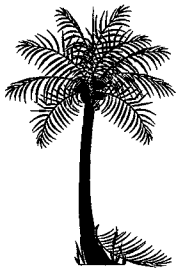
Real Property and Financial Services Section
Hawaii State Bar Association

# KA NU HOU

*"The News"*



October 1999

## FROM THE CHAIR

We would like to congratulate Amy M. Cardwell, the Section's second scholarship recipient for 1999. Amy's article entitled "The Hawai'i Recreational Use Statute: A Practical Guide to Landowner Liability" appears in this issue.

Ms. Cardwell is currently in her third year at the William S. Richardson School of Law, and is a member of the Law Review. She has worked at the Legal Aid Society of Hawaii and the Land Use Research Foundation, and last summer, she clerked in the Alaska Attorney General's Office.

Our thanks go to Bill Deeley for once again chairing the Annual Real Property Litigation Update, which was held on October 21. The seminar featured United States Bankruptcy Judge Lloyd King and UH Law School Professor David Callies, who discussed recent case law in the areas of eminent domain, easements, restrictive covenants, adverse possession, taxation and the bankruptcy code.

There are several important upcoming events. The Section will be presenting two seminars as part of the Bar Convention, which will be held at the Sheraton Waikiki on December 2 and 3. The seminars will both be held on December 2. The first seminar on "Real Estate Appraisal Methodology" will be from 8:30 to 10:00 a.m., and will feature appraisers James Hallstrom, Jan Medusky and Richard Stellmacher. The second seminar on "Endorsements to Title Insurance Policies: Basic to Exotic" will be from 10:15 to 11:45 a.m. and will feature John Jubinsky, general counsel to Title Guaranty of Hawaii.

Enclosed with this newsletter is a notice of our annual Section meeting which will be held on December 9 at the Plaza Club. The featured speaker will be Tim Johns, Esq., Director of the Department of Land and Natural Resources, who will give his perspective on the issues facing his Department.

The seminar on opinion letters has been postponed until the first quarter of next year. We were hoping to hold it as part of the Bar Convention, but it would have taken one full day, and we were only allotted half a day. After the date of the seminar has been set, brochures will be mailed to all HSBA members.

This newsletter also contains a ballot for the election of new officers and board members for the year 2000. Please remember to complete and return the ballot, whether or not you plan to attend the annual Section meeting.

Since this is my last newsletter, I would like to express my thanks to the Executive Committee and the Board members for their assistance and support during my tenure. I look forward to Jon Pang taking my place next year, and I am confident he will serve you well. Thank you for permitting me to serve as your Chair.

Aloha,

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## THE HAWAI'I RECREATIONAL USE STATUTE: A PRACTICAL GUIDE TO LANDOWNER LIABILITY

***By Amy Cardwell***

I. INTRODUCTION

The Hawai'i Loa Ridge hiking trail, located above a gated community in east Honolulu, O'ahu is off limits to hiking groups unless they are willing to "sign their life away" with a liability waiver at the guard shack.[1] Moreover, some hunters have also been turned away at the guard shack despite the fact that no "hunting cap" or limit on the number of hunters allowed on the trail at any one time exists and despite the fact that they were willing to sign the waiver. These hunters were given the reason that there were already hunting groups on the mountain.[2]

Similarly, there is a hiking trail in Wai'anae, on the west coast of O'ahu,

[1] Telephone interview with Jeff Mikulina, Executive Director, Sierra Club Hawai'i Chapter (Feb. 6, 1999). *See* "Appendix A" for a copy of the Hawai'i Loa Ridge waiver form.

