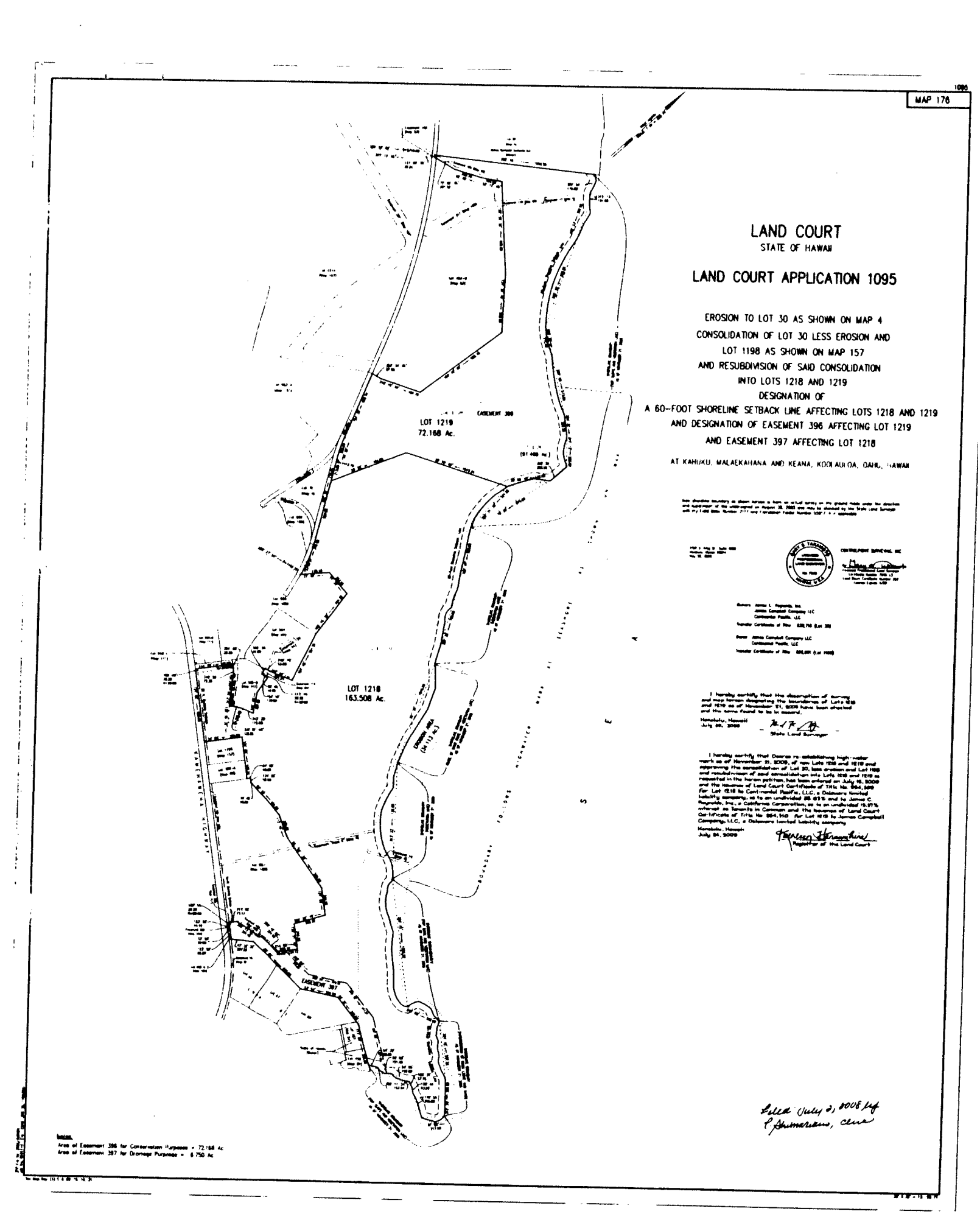
Dated: Honolulu, Hawaii, January 22, 2010.

Respectfully submitted,

JULIE H. CHINA
Deputy Attorney General
Attorney for Respondent-Appellant
STATE OF HAWAII

APPENDIX "A"

Map 176


MAP 176
LAND COURT
STATE OF HAWAII
LAND COURT APPLICATION 1095
EROSION TO LOT 30 AS SHOWN ON MAP 4
CONSOLIDATION OF LOT 30 LESS EROSION AND
LOT 1198 AS SHOWN ON MAP 157
AND RESUBDIVISION OF SAID CONSOLIDATION
INTO LOTS 1218 AND 1219
DESIGNATION OF
A 60-FOOT SHORELINE SETBACK LINE AFFECTING LOTS 1218 AND 1219
AND DESIGNATION OF EASEMENT 396 AFFECTING LOT 1219
AND EASEMENT 397 AFFECTING LOT 1218
AT KAHUKU, MALAEKAHANA AND KEANA, KOOLAULOA, OAHU, HAWAII
LOT 1219
72.168 Ac.
LOT 1218
163.508 Ac.
EASEMENT 396
EASEMENT 397
Area of Easement 396 for Conservation Purposes = 72.168 Ac
Area of Easement 397 for Drainage Purposes = 6.750 Ac
Filed July 2, 2008

