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
	)	HON. Gary W.B. Chang
to register and confirm title to land situate at Kahuku, District of Koolauloa, City and County of Honolulu, State of Hawaii	)	

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

CONSTITUTIONS AND STATUTES

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

Page

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

Pursuant to Haw. R. App. P. 28(g) and this Court's Order Granting Motion of Pacific Legal Foundation for Leave to Submit Brief Amicus Curiae in Support of Appellee (May 24, 2010), Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner-Appellee James Campbell Company LLC (Campbell).

SUMMARY OF ARGUMENT

This appeal presents an issue left unaddressed by the Hawaii Supreme Court in *In re Robinson*, 49 Haw. 429, 421 P.2d 570 (1966). Namely, whether the government waives a reservation of mineral and mining rights when it fails to raise and protect it in a Land Court title registration case, or whether government's mineral and mining rights are inherent servitudes that need not be reflected in a Land Court decree.

Under Hawaii's Torrens Land Act – codified at Haw. Rev. Stat. § 501-1, *et seq.*, – the State of Hawaii (State) guarantees indefeasible title to the rights and interests reflected in the register. Land Court registration insures that interests which are not reflected on title do not exist, and persons who are wrongfully deprived of land or their interest through registration or the act or omission of the registrar are entitled to be paid by an indemnity fund, and the State's guarantee operates against all claims, including claims by the State itself.

In the case at bar, the State is arguing that despite the absence of a reservation of mineral and mining rights and a flowage easement in a 1938 Land Court decree confirming title to Campbell's predecessor, Campbell's title is now burdened by these reservations. The State argues that these reservations are "self-effectuating" and inherent in title, and need not have been asserted and preserved by the Territory when it appeared in the 1938 proceeding.

This brief addresses two issues.

First, even if in the original land grants the State of Hawaii's predecessor did not convey – or reserved to itself – mineral and mining rights, they are not "burdens and incidents which attach by law" inherent in all Hawaii land titles. A reservation of mineral and mining rights could have been raised when the Territory appeared asserted other interests in the 1938 Land Court proceeding.

Because the 1938 Land Court decree confirming title in Campbell's predecessor did not reflect a reservation of mineral and mining rights to the Territory, any claims to such rights by the State of Hawaii (State) were extinguished. The fact the State asserted mineral and mining rights claim in the present case seriously undermines its argument that the reservation of this claim is inherent and that it need not have been raised in Land Court at all.

Second, the State's public trust powers do not include the imposition of flowage easements. The State's duty to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people" Haw. Const. art. XI, § 7, does not include a right to physically invade all property with water. If it does, the public trust is a per se physical taking.

IDENTITY AND INTEREST OFAMICUS CURIAE

Founded in 1973, PLF has a long tradition of appearing as a friend of the court and on behalf of parties in support of constitutional rights in Hawaii and federal courts, and has participated in some of the most important regulatory takings, shoreline, and property cases in this Court and the U.S. Supreme Court.[1] PLF is a nonprofit tax-exempt public interest law foundation organized under the laws of the State of California, registered with the State of Hawaii, supported primarily by voluntary private donations from thousands of citizens across the country, including numerous supporters in Hawaii. PLF has offices in Honolulu, as well as Sacramento, California; Stuart,

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1. Most recently for example, PLF attorneys represented parties in *Pono v. Molokai Ranch, Ltd.*, 119 Haw. 164, 194 P.3d 1126 (Haw. Ct. App.) (zoning and environmental law), *cert. rejected*, 2008 WL 5392320, 2008 Haw. App. LEXIS 686 (Haw. 2008); *County of Kauai* ex rel. *Nakazawa v. Baptiste*, 115 Haw. 15, 165 P.3d 916 (2007) (property taxes); and *Maui Tomorrow v. State of Hawaii*, 110 Haw. 234, 131 P.3d 517 (2006) (public trust issues and federal civil rights). PLF is currently participating – or has participated – as amicus curiae in *Leone v. County of Maui*, No. 29696 (regulatory takings); *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 122 Haw. 34, 222 P.3d 441 (Haw. Ct. App. 2009) (shoreline and regulatory takings); *Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 126 P.3d 1071 (2006) (shoreline issues). PLF also represented parties or participated as amicus curiae in *Kelo v. City of New London,* 545 U.S. 469 (2005) (public use in condemnation); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005) (regulatory takings); *Palazzolo v. Rhode Island*, 533 U.S. 601 (2001) (regulatory takings); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulatory takings and shoreline); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (same); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (regulatory takings); *Dolan v. City of Tigard*, 512 U.S.374 (1994) (regulatory takings); *Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989) (shoreline); *Robinson v. Ariyoshi*, 933 F.2d 781 (9th Cir. 1991) (takings); *Public Access Shoreline Hawaii v. Hawaii Planning Comm'n*, 79 Haw. 425, 903 P.2d 1246 (1996) (public trust); *In re Water Use Permit Applications*, 96 Haw. 27, 25 P.3d 802 (2001) (public trust).