[2] Telephone interview with Greg Gillia, President, O'ahu Chapter of the National Wild Turkey Federation (Apr. 8, 1999). Mr. Gillia stressed that this was his personal experience when he attempted to enter Hawai'i Loa Ridge to hunt wild pig. He reported that he was told by the State Department of Land and Natural Resources that there should be no cap to hunting access on Hawai'i Loa Ridge as long as the hunter was willing to sign the liability waiver. *Id.*

where the Hawai'i Nature Center is prohibited from taking its hiking groups across land leased by another conservation group, the Nature Conservancy, because the Hawai'i Nature Center charges a small fee for its hikes.[3] Unless the Hawai'i Nature Center obtains a certificate of insurance to indemnify the Nature Conservancy, the Nature Conservancy will not allow outside hikes to access the Wai'anae trail.[4] In fact, the Nature Conservancy itself will not allow anyone to participate in its own free guided hikes without signing a liability waiver.[5]

Thirty years ago, to address exactly these kinds of restrictions imposed by private landowners on recreational access, the Hawai'i Legislature adopted what is now commonly known as the Hawai'i Recreational Use Statute ("HRUS").[6] Enacted to encourage landowners to open up their property by providing limited immunity from tort liability (so long as the landowner did not charge a fee), the Legislature's hope was that more landowners would allow the public access to their lands with potential recreational value.[7] Three decades later, however, the problem of restricted access persists, limiting access for some of Hawai'i's most active recreational users.

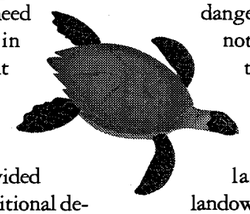
Like Hawai'i, all states across the nation have enacted some sort of "recreational use statute" to limit landowner liability to recreational users.[8] The objective basis for the enactment of these statutes is to promote increased public access to private lands by limiting the liability of landowners to situations where: (1) they receive compensation for the use of their property; and (2) injury results from malicious or wilful acts of the owner.[9] Thus, the degree to which landowners do in fact open their lands to the public directly correlates to how effectively this legislation relieves them of their common law duty of care.

The recreational use of private lands is of particular importance in Hawai'i, a state composed of an island chain, where land is at a premium because of the limitation on all sides by the Pacific Ocean, and because of the unique historical development of land ownership patterns in the state. For example, the interior public lands of the Hawaiian islands, typically designated by the State as Forest Preserves to protect prime watersheds, are often ringed by large private land holdings that the public has to cross in order to gain access to spectacular hiking trails.[10]

Even today, however, many private landholders remain concerned about the protection the HRUS will provide them if they open up their lands for recreational purposes.[11] Why are these private landowners still fearful about opening their lands for recreational purposes when the HRUS was enacted to encourage them to do so by relieving such worries about liability? What do Hawai'i's landowners fear from allowing hikers and other recreational users onto their lands? What recreational opportunities are Hawai'i's communities losing in the process?

This article will examine some of the ongoing problems with the HRUS faced by landowners and recreational users alike. The sections which follow will demonstrate the thesis of this article - that landowners will continue to doubt the protection afforded by the HRUS until the statute has been interpreted by consistent decisions of Hawai'i state courts.

Part II will examine the legislative history of the statute to help explain the concerns that generated the need for such legislation here in Hawai'i. It will also present an overview of the problems with the HRUS, examining the exceptions to the immunity protection provided by the statute and the definitional deficiencies presented by the terms "recreational purpose" and "land" as used in the statute. Part III will look at landowners' and recreational users' concerns with the statute. Keeping in mind that the statute has only recently been tested in State court, each analysis section explains either the attempts that have been made within our state to deal with these problems, how other states are addressing these issues, or both, and ideas for improving our state statute.