APPENDIX "A"

APPENDIX "B"

HAWAII LAW

HAWAII LAW

Haw. Rev. Stat. § 501-1

Haw. Rev. Stat. § 501-23

Haw. Rev. Stat. § 501-71

Haw. Rev. Stat. § 501-81

Haw. Rev. Stat. § 501-82

1903 Sess. Laws Haw. Act 56 § 70

2 Rev. Laws of Haw. 2141-2142 (1925)

2 Rev. Laws of Haw. 2191 (1925)

Rev. L. Haw. § 5014 (1935)

Rev. L. Haw. § 5040 (1935)

§501-1 Court; jurisdiction; proceedings; location; rules, practice, etc. 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, and also have jurisdiction over such other questions as may come before it under this chapter, subject to the rights of appeal under this chapter. 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.

The court shall hold its sittings in Honolulu, but may adjourn from time to time to such other places as the public convenience may require.

The court shall have jurisdiction throughout the State, and shall always be open, except on Saturdays, Sundays, and holidays established by law.

It is a court of record, and shall cause to be made a seal, and to be sealed therewith all orders, process, and papers made by or proceeding from the court and requiring a seal. All notices, orders, and process of the court may run into any judicial circuit and be returnable as the court may direct.

The procedure shall conform as near as may be to the practice in the circuit courts, but subject to the express provisions of this chapter and to general laws and rules of court. Forms prescribed by the court before taking effect shall be approved by the supreme court.

Upon demand for jury trial, issues shall be framed therefor by the circuit judge to whom the case has been assigned. No other issues shall be presented to the jury, and a special verdict shall be rendered.

In this chapter, except where the context requires a different construction, the word "court" or "judge" means the land court, the administrative judge of the circuit court of the first circuit, civil division, or the circuit judge to whom a land court matter is assigned pursuant to section 501-2. [L 1903, c 56, §2; am L 1913, c 21, §1; am L 1921, c 208, §1; RL 1925, §3191; RL 1935, §5000; RL 1945, §12600; RL 1955, §342-1; HRS §501-1; am L 1972, c 91, §1(a), (b); am L 1984, c 102, §3]

APPENDIX "B"

§501-23 Application, form, and contents. The application shall be in writing, signed, and sworn to by the applicant or by some person duly authorized in the applicant's behalf. If there is more than one applicant, the application shall be signed and sworn to by, or in behalf of, each. It shall contain a description of the land, with a statement of the estate or interest of the applicant in the land. It shall state whether the applicant is married, and if married, the name in full of the wife or husband, the time and place of marriage, and the name and office of the officer performing the marriage ceremony; and if unmarried, whether the applicant has been married, and if so, when and how the marriage relation terminated; and if by divorce, when, where, and by what court the divorce was granted. It shall also state the name in full and the address of the applicant and also the names and addresses of the adjoining owners and occupants, if known; and if not known, it shall state what search has been made to find them. If the applicant has been known by more than one name, the applicant shall state all the applicant's names in full. It may be in form as follows:

State of Hawaii.

To the Honorable Judge of the Land Court:

I (or we), the undersigned, hereby apply to have the land herein described brought under the operation and provisions of chapter 501 of the Hawaii Revised Statutes and to have my (or our) title therein registered and confirmed as an absolute (qualified or possessory) title. And I (or we) declare:

(1) That I am (or we are) the owner (or owners) in fee simple of a certain parcel of land, with the buildings (if any, and if not, strike out the clause), situate in (here insert accurate description).

(2) That the land at the last assessment for taxation was assessed at....dollars; and the buildings (if any) at....dollars.

(3) That I (or we) do not know of any mortgage or encumbrance affecting the land, or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion, or expectancy. (If any, add "other than as follows," and set forth each clearly.)

(4) That I (or we) obtained title (if by deed, state name of grantor, date, and place of record, and file the deed, or state reason for not filing. If in any other way, state it).

(5) That the land is....occupied (state name in full, residence and post office address of occupant and the nature of the occupancy. If unoccupied, insert "not").

(6) That the names in full and addresses as far as known to me (or us) of the occupants of all lands adjoining the land are as follows: (give post office address, street, and number wherever possible. If names not known, state whether inquiry has been made, and what inquiry.)