Florida; and Bellevue, Washington. PLF is participating in this appeal as amicus curiae since it is concerned whenever the government attempts to upset long-standing rules and settled expectations. This brief provides the Court with historical perspective on the Torrens title registration system, and the potential impacts the State's arguments would have on this system which has provided over one hundred years of land title integrity, if accepted.

STATEMENT OF THE CASE

The State claims that title to property on Oahu's north shore which was registered and confirmed to Campbell by the Land Court in 1938 is subject to the State's ownership of "all mineral and metallic mines of every kind or description on the property, including geothermal rights," even though the Land Court registered title does not reflect the State's claimed interest. The State also claims Campbell's title is subject to a flowage easement in favor of the State, even though Campbell's confirmed title does not reflect an easement, since the public trust in water resources includes a flowage easement.

The case arose when Campbell submitted a petition to the Land Court in 2009 to consolidate and subdivide its land, and the State appeared and asserted its claim to reserved mineral rights and to the flowage easement. The State argued that Campbell's registered title never included interests which the State reserved, even though the State's predecessor (the Territory of Hawaii) appeared in the 1938 proceedings and asserted other claims, and Campbell's title was confirmed to be free of all interests, including the Territory's. The Land Court held that the State's claim of mineral rights was extinguished by the court's 1938 judgment, and that Campbell's title was free of a flowage easement.

The State appealed to this Court, arguing that the original grantor of the land (the King as an individual) did not own the mineral rights, so could not have conveyed them to Campbell, and that the government's reservation of mineral rights is "self-effectuating" whether noted in the land grant or not. It also claims that the government possesses a flowage easement on all Hawaii land as a function of the public trust in water resources. Campbell counters that the State is bound by a Land Court title like any other party, and the fact that its claimed mineral rights and flowage easement were not noted in the certificate of title means that they were extinguished, and that the 1938

proceedings were *res judicata* against the State regarding interests the Territory could have raised, but did not. To impose these interests now, 70 years after its title was confirmed and registered, would be a taking without compensation.

ARGUMENT

I. THE STATE COULD HAVE ASSERTED ITS MINERAL RIGHTS IN THE 1938 REGISTRATION PROCEEDING, BUT DID NOT

A. Land Court Registration Vests Title And Promotes Certainty And Reliance

Hawaii utilizes a dual system of land registration. One is a *deed* registration system, the other is *title* registration (known as "Land Court") – a statutory Torrens scheme where the State guarantees indefeasible title to the rights and interests reflected in the register. Land Court title conclusively establishes title to land. *Aames Funding Corp. v. Mores*, 107 Haw. 95, 101, 110 P.3d 1042, 1048 (2005). Hawaii first adopted the Torrens Land Act in 1903, and it is currently codified in substantially the same form at Haw. Rev. Stat. ch. 501, *et seq. See In re Estate of Campbell*, 66 Haw. 354, 358, 662 P.2d 206, 209 (1983) (The "basic Torrens title system of land registration has continued virtually unaltered to the present.").

The purpose of Land Court registration is to preserve "integrity of title" by making the State the guarantor that if an interest does not appear in the title, it does not exist:

> The Torrens system, in general, is a method of creating a certificate of title and then registering a legal and basically absolute title to real property. This procedure, utilizing none the less, a judicial hearing to adjudicate all claims at the outset, was at one time in effect in 20 states. At the present time only ten states still utilize the (one step) Torrens system. Eleven states have repealed the Torrens statutes. In the remaining ten, in which the Torrens system is still in effect, the system is voluntary, and it functions side by side with the "old style," evidence of title recording system. The ten states are Colorado, Georgia, Hawaii, Massachusetts, Minnesota, North Carolina, Ohio, Virginia, Pennsylvania and Washington. New York recently repealed its registration of title law. In New York State around Buffalo and on Long Island there has been some use of the registration procedure. The registration system, until fairly recently at least, was in substantial use only in Massachusetts, Minnesota and Hawaii.

