

## HISTORY OF HIGHWATER MARK IN HAWAII

Being an employee of the State, the expressions on the following pages are naturally slanted to the views and position of the State Government. Some of the definitions and interpretations expressed would be disputed and rightfully so since we have several key Highwater Mark Court cases on appeal in the Supreme Court of Hawaii and in the Federal District Court. However, in view of the Opinions and instructions received from the Attorney General of the State of Hawaii, we will continue to adhere to the premise that the Ashford Ruling in 50 Hawaii 314 applies on all seashore properties throughout the State.

Before proceeding any further, let me give you a brief history of the question of Highwater Mark in Hawaii.

As you all know, Hawaii's land tenure system is very unique, having been derived from an absolute monarchy. Under this system all of the lands were considered to be the property of the King. However, the Native Tenants that occupied the Chief's lands were entitled to free access to the beaches and the sea for fishing, bathing and recreation. These Rights were perpetuated and remained as encumbrances on the ocean front lands. It was not until 1848 that the reigning King Kamehameha III finally sponsored Legislation that made it possible for people other than the King to own fee simple lands. In the Great Mahele of 1848, the King and the Chiefs and Konohikis quit-claimed to each other their interest in all of the Ilis and Ahupuaa throughout the Hawaiian Kingdom as listed in the Mahele Book. On all of these lands that were presented to the Board of Commissioners to Quiet Land Titles" for confirmation of their awards, the rights of the native tenants were reserved.

Many of these lands adjoin the sea. Those parcels that were described by metes and bounds (in magnetic bearings) usually referred to the seaward course as running along the sea. To further complicate matters, the Hawaiian Language has many variations and synonym of the phrase "along the sea". These early surveys conducted by "Foreigners" gave no indication as to

whether the term "along the sea" always coincided with the term Highwater Mark as interpreted under Common Law practices. The State contends that it does not. The Surveyors that conducted the early surveys performed in the 1850's used very crude magnetic compasses. These instruments were not capable of measuring elevations. Common law as developed in certain states have accepted mean highwater mark as the seashore boundary. This criteria requires the measurement of a definite elevation to establish and locate the shoreline. There is no record of Bench Marks (elevation monuments) as ever being established during the 1850's and 1860's. The earliest elevations in the Honolulu area were measured and recorded about 1874 after the establishment of the Office of the Surveyor General of Hawaii. The surveys performed by the Surveyor General's staff during 1872 through 1900 never used the phrase "highwater mark" as the seaward boundary as evidenced by the field notes on file in the Survey Division. It was in the late 1890's or 1900's that the term Highwater Mark was first used to denote the seaward boundaries of the fast lands.

Surveyors have continually encountered difficulty in agreeing on exactly where highwater mark lies and how this line should be located. On sandy beaches, most of the surveyors in Hawaii formerly used the "Debris Line" left by the higher of the high tides of the previous night or morning of the survey. In 1932, a legal opinion was rendered by the then Territorial Attorney General dated September 1, 1932 and identified as Opinion No. 1589. This opinion established highwater mark to be "mean highwater mark" which for all practical purposes could be located by means of elevation as being 0.8 of a foot above mean sea level.

In September of 1936, Legal Opinion No. 1627 was issued by the Attorney General elaborating further on the measurement of mean highwater and also the effect of natural erosion on the seaward boundary of a parcel of land bordering the sea. Despite these opinions, the Survey Office continued to use the "Debris Line" on sandy beaches as being the highwater mark. In 1938, Phil and Muriel D. Cass filed an Application for registration of title under Land Court Application 1225 at Heeia, Koolaupoko, Oahu. I will not dwell

on the details of the case but in effect Judge Cristy, Judge of the Land Court ruled that mean Highwater Mark is the seaward boundary. This occurred in May of 1940. No further confrontation regarding Highwater Mark was noted until 1963. This probably can be attributed to the secession of Field Checks of original Land Court Applications by the Survey Department from 1933 to July 1949. Thus, the Survey Office had no knowledge of what criteria was used to locate seaward boundaries of lands that were registered during this period.

From 1950, when I joined the Survey Office Staff, Land Court Applications that ran along the sea adopted the vegetation line or the debris line as the boundary. In February 1963, on an application to claim accretion to several lots registered in the Land Court under Land Court Application 616, commonly referred to as the Dowsett Case, the Judge of the Land Court, the Honorable Harry R. Hewitt rendered a Decision declaring that highwater mark must be located by reference to a tidal elevation. That elevation is most fairly represented by mean high tide. The Attorney General decided not to appeal the case to the Supreme Court of Hawaii because the case was not in the proper posture to be appealed since it was not an original registration. Thus, from 1963 until 1968, Land Court maps that were registered used mean Highwater Mark as well as vegetation and debris lines as the seaward boundaries.