(7) That the names and addresses so far as known to me (or us) of the owners of all lands adjoining above land are as follows: (same directions as above.)

(8) That I am (or we are) married (follow literally the directions given in section 501-23.)

(9) That my (or our) full name (or names), residence and post office address are as follows:

Dated: ..... (Schedule of documents.)

.....
(Signature).

State of Hawaii } ss.

Dated: .....

Then personally appeared the above named..... known to me to be the signer (or signers) of the foregoing application, and made oath before me, that the statements made therein, so far as made of the signer (or signers) own knowledge are true, and so far as made upon information and belief, that the signer (or signers) believes them to be true.

....., Notary Public.

[L 1903, c 56, §21; am L 1913, c 21, §1 and c 126, §2; RL 1925, §3210; RL 1935, §5014; RL 1945, §12614; RL 1955, §342-15; HRS §501-23; gen ch 1985; am L 2006, c 38, §11]

§501-81 Legal incidents of registered land. Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing in this chapter shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife; or from liability to attachment or mesne process or levy on execution; or from liability to any lien of any description established by law on land and the buildings thereon, or in the interest of the owner in land or buildings; or to change the laws of descent except as provided in section 501-71; or the rights of partition between coparceners and other cotenants; or the right to take the same by eminent domain; or to relieve such land from liability to be recovered by a trustee in bankruptcy under the provisions of law relating to preferences; or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land; except as otherwise expressly provided in this chapter. [L 1903, c 56, §70; RL 1925, §3259; RL 1935, §5040; RL 1945, §12640; RL 1955, §342-41; HRS §501-81; am L 1972, c 91, §1(p)]

1903 Haw. Sess. Laws Act 56 § 70

LEGAL INCIDENTS OFREGISTERED LAND

Section 70. Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing contained in this Act shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife, or from liability to attachment on *mesne* process or levy on execution, or from liability to any lien of any description established by law on land and the buildings thereon, or in the interest of the owner in such land or buildings, or to change the laws of descent except as provided in Section 92 of this Act, or the rights of partition between co-parceners and other co-tenants, or the right to take the same by eminent domain, or to relieve such land from liability to be recovered by an assignee in bankruptcy under the provisions of law relating to preferences, or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land, except as otherwise expressly provided in this Act or any amendment thereof.

APPENDIX "B"

2 Rev. Laws of Haw. 2191 (1925)

Sec. 6. The form of all royal fee simple patents shall be as follows:

Kamehameha, —, by the grace of God, King of the Hawaiian Islands, by this his royal patent, makes known unto all men that he has for himself and his successors in office, this day granted and given, absolutely, in fee simple unto ....., his faithful and loyally disposed subject, for the consideration of ..... dollars, paid into the royal exchequer, all that certain piece of land, situated at ....., in the island of ....., and described (by actual survey or by natural boundaries as the case may be) as follows:

Containing ..... acres, more or less; excepting and reserving to the Hawaiian government, all mineral or metallic mines, of every description.

To have and to hold the above granted land in fee simple, unto the said ....., his heirs and assigns forever, subject to the taxes to be from time to time imposed by the legislative council equally, upon all landed property held in fee simple.

In witness whereof I have hereunto set my hand, and caused the great seal of the Hawaiian Islands to be affixed, at Honolulu, this ..... day of ....., 18....

APPENDIX "B"

Rev. L. Haw. Section 5014 (1935)

Sec. 5014. Application, form and contents. The application shall be in writing, signed and sworn to by the applicant or by some person duly authorized in his behalf. If there is more than one applicant, the application shall be signed and sworn to by, or in behalf of, each. It shall contain a description of the land, with a statement of the estate or interest of the applicant in the land; it shall state whether the applicant is married, and if married, the name in full of the wife or husband, the time and place of marriage, and the name and office of the officer performing the marriage ceremony; and if unmarried, whether he or she has been married, and if so, when and how the marriage relation terminated; and if by divorce, when, where and by what court the divorce was granted. It shall also state the name in full and the address of the applicant and also the names and addresses of the adjoining owners and occupants, if known; and if not known, it shall state what search has been made to find them. If the applicant shall have been known by more than one name, he shall state all his names in full. It may be in form as follows:

Territory of Hawaii.

To the Honorable the Judge of the Land Court:

I (or we), the undersigned, hereby apply to have the land herein described brought under the operation and provisions of chapter 144 of the Revised Laws of Hawaii 1935, and to have my (or our) title therein registered and confirmed as an absolute (qualified or possessory) title. And I (or we) declare:

(1) That I am (or we are) the owner (or owners) in fee simple of a certain parcel of land, with the buildings (if any, and if not, strike out the clause), situate in (here insert accurate description).