Todd Barnet, *The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law*, 12 Buff. Envt'l. L.J. 1, 19-20 (2004) (footnotes

omitted).[2] Land Court registration insures that interests not reflected on title do not exist. *See Aames Funding*, 107 Haw. at 103, 110 P.3d at 1050 (In order to preserve the intent and purpose of the land registration system, courts must scrupulously observe the integrity of certificates of title and "every subsequent purchaser of registered land who takes a certificate of title for value . . . is entitled . . . to hold the same free from all encumbrances except those noted on the certificate and the statutory encumbrances enumerated.") (quoting *In re Bishop Trust Co.*, 35 Haw. 816, 825 (Terr. 1941)); *Waikiki Malia Hotel v. Kinkai Prop. Ltd. P'ship*, 75 Haw. 370, 391, 862 P.2d 1048, 1060 (1993) ("The fundamental intent of [Torrens land registration] is to preserve the integrity of titles."). Indeed, persons who are wrongfully deprived of land or their interest through registration or the act or omission of the registrar are entitled to be paid by an indemnity fund, and the State's guarantee operates against all claims, including claims by the State itself.

The Hawaii Legislature adopted the system to simplify transfers, and encourage reliance on land titles:

> [The Torrents Land Act of 1903] provides an economical and convenient manner of recording land titles, which, . . . will do away with the present cumbersome plan of records and largely reduce the expense of land transfers. . . . The plan proposed is such that under it land can be transferred with as great facility as shares of stock are at the present time.

1903 Haw. Senate J. at 337. *See also* William C. Niblack, *Pivotal Points in the Torrens System*, 24 Yale L.J. 274, 284 (1915) (The "purpose of registering titles . . . is two-fold, to give certainty of title to the person who is put on the list of owners of registered estates, and to facilitate transfers of registered estates by doing away with the necessity for any examination of the title back of the last certificate."). Upon issuance of a decree by the Land Court, an owner's title is vested:

The proceedings upon the application shall be proceedings in rem against the land,

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2. "Torrens" title derives its name from Sir Robert Torrens, an Australian by way of Ireland who became the first premier of South Australia. Largely through his efforts, South Australia adopted a system of land registration which was adopted by other common law jurisdictions, including several in the United States. *See In re Estate of Campbell*, 66 Haw. 354, 358, 662 P.2d 206, 209 (1983). "Torrens believed that a land register should show the actual state of ownership, rather than just provide evidence of ownership. Under this system, the government guaranteed all rights shown in the land register." Tim Hanstad, *Designing Land Registration Systems for Developing Countries*, 13 Am. U. Int'l L. Rev. 647, 651 (1998) (footnotes omitted).

and the decrees shall operate directly on the land and vest and establish title thereto.

Haw. Rev. Stat. § 501-1 (1993). Vested rights are "property rights which cannot be taken away by government regulation." *See County of Kauai v. Pacific Standard Life Ins. Co.*, 65 Haw. 318, 324, 653 P.2d 766, 772 (1982) (vested rights are constitutionally-protected property rights). Because it is property, a landowner has a "legitimate claim of entitlement" to the rights vested in a Land Court-confirmed title. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). This has two consequences. First, she is entitled to due process. *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw. 343, 353-54, 949 P.2d 183, 194 (Haw. Ct. App. 1997) ("[D]ue process principles protect a property owner from having his or her vested property rights interfered with . . . and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.") (citations omitted). *See also Brown v. Thompson*, 91 Haw. 1, 11, 979 P.2d 586, 596 (1999) (boat mooring and live-aboard permits are property and may not be revoked without due process). Second, her title is protected from a taking without just compensation. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) ("While the consent of individual officials representing the United States cannot 'estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.") (citations omitted). *See also* Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 Urb. Law. 215, 237-38 (1995) ("A landowner's expectations are investment-back and reasonable when he substantially proceeds in good faith after government approval of his development.").

B. Mineral Reservations Are Not Inherent In Land Titles

As a general rule, a Land Court decree must include all encumbrances burdening the land:

> [A Land Court decree] shall contain a description of the land as finally determined by the court; and shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments, and other encumbrances including rights of husband and wife, if any, to which the land or the owner's estate is subject.