## II. Background

### A. Traditional Common Law Relating to the Use of Private Land

Traditional common law tort theory provides that the status of a person entering the land determines the landowner's duty of care toward that person.[12] Thus, when an injury occurs on the premises of an owner, the extent to which the owner can be held liable depends on whether the visitor is categorized as an invitee, a licensee, or a trespasser.[13]

Under traditional common law, landowners have a duty to warn invitees of known defects on the premises and to inspect and correct potential defects.[14] Licensees are owed a duty only if the landowner knows or has reason to know that a dangerous condition exists and does not take steps to make the condition safe or warn the licensee.[15] Trespassers are owed the lowest duty of care because they enter the premises without the landowner's permission.[16] A landowner merely has a duty to refrain from causing wilful or wanton injury to trespassers.[17] An exception to this rule applies, however, if the landowner knows or should know of the trespasser's presence or knows that people habitually trespass on the property. Then, the duty to refrain from causing wanton or wilful injury becomes a duty to warn of concealed dangers caused by artificial conditions.[18]

### B. Modern Common Law Duty to Users of Private Lands in Hawai'i

In Hawai'i, as in many other states, these traditional common law status distinctions were largely abolished by the Hawai'i Supreme Court's 1969 decision in *Pickard v. City and County of Honolulu*.[19] The court, following the lead of California's Supreme Court in a radical break from traditional common law doctrine one year earlier in *Rowland v. Christian*[20], ruled that an occupier of land simply has a duty to use the standard tort duty of "reasonable care" for the safety of all persons reasonably anticipated to be on the premises regardless of the legal status of the individual.[21] Now, instead of automatically categorizing an entrant before applying the corresponding common law rules, *Pickard*'s unitary standard requires a court and jury to focus on whether the landowner acted reasonably in managing the property with respect to the foreseeable entrant, thus simplifying the inquiry and effectively raising the standard of care higher than the traditional rules.[22]

At the same time, however, the Hawai'i Legislature recognized that the threat of litigation would discourage private landowners from making their lands available for recreational use.[23] Overcoming this disincentive required immunization of landowners for injuries occurring on their property.[24] The HRUS was meant to provide the means to this end.

### C. An Introduction to the HRUS

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[3] Telephone interview with Diana King, Educational Director, Hawai'i Nature Center (Feb. 1, 1999).

[4] Telephone interview with Pauline Sato, Oahu Preserves Manager, The Nature Conservancy (Feb. 8, 1999). The land leased by the Nature Conservancy is owned by one of the largest private landholders in Hawai'i, the Campbell Estate. *Id.*

[5] *Id.*

[6] HAW. REV. STAT. ANN. § 520 (Michie 1998).

[7] *See* S. 5-534, 1st Legis. Sess. 1075 (Haw. 1969) and S 5-760, 1st Legis. Sess. 914 (Haw. 1969).

[8] *See* Stuart J. Ford, *Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, 1991 WIS. L. REV. 491, 498 & n.24. This article states that 48 states have enacted recreational use statutes, listing Alaska, North Carolina, and the District of Columbia as the jurisdictions which had no recreational use statute. *Id.* However, in 1995, North Carolina enacted its version of that state's recreational use statute. *See* N.C. GEN. STAT. § 38A-1 through § 38A-4. In Alaska, tort immunity is provided for personal injuries or death occurring on unimproved land if the person entered the land for a recreational purpose and had no responsibility to compensate the owner for the person's use or occupancy of the land. *See* ALASKA STAT. § 09.65.200 (Michie 1998). In addition, Alaska has recently passed a bill providing tort immunity to landowners who provide access to trails across their lands via a conservation easement granted to the state or a municipality. *See* CSSB 45 (FIN) am, 21st Leg., 1st Sess., (Alaska 1999). The immunity applies to the private landowner and the state or municipality and it also applies whether the recreational user was injured on the easement or had wandered off to some other part of the landowner's property. *Id.*

[9] *See Public Recreation on Private Lands: Limitations on Liability*, 24 Suggested State Legislation 150 (1965) (a "model act" authored by the Council of State Governments, which meets every year in Washington, D.C.).