(2) That said land at the last assessment for taxation was assessed at..... dollars; and the buildings (if any) at ..... dollars.

(3) That I (or we) do not know of any mortgage or incumbrance affecting said land, or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion or expectancy. (If any, add "other than as follows," and set forth each clearly.)

(4) That I (or we) obtained title (if by deed, state name of grantor, date and place of record, and file the deed, or state reason for not filing. If in any other way, state it).

(5) That said land is ..... occupied (state name in full, residence and postoffice address of occupant and the nature of his occupancy. If unoccupied, insert "not").

(6) That the names in full and addresses as far as known to me (or us) of the occupants of all lands adjoining said land are as follows: (give postoffice address, street and number wherever possible. If names not known, state whether inquiry has been made, and what inquiry.)

(7) That the names and addresses so far as known to me (or us) of the owners of all lands adjoining above land are as follows: (same directions as above.)

(8) That I am (or we are) married (follow literally the directions given in section 5014.)

(9) That my (or our) full name (or names), residence and postoffice address are as follows:

Dated this ..... day of ..... in the year 19..... (Schedule of documents.)

.....
(Signature.)

Territory of Hawaii } ss.

.....19.....

Then personally appeared the above named.....
known to me to be the signer (or signers) of the foregoing application, and made oath before me, that the statements made therein, so far as made of his (or their) own knowledge are true, and so far as made upon information and belief, that he (or they) believes them to be true.

.....Notary Public.

[L. 1903, c. 56, s. 21; am. L. 1913, c. 21, s. 1; am. L. 1913, c. 126, s. 2; R. L. 1925, s. 3210.]

APPENDIX "B"

Rev. L. Haw. Section 5040 (1935)

LEGAL INCIDENTS OF REGISTERED LAND.

Sec. 5040. Same as of unregistered land. Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing contained in this chapter shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife; or from liability to attachment or mesne process or levy on execution; or from liability to any

lien of any description established by law on land and the buildings thereon, or in the interest of the owner in land or buildings; or to change the laws of descent except as provided in section 5089; or the rights of partition between coparceners and other cotenants; or the right to take the same by eminent domain; or to relieve such land from liability to be recovered by an assignee in bankruptcy under the provisions of law relating to preferences; or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land; except as otherwise expressly provided in this chapter. [L. 1903, c. 56, s. 70;.R. L. 1925, s. 3259.]

APPENDIX "B"

APPENDIX "C"

Findings of Fact, Decision and Order Filed July 16, 2009

Decree Filed July 16, 2009

Relevant portions of the June 1, 2009 transcript before the Land court in Land Court App. No. 1095, Land Court No. 08-1-0054, are attached pursuant to Haw. R. App. P.28(b)(3) and (b)(4)(c).

IN THE LAND COURT OF THE STATE OF HAWAII

In the Matter of the Application of THE TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, to register and confirm title to land situated at Kahuku, District of Koolauloa, City and County of Honolulu, State of Hawaii	LAND COURT APPLICATION NO. 1095 FINDINGS OF FACT, DECISION AND ORDER (MAP 176); CERTIFICATE OF SERVICE L.C. Case No. 08-0054

2009 JUL 16 PM 4:1

FINDINGS OF FACT, DECISION AND ORDER (MAP 176)

The records show the following:

1. The Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements of JAMES CAMPBELL COMPANY LLC, a Delaware limited liability company, CONTINENTAL PACIFIC, LLC, a Delaware limited liability company, and JAMES C. REYNOLDS, INC., a California corporation for correction of boundary to reflect erosion of Lot 30, as shown on Map 4 of Land Court Application No. 1095 and other relief sought therein was filed on July 2, 2008, and it, together with the map showing such erosion filed with said petition, was referred to the State Land Surveyor, who reported "that the description and map has been examined and checked as to form and mathematical correctness and found to be in accord."

2. The Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements of JAMES CAMPBELL COMPANY LLC, a Delaware limited liability company, CONTINENTAL PACIFIC, LLC, a Delaware limited liability company, and JAMES C. REYNOLDS, INC., a California corporation, for correction of boundary to reflect erosion of Lot 30, as shown on Map 4 of Land Court Application No. 1095 and other relief sought therein was filed on February 12, 2009.

APPENDIX "C"

3. The only adjoining landowner other than James Campbell Company LLC, Continental Pacific, LLC and James C. Reynolds, Inc., is the State of Hawai'i.

4. Due notices were served on the Attorney General, and all other interested parties as required by law and the rules of this Court.