Haw. Rev. Stat. § 501-74 (1993). Mineral and mining rights are encumbrances upon title. *See, e.g.*, *Dedman v Board of Land & Nat. Resources*, 69 Haw. 255, 259, 740 P.2d 28, 31 (1987) (when the

State and Campbell exchanged deeds, "[t]he State reserved, however, mineral rights . . ."). The key issue in the case at bar is whether the Territory was excused from raising and asserting its claim to these encumbrances in the proceedings which resulted in the 1938 Land Court decree. It was not.

Under the Torrens Act, certain encumbrances need not be reflected in a decree. The Act sets forth the "burdens and incidents which attach by law" to all land which need not be raised in Land Court proceedings: (1) Land Court property is not immune from spouse's rights; (2) it is not immune from attachment or levies; (3) it is not immune from liens; (4) Land Court property may be transferred by devise or descent; (5) it may be partitioned; (6) it is not immune from condemnation; (7) it is not immune from bankruptcy laws; and (8) it is treated the same as other property for purposes of any other "burdens and incidents." Haw. Rev. Stat. § 501-81 (1993). Despite mineral and mining rights not appearing on this list, the State asserts, without citation, that "[l]aws 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 this section. Op. Br. at 30.[3]

The State appears to rest its entire case on *In re Robinson*, 49 Haw. 429, 421 P.2d 570 (1966) since that case is its sole support for the claim the government need not reserve mineral and mining rights in a Land Court proceeding, and that they exist despite their absence from a decree. In *Robinson*, the Hawaii Supreme Court held that the omission of the government's reservation of mineral and mining rights in a land commission award was harmless error, since the statutorily prescribed form of the royal patent (and the patent itself) contained the reservation. The court concluded the Land Commission award could not have disposed of the reservation because "[t]he effect of this prescribed form of the patent was to make the mineral rights reservation self-effectuating." *Id.* at 440, 421 P.2d at 577 (citations omitted). In other words, it did not mattter that the patent was silent, the State's reservation was preserved by statute. The court held that the Land

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3. The State also argues that independent of section 501-81, its mineral and mining reservation is inherent in title and did not need to be preserved in the 1938 Land Court decree. It asserts that if the King did not originally grant mineral and mining rights to Campbell's predecessor, then Campbell could never acquire them. The State misses the issue in this appeal; it is not a question of whether the original grants to Campbell's predecessor included mineral and mining rights. That is a straightforward factual issue. The question is whether the State had a duty to preserve any reservation of such rights when the Land Court issued the 1938 decree, and having failed to do so, whether it can do so now, 70 years after final judgment.

Commission award thus preserved the State's reservation, even though the award itself did not reflect it, and because the State's reservation had been preserved, the Land Court decree must reflect it.

This is a much different question than whether in a subsequent Land Court proceeding the State must assert its claims. In *Robinson*, the State *did* assert its claim to have reserved mineral and mining rights in Land Court. In the case at bar, however, it is undisputed the State's predecessor did not. The *Robinson* court did not, as the State argues, conclude that a claim to mineral and mining rights is forever immune from waiver or operation of the rules of claim and issue preclusion because it the reservation is inherent in title. Indeed, the court expressly declined to determine that issue:

> We do not have before us the question of whether a waiver of the mineral rights reservation, by omission of the same from the patent, would have been authorized after the date of the repeal [of the statute]. No such waiver was attempted as to these awards.

Robinson, 49 Haw. at 443 n.14, 421 P.2d at 578 n.14.

If, as the State urges this Court to conclude, it is not necessary for the State to appear and protect its rights in Land Court, and it is not necessary for the State's reservation of mineral and mining rights to be reflected in a Land Court decree, it is fair to wonder why the *Robinson* court remanded the case to the Land Court "for an entry of a modified decree" reflecting the State's reservation. *Id.* at 443, 421 P.2d at 579. Under the State's theory, that would be superfluous. It also does not answer why in the case at bar, the State appeared in Land Court and asserted its claims.

II. IF THE PUBLIC TRUST DOCTRINE IMPOSES A FLOWAGE EASEMENT OVER ALL LAND, IT IS A PER SE PHYSICAL TAKING

The State also asserts the Territory was excused from asserting its claim to a flowage easement because all Hawaii land is inherently subject to the easement by virtue of the public trust in water resources. This argument fails for two reasons. First, the public trust does not impose the physical servitude suggested by the State. Second, if it does impose an easement, the public trust violates the U.S. Constitution because it is a per se physical taking.