[10] According to estimates by the State's Department of Natural Resource's Trail and Access Program, Na Ala Hele, the public is guaranteed access on only 23 out of 227 known trails and access roads on the island of O'ahu. The rest of the trails may or may not be open to the public for recreational use under some other public entity, or are restricted access according to conditions set by the landowner whose land the trail crosses. Na Ala Hele's estimates for the outer islands paint a similar picture: Kauai, 34 trails and access roads out of 167 are guaranteed open to the public; on Molokai, 4 out of 46; on Maui, 23 out of 115; and on Lanai, 4 out of 62. The estimates for the Big Island of Hawai'i are 23 out of 131, however, included in the total number are the shoreline access paths (not trails, but lateral access for the public to reach the beaches, usually controlled by the counties) for that island. Interview with Curt Cottrell, Program Director, State of Hawai'i Na Ala Hele (Trails) Program in Honolulu, Haw. (Apr. 7, 1999).

[11] Telephone interview with Ben Kudo, Partner, Dwyer Imanaka Schraff Kudo Meyer & Fujimoto (Jan. 25, 1999).

[12] *See generally*, 62 AM. JUR. 2D *Premises Liability* § 37 (19____) (explaining the common law duty of care toward persons entering upon private land).

[13] *See* W. Page Keeton et.al., *Prosser And Keeton On The Law Of Torts*, § 58 at 393 (5th ed. 1984).

[14] Restatement (Second) Of Torts § 341 (1965).

[15] *Id.* at § 342 (1965).

[16] *See* Black's Law Dictionary 1504 (6th ed. 1990).

[17] *See generally*, Keeton, et. al., *supra* note 13, § 58, at 393.

[18] Restatement (Second) Of Torts § 334-36 (1965).

[19] *See Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969). In *Pickard*, the plaintiff fell through a hole in the floor of a public restroom and sued the City and County of Honolulu for his injuries. The City and County contended it did not owe a duty to a mere licensee and, alternatively, that the plaintiff was contributorily negligent because he entered the restroom even though the lights did not work and he could not see his way.

[20] *See Rowland v. Christian*, 433 P.2d 561 (Cal. 1968).

[21] *Pickard* is Hawai'i's seminal case that found that the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others. *See Pickard*, 433 P.2d at 446.

[22] *Id. But cf. Doe v. Grosvenor Properties (Hawai'i) Ltd.*, 73 Haw. 158, 163-164, 829 P.2d 512, 515 (1992) wherein the Hawai'i Supreme Court declared: "Although the *Pickard* duty of reasonable care regardless of status distinctions continues to define a landowner's duty of care in this jurisdiction, status distinctions remain important in the decision to create exceptions to the general rule that it is unreasonable to impose a duty to anticipate and control the actions of third persons. Exceptions to the rule that there is no duty to protect may arise when justified by the existence of some special relationship between the parties," (i.e., common carrier to passengers, innkeeper to guest).

[23] *See* S. 5-534, 1st Legis. Sess. 1072 (Haw. 1969) *and* S. 5-760, 1st Legis. Sess. 914 (Haw. 1969).

[24] *Id.*

While Hawai'i tort law imposes a common law duty of reasonable care on everyone, it provides an exception from that duty in its recreational use statute, Chapter 520, Hawai'i Revised Statutes.[25] The current version of the HRUS provides that owners of possessory or nonpossessory interests in land owe no duty of care to keep the premises safe for persons coming onto their land for any recreational purpose.[26] Under the statute, landowners owe no duty to warn recreational entrants of hazardous conditions, uses, structures, or activities.[27] The statute enumerates certain activities as falling within the definition of recreational purpose, such as hiking, swimming, camping, and hunting.[28]

Chapter 520 expressly provides that landowners who permit recreational users to enter their properties do not assure that the premises are safe, do not confer upon the person entering the legal status of invitee or licensee, and do not assume responsibility for their injuries.[29] The statute, however, does not confer immunity from liability in instances where the landowner wilfully or maliciously fails to guard or warn of a dangerous condition, where the landowner charges a fee for the recreational use of their land, or for injuries suffered by a house guest while on the owner's premises.[30] Additionally, government lands are specifically excluded from immunity under the statute.[31]