5. The State of Hawai'i filed an Answer with the Court on March 11, 2009.

6. The City and County of Honolulu filed an Answer with the Court on March 20, 2009.

7. A return hearing was held on March 30, 2009, and the matter was set for hearing on June 1, 2009.

8. Petitioner James Campbell Company LLC filed a Reply Memorandum in Support of its Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements with the Court on March 24, 2009.

9. Petitioner James Campbell Company LLC filed a Supplemental Memorandum of Facts and Law in Support of its Petition with the Court on May 20, 2009.

10. The State of Hawai'i filed a Memorandum in Opposition to Petitioner's 'Reply Memorandum' dated March 24, 2009 with the Court on May 22, 2009.

11. Petitioner James Campbell Company LLC filed a Supplemental Memorandum in Response with the Court on May 27, 2009.

12. The State of Hawai'i, by its attorneys, Julie China, Esq. and Linda Chow, Esq., Deputies Attorney General, appeared at the hearing on June 1, 2009 and argued the matter on behalf of the State of Hawai'i.

13. Petitioner James Campbell Company LLC, by its attorneys, Christopher J. Cole, Esq., and Mark K. Murakami, Esq., appeared at the hearing on June 1, 2009 and argued the matter.

14. Continental Pacific, LLC, by its attorney, Burt T. Lau, Esq., appeared at the hearing on June 1, 2009, but did not argue the matter.

15. Except as noted above, no answers have been filed or appearances noted.

BASED UPON THE FOREGOING, THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

1. On or around July 16, 1934, the Trustees under the Will and of the Estate of James Campbell, Deceased, filed an Application with this Court to register title to their land in Kahuku, Island of Oahu, City and County of Honolulu, Territory of Hawaii and to bring that land under the operation and provisions of Chapter 186 of the Revised Laws of Hawaii, 1925.

2. In accordance with Section 3219 of Chapter 186 of the Revised Laws of Hawaii (1925), the Court referred the Application to a Court appointed examiner of title, and after a review of the title, a Report of Examiner was filed with this Court on October 2, 1934.

3. As set forth in the Report of the Examiner, title to the registered land that is now the subject of the Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements that is being adjudicated by

this Court in this action derived from four (4) sources. They are: (1) Land Commission Award No. 8452 Apana 1 and Royal Patent No. 5616, both to A. Keohokalole, for lands in the ahupua'a of Malaekahana, (2) Land Commission Award No. 7130 and Royal Patent No. 5693, both to Kinimaka for roughly one half of the lands in the ahupua'a of Keana, (3) Grant No. 550 to Charles Gordon Hopkins for the remaining one half of the lands in the ahupua'a of Keana, and (4) Deed of Kamehameha III to Charles Gordon Hopkins dated September 10, 1851, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 5, Page 153 for lands in the ahupua'a of Kahuku.

4. Royal Patent No. 5616 to A. Keohokalole, for the lands in Malaekahana, Royal Patent No. 5693 to Kinimaka for roughly one half of the lands in Keana, and Grant No. 550 to Charles Gordon Hopkins for the remaining one half of the lands in Keana were then subject to a reservation of mineral and metallic mines in favor of the territorial government at that time.

5. The Deed of Kamehameha III to Charles Gordon Hopkins dated September 10, 1851, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 5, Page 153 for lands in the ahupua'a of Kahuku did not contain a reservation of mineral and metallic mines in favor of any government or person.

6. The Territory of Hawaii was provided notice of the application proceedings in Land Court Application No. 1095, as evidenced by the Citation filed on September 14, 1936 in this Land Court Application.

7. The Territory of Hawaii, through its Attorney General, filed an Answer and Claim of the Territory of Hawaii (the "Territory's Answer and Claim") in this Court on February 26, 1937.

8. The Territory of Hawaii made a claim to this Court, including a claim of fee simple title to two parcels, a claim that the legal descriptions of Exclusions 8, 9 and 10 of which the Territory of Hawaii had title, were erroneous, a claim for easements over Lot J, Lot C, and Lot D, and a claim that the Territory of Hawaii and all other owners of Kuleanas situated within the lands described in the application are entitled to rights-of-way by necessity to the nearest public highway.

9. The Territory's Answer and Claim did not assert a claim for a reservation of mineral and metallic mines of every kind or description on the property, including geothermal rights, and the right to remove the same.

10. The Territory's Answer and Claim asserted "[t]hat the Territory of Hawaii and all other owners of Kuleanas situated within the lands described in the application are entitled to rights-of-way by necessity to the nearest public highway."

11. The Territory's Answer and Claim did not assert a claim for a reservation of the rights of native tenants.

12. The Territory's Answer and Claim did not assert a reservation of all right, title, interest, or claim to waters having their source upon or flowing over or under the property.

13. The Territory's Answer and Claim did not assert a claim of a reserved easement for the free flowage of waters through, over, under, and across the property.