In August of 1963, Clinton R. Ashford and Joan B. S. Ashford filed for registration of title to the Land Court under Land Court Application 1835 located on the Island of Molokai, State of Hawaii. This parcel bordered the sea. The applicant claimed that the seaward boundary was at mean highwater mark using an elevation of approximately 0.4 of a foot above mean sea level. The State contested the Applicants' interpretation of the Highwater Mark. The Honorable Samuel P. King, Judge of the Land Court, ruled and cited the Dowsett accretion case and held that the highwater mark was at the mean high tide.

The State decided that the case should be made a test case to determine once and for all what criteria should be used to set the seaward boundaries of all lands in Hawaii. The State appealed the Decision. The State contended

that during the 1850's when the great majority of the conveyances originated, the Kings of Hawaii had no knowledge or information of tide elevations or bench mark elevations. Such records did not become available on all of the islands until the 1890's. Hence, they never had intended to use elevation in establishing seashore boundaries. Furthermore, there being no record of tide elevation and bench marks the early Surveyors could not have established a seaward boundary at mean highwater mark. The State also argued that the common tenants' rights to access to the sea included the right to use the sandy beaches and traverse along the rocky shoreline to swim, fish and seek other variety of seafoods. These rights of the native tenants were explicitly reserved in the Land Commission Awards granted by the Land Commissioners.

The Supreme Court ruled in favor of the State and reversed the Land Court's decision on April 30, 1968. The Court ruled as follows: "The location of a boundary described as (ma ke kai) is along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." This ruling which was favorable to the State should have resolved our shoreline problems. However, because of a few ambiguities in the decision, we are faced with additional problems.

The State of Hawaii upon instructions from the State Attorney General contends that this Supreme Court ruling encompasses all seaward boundaries. Whether the land has a sandy beach or a rocky sea coast, or whether the land is registered in the Land Court or is unregistered would not exempt the land from this ruling. On the other hand, some Attorneys interpret the decision to affect only grants by the Kings of Hawaii which describe the seaward boundaries as "Ma Ke Kai" (Along the sea).

In 1970, the State of Hawaii once again challenged the location of Highwater Mark in Court. In Land Court Application 1842, Martha Alexander Waterhouse, Applicant, the State claimed that the vegetation line should be the seaward boundary. Land Court Judge Dick Yin Wong on October 12, 1971, ruled that debris line consistent with the Ashford ruling of "upper reaches

of the wash of waves" was the seaward boundary.

The 1970 Legislature enacted the Shoreline Setback Act being Act 136 which amended Section 205-6 of the Hawaii Revised Statutes. In the Act, the term "Shoreline" was defined as "the upper reaches of the wash of waves, other than storm and tidal waves, usually evidenced by the edge of vegetation growth, the upper line of debris left by the wash of waves." This definition is almost identical with the Ashford ruling. Therefore, in effect shoreline is synonymous with Highwater Mark which is the seaward boundary of all seafront property.

In conformance with the Act the various County Planning jurisdictions promulgated and adopted their own Shoreline Setback Rules and Regulations taking effect in June 1971. In all of the four Counties, the State of Hawaii was thrust with the burden of certifying the shoreline maps. The Chairman of the Board of Land and Natural Resources certifies shoreline maps of Hawaii, Maui and Kauai. The State Land Surveyor certifies shoreline boundaries for Oahu.

In early 1971, before the Setback Rules were adopted, the State again got involved in a Shoreline showdown. The City and County of Honolulu Planning Department requested our comments regarding a consolidation resubdivision of several lots in Kailua, Oahu, that bordered along the sea. These lots were a part of an existing Land Court shown on Map 227 of Land Court Application 677, Estate of Harold K. L. Castle, Owner. A location of the shoreline fronting these lots revealed that substantial erosion had occurred. The State requested that the map be revised to show this erosion by changing the seaward boundary of the Land Court map. The applicant refused. The State refused to certify the shoreline map. Without the certification, The Planning Department refused to approve the subdivision. The Attorney General decided to have the Land Court decide the issue. The map was finally filed with the Land Court on March 4, 1971. The petition and map were transmitted to the Survey Division for the usual routine check and report.

The State Land Surveyor filed the Return of the State Land Surveyor for this application but also added this statement in the return, "The

present seashore boundary of these lots are further mauka (inland) than the highwater mark shown on this map and Map 227" and that the State of Hawaii "disputes the highwater mark as shown on this map". This was the first instance where a boundary was disputed through the Return of the State Land Surveyor. As a follow-up, the Attorney General filed an objection to the petition for consolidation-resubdivision.

At a hearing the petitioners filed a motion to strike the statements mentioned above contending that the State of Hawaii had no standing. Judge Dick Yin Wong granted the motion to strike and the Land Court map was approved. The petitioners argued that once a Land Court boundary is adjudicated, the title is good against the world including the Government and, therefore, the record boundary of that Land Court Application would not change. The State appealed the decision.