D. Legislative History of the HRUS

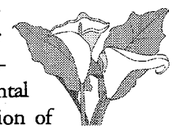
During the 1950's and 60's, various states across the nation began to adopt recreational use statutes in response to the recognition of the growing need in American society for more recreational land.[32] In the post-World War II era, overpopulation and greater leisure time led to increased participation in recreational activities.[33] However, national and state parks began to be crowded, while many wilderness areas were succumbing to suburban sprawl.[34] Despite a resurgent interest in adding new lands to the National Parks System, it seemed highly unlikely at the time because of rising land prices and falling state budgets, that there would be an improvement in recreational opportunities without the contribution of private landowners.[35]

The imperative of encouraging private landowners to open up their land for private recreational use was eventually recognized in 1965 when the Council of State Governments, a governmental body that meets once per year and is made up of officials from various states, adopted "Suggested State Legislation" to that end.[36] Known as the "Model Act of 1965," it recommended that state legislatures pass "an act to encourage landowners to make their land and water areas available to the public by limiting liability in connection therewith."[37] The 1965 Model Act was subsequently adopted over the next several years with language substantially similar in format by several states, including Hawai'i.[38]

On July 14, 1969, Hawai'i Governor Burns' approval of the State Legislature's Act 186 enacted what is now commonly known as the Hawai'i Recreational Use Statute.[39] Unfortunately, there is very little legislative history available regarding the original enactment of the HRUS. It is clear, however, that the Hawai'i Legislature made small adjustments to the 1965 Model Act to clarify that the HRUS would not apply to government lands.[40] As a whole, though, given the noted similarity between the HRUS and the Model Act,[41] the Hawai'i Legislature appeared to be motivated by the concerns expressed by other legislative bodies at the time regarding the growing need for recreational lands.

Ten years later, in 1979, a national coalition of sporting and environmental groups cosponsored an investigation and report on landowner liability and trespass laws.[42] The report found that existing legislation across the country was still largely ineffective at getting landowners to open up their lands for recreational use because of continued landowner suspicion of complex laws that were inconsistent from state to state.[43] In addition, judicial construction of these statutes tended to be strict because the underlying legislative policy of limiting a landowner's duty to recreational users was in derogation of the traditional common law.[44] The results of this study culminated in a revision of the 1965 Model Act regarding recreational use statutes that became known as the 1979 Model Act.[45] One major difference in between the 1965 Model Act and the 1979 Model Act is that the latter defines "owner" to include any "individual, legal entity, or governmental agency that has any ownership or security interest whatever or lease or right of possession in the land."[46] Hawai'i never adopted the 1979 Model Act definitions and did not add governmental agencies to the HRUS definition of "owner."[47] Hawai'i state government, however, already has broad immunities under the State Tort Liability Act.[48]

In 1985, President Reagan appointed a Commission on Americans Outdoors (the "Commission") whose task was to make recommendations to ensure the future availability of outdoor recreation for the American people.[49] The Commission completed its report in 1986 noting that projections made in 1962 concerning national recreational demand for the year 2000 were reached in 1980.[50] The Commission predicted that the pressures on America's lands and waters for recreational activities would continue to grow.[51] It recommended that federal and state governments enact or improve recreational use statutes to provide greater protection to governmental entities and private providers who allow the public to use their land for recreation.[52]



In 1988, the Hawai'i Legislature established a statewide trail and access program known as "Na Ala Hele" (from the Hawaiian phrase "E mau na ala hele," meaning preserve the trails to walk on) under Chapter 198D, Hawai'i Revised Statutes.[53] Under Section 198D-7, the Department of Land and Natural Resources, in consultation with the State Office of the Attorney General, was tasked with examining the legal issues relating

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[25] *See* HAW. REV. STAT. ANN. § 520 (Michie 1998).