14. The Territory's Answer and Claim did not assert a claim for a reservation of the Territory's interest in all religious, historical, and archeological sites on the property.

15. The Territory's Answer and Claim did not assert any other rights.

16. After a hearing, this Court issued its decision (the "Decision") which was filed on November 30, 1937. This Court's Decision stated that all claims of the Territory of Hawaii in the Territory's Answer and Claim have been settled by agreement with the applicants or by exchange deeds filed in the record herein.

17. This Court's Decision addressed the matter of rights of way for exclusions out to the government road.

18. This Court entered its original Decree which was transcribed and resulted in the issuance of Original Certificate of Title No. 17,854.

19. The 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 of every kind or description on the property, including geothermal rights, and the right to remove the same, a reservation of the rights of native tenants, a reservation of all right, title, interest, or claim to waters having their source upon or flowing over or under the property, a reserved easement for the free flowage of waters through, over, under, and across the property, a reservation of the Territory's interest in all religious, historical, and archeological sites on the property, or a reservation of any other rights.

20. Neither the Territory of Hawaii nor any other party took an appeal from this Court's Decree of registration of the lands of the Trustees under the Will and of the Estate of James Campbell, Deceased in Land Court Application No. 1095.

21. Petitioner JAMES CAMPBELL COMPANY LLC, a Delaware limited liability company, Petitioner CONTINENTAL PACIFIC, LLC, a Delaware limited liability company, and Petitioner JAMES C. REYNOLDS, INC., a California corporation, are the current owners of Lot 30, as shown on Map 4, and Lot 1198, as shown on Map 157 that are the subject of the Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements that is the subject of this case.

22. The high-water mark, which is the seaward boundary of new Lot 1218, and new Lot 1219, as of November 21, 2005, is as shown on Map 176 of Land Court Application No. 1095.

23. The change in location of the seaward boundary has been due entirely to natural erosion of the original Lot 30 on the seaward side.

24. The State of Hawai'i has asserted, and the Court finds that the State of Hawai'i owns the submerged lands up to the highest reaches of the wash of the waves, including 34.113 acres of eroded land.

25. Lot 30 less erosion is consolidated and resubdivided and redesignated as Lot 1218 and Lot 1219, both as shown on Map 176, that a 60 foot shoreline setback line is created and shown on Map 176 as affecting Lot 1218 and Lot 1219, both as shown on Map 176,

that Easement "396" (area 72.186 acres) for conservation purposes is designated on Lot 1219, and that Easement "397" (area 6.750 acres) for drainage purposes is designated on Lot 1218.

26. Petitioner JAMES CAMPBELL COMPANY LLC, a Delaware limited liability company is owner of new Lot 1219, as shown on Map 176; and

27. Petitioner CONTINENTAL PACIFIC, LLC, a Delaware limited liability company, and Petitioner JAMES C. REYNOLDS, INC., a California corporation are the owners of new Lot 1218, as shown on Map 176, with CONTINENTAL PACIFIC, LLC, a Delaware limited liability company, owning an undivided eighty-six and sixty-three one hundredths percent (86.63%) fee simple interest therein, and with JAMES C. REYNOLDS, INC., a California corporation, owing the remaining undivided thirteen and thirty-seven one hundredths percent (13.37%) fee simple interest therein, with CONTINENTAL PACIFIC, LLC, and JAMES C. REYNOLDS, INC. being tenants in common.

28. The State of Hawai'i has asserted, and the Court finds that the State of Hawai'i has reserved an interest in water rights, if any, that may affect the land that is the subject of the Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements, but the interest of the State of Hawai'i, if any, is not an easement or encumbrance upon registered title.

29. The State of Hawai'i has asserted, and the Court finds that the State of Hawai'i has reserved an interest in the rights of native tenants, if any, that may affect the land that is the subject of the Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements, but the interest of the State of Hawai'i, if any, is not an easement or encumbrance upon registered title.

30. The reservations of mineral and metallic mines in (i) Royal Patent No. 5616 to A. Keohokalole, for the lands in Malaekahana, (ii) Royal Patent No. 5693 to Kinimaka for roughly one half of the lands in Keana, and (iii) Grant No. 550 to Charles Gordon Hopkins for the remaining one half of the lands in Keana were extinguished by issuance of the original decree in Land Court Application No. 1095 in 1938.

31. The land in Kahuku conveyed by Deed of Kamehameha III to Charles Gordon Hopkins dated September 10, 1851, recorded in the Bureau of Conveyances of the State of Hawai'i in Liber 5, Page 153, never was subject to a reservation of mineral and metallic mines in favor of any government or person.