A. The Public Trust Does Not Impose An Easement

A "flowage easement" is an interest in land prohibiting a property owner from impeding the

"natural flow or movement of water from an upper estate to a lower one," and "is a servitude which the owner of the latter must bear, though the flowage be not in a natural water course with well defined banks." *Black's Law Dictionary* 576 (5th ed. 1978). In simpler terms, the State asserts it has an inherent right to flood Campbell's – and everyone else's – land pursuant to the State's duties as trustee of the public trust in water resources. The public trust, however, is not so broad.

The State's public trust in water resources is requirement for State to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people." Haw. Const. art. XI, § 7. *See also In re Water Use Permit Applications*, 94 Haw. 97, 9 P.3d 409 (2000). It is not an interest in land, but rather a prohibition of private ownership of water resources. *Robinson v. Ariyoshi*, 65 Haw. 641, 674 n.31, 658 P.2d 287, 301 n.31 (1982) ("the king's reservation of his sovereign prerogatives respecting water constituted much more than a restatement of police powers . . . [and] retained on behalf of the people an interest in the waters of the kingdom which the State has an obligation to enforce and which necessarily limited the creation of certain private interests in waters."). The public water trust imposes upon the State a duty is to "protect" and "promote" water resources, Haw. Const. art. XI, § 1, and to 'to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.'" *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 222-23, 140 P.3d 985, 1002-03 (2006) (quoting *Water Use Permit Applications*, 94 Haw. at 138, 9 P.3d at 450); *Robinson*, 65 Haw. at 674, 658 P.2d at 310). However, unlike the public trust in navigable waters which operates like an easement, the public water trust does not impose a physical servitude or an easement. *Water Use Permit Applications*, 94 Haw. at 136, 9 P.3d at 448 ("The rules developed in order to protect public water bodies and submerged lands for public access and use, however, do not readily apply in the context of water resources valued for consumptive purposes, where competing uses are more often mutually exclusive.") (citing *State v. Public Serv. Comm'n*, 81 N.W.2d 71, 74 (Wis. 1957); *People* ex rel. *Webb v. California Fish Co.*, 138 P. 79, 88 (Cal. 1913). Even assuming that the State need not have raised its public trust duties because it is one of the "burdens and incidents which attach by law" to all land under Haw. Rev. Stat. § 501-81 (1993), the Land Court was correct when it concluded that the State was required to have raised its claim to a flowage easement in the 1938 proceedings because the public trust does not encompass a flowage easement.

B. If The Public Trust Imposes An Easement, It Is A Physical Invasion Taking

If the State's argument the public trust imposes a flowage easement is accepted, however, then the public trust in water resources may be subject to invalidation as a per se physical taking of private property. When regulation or other state action (including judicial action) imposes an easement or otherwise requires a property owner to allow trespass on her land, the U.S. Supreme Court has repeatedly found a taking as a matter of law. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (requirement that marina owner allow public access held a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (a regulation requiring even *de minimus* physical invasion of property violates the Takings Clause); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (conditioning a development permit on allowing a public easement is a taking). Land owners presently have a recognized right to keep floodwaters from damaging their land, even if the flooding is caused by the government. *See, e.g.,Olson v. United States*, 292 U.S. 246 (1934); *Hayashi v. Alameda County Flood Control & Water Conserv. Dist.*, 334 P.2d 1048 (Cal. Ct. App. 1959). It is one thing to for the State to have a duty to "preserve" and "protect" water resources. If, however, that duty includes the power to flood private property, then it "goes too far" because it destroys the most essential stick in the bundle of property rights – the right to exclude others. *See Pennsylvania Coal Co. v. Mahon*, 360 U.S. 393, 415 (1922) (when regulation "goes too far" it will be deemed a taking).

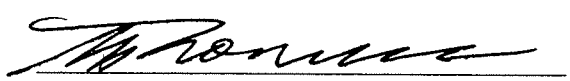
CONCLUSION

Mineral and mining reservations are not inherent in title, and must be raised by the State in Land Court proceedings. The State's public trust duties do not include the ability to burden all land with a right to physically invade it with water. The Land Court's judgment should be affirmed.

DATED: Honolulu, Hawaii, June 8, 2010.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



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