[26] *See id.* at § 520-2: "Owner means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises."

[27] *See id.* at § 520-3: "[A]n owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. . . ."

[28] *See id.* at § 520-2: "'Recreational purpose' includes but is not limited to any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical archaeological, scenic, or scientific sites."

[29] *See id.* at § 520-4 (emphasis added).

[30] *See id.* at § 520-5.

[31] *See id.* at § 520-2:" 'Land' means land, roads, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to realty, other than lands owned by the government." (emphasis added).

[32] *See* G. Thomas & M. Dettmer, *Trespassing on the Recreational User Statute*, 61 MICH. B.J. 726, 727 (1982) (seminal recreational use legislation was enacted in the following states: Colorado (1963), Delaware (1953), Florida (1963), Maine (1961), Maryland (1957), Michigan (1953), Nevada (1963), New Hampshire (1961), New York (1963), Ohio (1963), South Carolina (1962), Tennessee (1963), and Wisconsin (1963)).

[33] *Id.*

[34] *See John C. Barrett, Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 WASH. L. REV. 1, 3-4 (1977).

[35] *Id.*

[36] "Suggested State Legislation" is a report that contains proposals approved by the Committee of State Officials on Suggested State Legislation of the Council of State Governments that meets every year in Washington, D.C. The Suggested State Legislation should "be introduced only after careful consideration of local conditions, existing statutory practices and constitutional requirements." *See Foreword* to 24 Suggested State Legislation at iii (1965).

[37] *See Public Recreation on Private Lands: Limitations on Liability*, 24 Suggested State Legislation 150 (1965). The council was made up of representatives from various states. State representative Robert W. B. Chang represented Hawai'i. *Id.* at v.

[38] *See Gibson v. Keith*, 492 A.2d 241, 243 (1985): ". . . [A]dopted by sixteen states, including Delaware — Arkansas, Georgia, *Hawaii*, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, Nebraska, Oregon, Pennsylvania, South Carolina and Utah — represents the model act essentially unchanged."

[39] Act 186, 1969 Haw. Sess. Laws 333.

[40] The 1965 Model Act makes clear in its preamble that it is "designed to "encourage [the] availability of *private* lands by limiting the liability of landowners." *See Public Recreation on Private Lands: Limitations on Liability*, 24 Suggested State Legislation 150 (1965) (emphasis added). The actual language of the model legislation, however, does not differentiate between private and public landowners. *Id.*

[41] *See e.g.* S. 5-760, 1st Legis. Sess. 914 (Haw. 1969) wherein the stated purpose of the bill repeats verbatim the Model Act.

[42] The report was sponsored by the National Association of Conservation Districts, The International Association of Fish and Wildlife Agencies, the National Rifle Association, the National Wildlife Federation, and the Wildlife Management Institute. Ford, *supra* note 8 at 499-500 & n. 31.

[43] *Id.* at 500.

[44] *Id.*

[45] *See* Joan M. O'Brien, *The Connecticut Recreational Use Statute: Should a Municipality Be Immune From Tort Liability?* 15 Pace L. Rev. 963, 973 (1995). *See also*, 39 Suggested State Legislation 107 (1978).

[46] *See* 39 Suggested State Legislation 107 (1978) (emphasis added).

[47] The legislative history is again unfortunately sparse regarding the consideration given the 1979 Model Act by the Hawai'i Legislature. Presumably, however, the Legislature was at least aware of the revisions because the representatives for State of Hawai'i on the Committee on Suggested State Legislation of the Council of State Governments that year included: Millicent Kim, House Research Officer; Wendall Kimura, Office of the Senate; Representative Tony T. Kunimura; Senator Joseph Kuroda; Melvin Y. Shinn, Counsel to the Senate President; Representative Katsuya Yamada; and Senator Mamoru Yamasaki. *See id.* at p. vii (1978).