32. Except for the rights described in Finding of Fact No. 24, and except for the reserved rights, if any, described in Finding of Fact No. 28 and Finding of Fact No. 29, the State of Hawai'i has not produced sufficient evidence to support its argument that the State of Hawai'i has the ownership or other reserved interests described in paragraphs 1, 3, 4, 5, 6 and 7 of the prayer for relief set forth on pages 4-5 of the Answer of the State of Hawai'i filed with this Court on March 11, 2009.

33. As set forth in the Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements in this matter, Lot 1198 and new proposed Lot 1218 are subject to a grant of easement in favor of the City and County of Honolulu and its Board of Water Supply, and new proposed Lots 1218 and 1219 are subject to the location of the shoreline setback line in accordance with City's regulation and/or ordinance.

34. That Lots 30 and 1198 and the new proposed Lots 1218 and 1219 are subject to the paramount power of the City and County of Honolulu to assess and collect real property taxes, penalties and interest which are or may become due, and which, under HRS Section 501-82(2), need not be noted as an encumbrance against title.

BASED UPON THE FOREGOING, THE COURT HEREBY ISSUES THE FOLLOWING DECISION AND ORDER:

1. Except for the rights described in Finding of Fact No. 24, and except for the reserved rights, if any, described in Finding of Fact No. 28 and Finding of Fact No. 29, the State of Hawaii's request to have this Court rule that the State of Hawai'i has, or has reserved, any ownership interest in or reservation affecting the subject property, including, without limitation, those set forth in paragraphs 1, 3, 4, 5, 6 and 7 of the prayer for relief set forth on pages 4-5 of the State of Hawaii's Answer filed herein on March 11, 2009, is denied.

2. The Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements is granted.

3. A decree shall be entered in conformity herewith and the Assistant Registrar of this Court is authorized and directed to endorse on the new Certificate of Title to be issued for Lot 1218 and on the new Certificate of Title to be issued for Lot 1219 a reference to said decree.

DATED: Honolulu, Hawai'i JUL 16 2009, 2009.

Gary W.B. Chang
JUDGE OF THE LAND COURT

APPROVED AS TO FORM:

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

APPROVED AS TO FORM:

BURT T. LAU
RONALD H. W. LUM, JR.
Attorneys for Petitioner CONTINENTAL PACIFIC, LLC

APPROVED AS TO FORM:

KENNETH K. P. WONG
BARRY A. SULLIVAN
Attorneys for Petitioner JAMES C. REYNOLDS, INC.

APPROVED AS TO FORM:

JULIE H. CHINA
Deputy Attorney General, Attorney for Respondent STATE OF HAWAII

APPROVED AS TO FORM:

WINSTON K. Q. WONG
Deputy Corporation Counsel, Attorney for Respondent CITY AND COUNTY OF HONOLULU

IN THE LAND COURT OF THE STATE OF HAWAII

In the Matter of the Application of THE TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, to register and confirm title to land situated at Kahuku, District of Koolauloa, City and County of Honolulu, State of Hawaii	LAND COURT APPLICATION NO. 1095 L.C. CASE NO. 08-0054 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing document will be duly served upon the following parties via U.S. Mail, First Class, postage prepaid:

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Winston K.Q. Wong. Esq.
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City and County of Honolulu
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Attorney for the City and County of Honolulu

DATED: Honolulu, Hawaii, June 15, 2009.

CARLSMITH BALL LLP

By _____
MARK K. MURAKAMI
CHRISTOPHER J. COLE
Attorneys for James Campbell Company LLC, a Delaware limited liability company

4812-4315-7762.4.060497-00878

IN THE LAND COURT OF THE STATE OF HAWAII

In the Matter of the Application of THE TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, to register and confirm title to land situated at Kahuku, District of Koolauloa, City and County of Honolulu, State of Hawaii	)	LAND COURT APPLICATION NO. 1095 DECREE (MAP 176)

2009 JUL 16 PM 4:01

DECREE (MAP 176)

In conformity with the Findings of Fact, Decision and Order entered herein on JUL 16 2009, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Map 176 of Land Court Application No. 1095 be and the same is hereby approved;

2. The high-water mark, being the seaward boundary of new Lot 1218, and new Lot 1219, as of November 21, 2005, is as shown on Map 176;

3. JAMES CAMPBELL COMPANY LLC, a Delaware limited liability company, one of the petitioners herein, is the owner of new Lot 1219 as shown on Map 176;

4. CONTINENTAL PACIFIC, LLC, a Delaware limited liability company, and JAMES C. REYNOLDS, INC., a California corporation, both petitioners herein, are the owners of new Lot 1218, as shown on Map 176, with CONTINENTAL PACIFIC, LLC, a Delaware limited liability company, owning an undivided eighty-six and sixty-three one hundredths percent (86.63%) fee simple interest therein, and with JAMES C. REYNOLDS, INC., a California corporation, owing the remaining undivided thirteen and thirty-seven one

APPENDIX "C"

hundredths percent (13.37%) fee simple interest therein, with CONTINENTAL PACIFIC, LLC, and JAMES C. REYNOLDS, INC. being tenants in common; and

5. The Assistant Registrar of the Land Court is hereby authorized and directed to endorse on the new Certificate of Title to be issued for Lot 1218 and on the new Certificate of Title to be issued for Lot 1219 a reference to this decree and to said map.