The State Supreme Court on February 7, 1973 reversed and remanded the case to the Land Court. The Court ruled that the State did have standing in the case. A hearing pursuant to the remand has not been held as yet.

In April of 1973, the State again became involved in a shoreline case. Helen Sanborn Davies, et al., submitted a subdivision of Lot 1-B as shown on Map 2 of Land Court Application 1578. Upon filing the map for shoreline certification, the State notified the applicant's Surveyor that "the Attorney General of the State of Hawaii has advised the Survey Division to adhere to the Ashford ruling and adopt the vegetation line as the shoreline and highwater mark". It goes on to say "the State will certify the subdivision if the seaward boundary be changed to the vegetation line."

The Applicant refused and filed a Motion for Order to Show Cause with the Land Court on May 18, 1973. Trial was held in Honolulu and Hanalei, Kauai, with much testimony presented before the Judge. Simply stated, Judge Dick Yin Wong ruled that because no evidence of permanent erosion exists, the highwater mark as originally located and approved in 1951 was the seaward boundary of the application. He also admitted that from the testimony and evidence presented to the Court, the Court found the "upper

reaches of the wash of the waves" in the Hanalei area to be at the "Edge of vegetation and debris line." This case is on appeal. A decision by the State Supreme Court should be forthcoming in the very near future. The outcome will have a tremendous impact on the Government's position on shoreline questions.

In October of 1973, the State Supreme Court rendered another significant "Highwater Mark" decision in the Sotomura case, County of Hawaii v. Sotomura, 55 Hawaii 176. This case clarified several key points. Points that Attorneys were in disagreement and not clearly defined in the Ashford ruling of 1968. The Sotomura Decision substantially clarified these formerly ambiguous points. The Decision states: "Where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka, the presumption is that the upper reaches of the wash of waves over the course of a year lies along the line marking the edge of vegetation growth. It also states that "When the sea gradually and imperceptibly encroaches upon the land, the loss falls upon the littoral owner, and land thus lost by erosion returns to the ownership of the State."

The Surveyor preparing a Shoreline map must keep in mind that he is responsible for whatever he represents on the map. The fact that the State certifies the map does not relieve him of this responsibility. If he surveys a line and represents that line to be vegetation line, he should be sure that the line represents a vegetation line that can be defended in Court. The State relies on the Professional knowledge, skill and integrity of the Registered Surveyor preparing these maps. We are not able to check every map that is filed for certification.

Many Surveyors especially on Maui, take photographs of the shoreline they locate. Stakes with colored ribbons are placed on the shoreline and photographed and the position of the camera and the direction of the photo is indicated on a photo-master. Another method is to draw the line on the photo showing the adopted line. If we observe any questionable lines from the photos, contact is made by phone or a sight inspection is arranged.

In this way, we are able to process the maps much faster.

The shoreline on sandy beaches are fairly well defined. Vegetation line will usually have precedence over most other factors. However, there are exceptions. If it can be proven that the "upper reaches of the wash of waves" never reaches the vegetation line throughout the year or rock formations at the top of the sandy beach would prevent vegetation from growing, the State would accept another line.

On rocky seacoast, the criteria is still the "upper reaches of the wash of the waves" based on the highest cyclical surf usually the high winter variety. In areas where it would be impossible for vegetation to grow, the white coloring of the rocks due to salt accumulation may be used. In other areas the top of sea pali is adopted. Where the top of sea pali is say 50 to 100 feet above the water, the acceptable line would be somewhere on the slope. The problem for the Surveyor may be accessibility to the area. If the drop is steep and nearly perpendicular, as a practical solution the top of the cliff should be adopted as the shoreline. I'm sure neither the State nor the County would object. However, the decision would generally be left to the property owner. Should he insist on claiming every square foot of land he is entitled to claim, he must expect to pay for a much more expensive survey.

Other problem areas we have encountered are shorelines that have seawalls that extend beyond the legally described seaward boundary. It is extremely difficult to ascertain when and under what conditions these walls were constructed. In certain instances, the State has challenged the ownership of these strips of land. The property owner is saddled with the burden of proof. Unless adjoining seashore can substantiate his claim, it would be very difficult for him to prove that accretion occurred prior to the construction of the seawall. For Land Court parcels he could register his claim in the Land Court and have the Judge decide whether he is entitled to the additional land. For unregistered lands, the question of ownership may never be resolved.

The mouth of streams may also be a problem. Presently, there are no written guidelines regarding this question. However, up to this point,



the State has accepted the shoreline across the mouth of the stream extending from the vegetation line on one bank to the vegetation line on the opposite bank. The navigability of the stream nor the ownership of the bed of the stream are considered for such purpose.

Prepared by:

Kazutaka Saiki  
Kazutaka Saiki, State Land Surveyor  
Survey Division, State Department  
of Accounting and General Services