[48] *See* HAW. REV. STAT. ANN. §§ 662-2 et.seq. (Michie 1998). The State Tort Liability Act waives the State's sovereign immunity and provides that the State will be liable in the same manner and to the same extent as a private person under similar circumstances. *Id.*

[49] *See Report And Recommendations To The President Of The United States*, President's Commission On Americans Outdoors (Dec. 1986).

[50] *Id.*

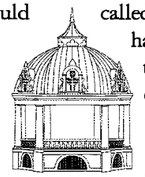
[51] *Id.*

[52] *Id.* It is doubtful, however, that the Commission's report resulted in revision of any states' recreational use statute because its emphasis was on the federal role in outdoor policy. *See* Terry L. Anderson, *Camped Out in Another Era*, Wall Street Journal, Jan. 14, 1987, *available* in WL-WSJ 314464. The fundamental thesis of the report was that the only way recreational land can be protected is through expanding the government's ownership and control. *Id.*

[53] *See* HAW. REV. STAT. ANN. § 198D (Michie 1998). Although Na Ala Hele came into existence following the Commission's report, the trail program was not a result of the Commission's report. Interview with Curt Cottrell, *supra* note 10. While there was a strong nationwide trend toward fitness and health in the late 1980's (baby boomers were facing middle age and health became a priority at the same time that their earning potential and disposable income peaked, thus the genesis of the "running boom" and the demand for more "linear recreational corridors"), the State Legislature was acting on local concerns unique to Hawai'i. *Id.* To begin with, tourism and resort development were on the rise and there was a push to preserve ancient Hawaiian trails. In addition, at the time, Hawai'i had the largest budget surplus of any state in the nation because of the real estate boom spurred on by tourism in the late 1980's and thus could well afford a state trail and access program. Finally, many of these trails had been developed in the 1930's and 1940's by the Civilian Conservation Corps. At that time, the "litigious atti-

to trails and accesses in Hawai'i.[54] One year later in 1989, a report was presented by the State Attorney General's Office.[55] This report noted that the immunity provided under the HRUS was not absolute and that landowners were still being exposed to tort liability even though they were making private land available for recreational use in compliance with the statute.[56] The report made several suggestions for statutory amendments that would reduce landowners' exposure to liability and encourage them to provide access through their lands.[57] These suggestions included: granting absolute immunity to landowners; allowing prevailing landowners to recover attorneys' fees and legal costs against the plaintiff and the plaintiff's attorney; limiting the damage recovery to $150,000; and including state and counties under the HRUS, thereby providing them the same protection as private landowners.[58]

The Attorney General's report, however, had very little noticeable impact as there was no significant legislative activity on the HRUS until just three years ago in 1996. Then, the statute was amended to include protection of landowners required by the State or county to provide parking or access through or across their property to reach other property used for recreational purposes.[59] There was concern expressed by plaintiff advocate groups that this expanded definition of recreational purpose would create a fiction that the mere use of a person's land would be deemed recreational in nature.[60] Thus, the legislature specified that the new subsection 520-4(b), pertains only to limitations on the liability of a landowner who is required or compelled to provide access to public recreation facilities or public trails through or across that owner's property because of state or county land use, planning, or zoning laws, ordinances, rulings, regulations, or orders.[61] According to Committee Reports, the decisions delineating unconstitutional takings of property requiring just compensation recently handed down by United States Supreme Court were also motivating the Legislature at the time this measure was enacted.[62]



More recently, in 1997, the case of *Collins v. Maui Land and Pineapple Company*, Inc. prompted the Legislature to once again amend the HRUS.[63] Ernest Lee Collins, a paramedic working for American Medical West, a company contracting with the State to provide emergency ambulance services on Maui, was called to rescue a tourist. The tourist had injured herself on a beach access trail that traversed private land owned by Maui Land and Pineapple Company, but was held open to the public free of charge for the sole purpose of permitting access to the beach. During the rescue, Collins injured his back when his foot slipped on the trail while attempting to remove the tourist from the area with the help of the fire department in a "stokes" basket. Collins brought suit against the landowner, Maui Land and Pineapple Company, Inc. ("MLP").