DATED: Honolulu, Hawaii JUL 16 2009.

KATHLEEN HANAWAHINE
REGISTRAR OF THE LAND COURT

LAND COURT STATE OF HAWAII

IN THE LAND & TAX APPEAL COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

JAMES CAMPBELL COMPANY LLC, et al, Petitioner, vs. State of Hawaii, City & County Of Honolulu, Respondents.	Land Court No. 08-1-0054

TRANSCRIPT OF PROCEEDINGS

before the Honorable Gary W.B. Chang, Judge, Fourteenth Division, presiding, on June 1, 2009.

Hearing on Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line due to Erosion and Designation of Easements.

APPEARANCES:

CHRISTOPHER J. COLE, ESQ. MARK K. MURAKAMI, ESQ.	For James Campbell Company LLC
BERT LAU, ESQ.	For Continental Pacific
JULIE H. CHINA, ESQ. LINDA CHOW, ESQ. Deputies Attorney General	For State of Hawaii

REPORTED BY
Sharon L. L. Hulihee, RPR, CSR 306
Official Court Reporter
State of Hawaii

Official Court Reporters
First Circuit Court
State of Hawaii

APPENDIX "C"

the distinguishing feature of the Sanborn case. When you're talking about shoreline and submerged lands, that's different and it's treated differently by Land Court. There's statutory provisions that address submerged lands. The State does own the title to those lands but it's not because they own the waves that are crashing on the shores; it's because they own the land underneath it so therefore it is a matter of title. That's the only reason why those cases -- that's the reason why those cases are distinguishable.

There's no case that says anywhere that water falls, which is all property in the state, means that the State owns the land where the water falls or where the water may pool or pond even or where water collects in the ground water. All land in Hawaii has ground water under it so that doesn't give this court jurisdiction title to land issues just because there's ground water under this property, just like any other property, so there's no reason to single this property out for any sort of encumbrance that actually will go to the -- to impair the vested title in the decree from 1938.

THE COURT: Okay. I think that this case has been unusual because, to date, this is the first time in this court in the last 10 years that anyone has challenged the State's reservations. I see some merit to the

arguments being presented as to some of the claimed reserved rights and I think that the record has been further clouded by the Territory's, I don't want to say failure, but the fact that the Territory did not specifically reserve its traditional metallic and mineral mines rights, etcetera, and water rights with respect to the original registration of the subject property.

So in balancing what the court believes are some of the priority interests of the people in general as opposed to the private interests of the owner of the land, because they raise a constitutional question of illegal taking without compensation, although that issue is somewhat obliquely raised primarily during argument, I think that the petition has merit and the court will grant the petition subject to the following two reservations in favor of the State: number one, the State's interest, if any, in water rights; and, number two, State's interest in native tenants' rights.

The other claimed reservations of the State are not persuasively established on this record to this court so the court will deny all other requested reservations. So there will be two -- petition will be granted subject to two reservations, that as to the State's rights, if any, in water and native tenants' rights.

Any questions or further record to be made, first, by the petitioner, Mr. Cole?

Mr. Cole, anything further?

MR. COLE: No questions.

THE COURT: Okay. And if you'll be so kind as to prepare an appropriate order.

Ms. China, any further arguments or records to be made?

MS. CHINA: I just wanted to clarify that the reservation of metallic mines that were in the original RP's and grants are no longer going to be recognized. Is that the court's ruling?

THE COURT: That's correct.

MS. CHINA: Okay.

THE COURT: Anything else?

Okay. I want to thank you very much for the very interesting and educational briefing that you did. Obviously you worked very hard on this case. It is somewhat unusual but I thank you very much for providing the court with the informative briefs and the very interesting arguments that helped focus the court's attention on the various issues.

All right. Thank you very much.

MR. COLE: Thank you, your honor.

THE COURT: Court stands in recess.

STATEMENT OF RELATED CASES

There are no known related cases pending in the Hawaii courts or agencies.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this date, two copies of the foregoing document were duly served on the following parties via U.S. Mail, first-class postage prepaid:

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DATED: Honolulu, Hawaii, JAN 22 2010.

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