The case was heard in United States District Court for the District of Hawai'i. Judge Helen Gillmor denied MLP's motion for summary judgment by concluding that the HRUS did not bar Collins' claim because paramedics did not fall under the definition of "recreational user" as expressed in the HRUS.[64] The State Legislature quickly reacted by amending the HRUS to address the concern of landowner's immunity from liability for claims of "persons who enter the premises in response to an injured recreational user."[65]

In 1998, there were no amendments to the HRUS. In 1999, however, there were a number of proposals before the State Legislature. The proposed amendments, some old, some new, included: adding governmental lands to the protection of liability afforded to landowners under the HRUS;[66] making persons entering lands for recreational use responsible for their own personal safety and well being;[67] and making losing plaintiffs under the HRUS pay the attorney's fees and costs of the prevailing defendant landowner.[68] All of these proposed amendments died and were replaced by a proposal that added only undeveloped government lands under the control of the State's trail and access program, Na Ala Hele, to the definition of lands under the HRUS.[69]

The Legislature thus continues to tinker with the HRUS. Its efforts reflect an attempt to effect a compromise between the need for access to more of Hawai'i's recreational areas and providing assurances to some of the largest landholders in the State who doubt the protections afforded by the HRUS.[70] These landowners have legitimate concerns, ranging from liability to vandalism, which prevent them from opening their lands to the public for recreational use.

## III. Landowners' Concerns

Nationwide, landowners have numerous concerns about opening their lands to public recreational users: (1) managing lands for public recreation is primarily "managing for people," and many private landowners have neither the training nor the desire to manage visitors; (2) recreational use is sometimes not compatible with the principle uses of the land; (3) acts of trespass, vandalism, and litter are increasing and "wilful trespass with firearms" is upsetting to many landowners; (4) many landowners seek privacy and discourage use by others for personal reasons; and (5) incentives for landowners are often lacking.[71] These and other reasons led the Commission to conclude that substantial portions of private lands may never be available for general public recreation use.[72]

In Hawai'i, landowners have experienced problems from recreational users such as increased litter on the property or excessive noise created by dirt bikes and off-road vehicles.[73] Some individuals who gain access to land with a landowner's permission for "picnicking" instead bring guns and shoot signs or fence posts, use beer bottles for target practice, shoot cattle, or illegally poach.[74] Entrants have destroyed gates or left them open or closed, contrary to the landowner's wishes.[75] Some people wander off of trails and destroy surrounding vegetation. Any exotic plant seeds traveling with these "wanderers" may germinate and destroy native vegetation in pristine areas.[76] A related problem, particular to Hawai'i and a few other states, is the cultivation of marijuana, where growers tap into the landowners' waterlines or steal fertilizers to use on the marijuana plants.[77]

The largest concern cited by landowners in Hawai'i when denying recreational access to their lands, however, is the legal uncertainty over how the State courts will interpret the HRUS given that so few Hawai'i cases have applied the statute.[78]

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tude" that exists in our society today was not a concern. Since people continue to use these trails today, however, liability *became* a concern for the Legislature. *Id.*

[54] *See* HAW. REV. STAT. ANN. § 198D-7 (Michie 1998).

[55] Office of the Attorney General for the State of Hawai'i, Report to the Legislature Regarding Senate Concurrent Resolution NO. 239 Requesting the Attorney General and the Department of Land and Natural Resources to Examine the Legal Issues Relating to Trails and Accesses in Hawai'i (1989).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *See* S. 18-1648, 1st Legis. Sess. 837 (Haw. 1996).

[60] *See Hearing on S.B. No. 2548 Before the Water and Land Use Planning Committee*, 18th Legis., 1st Reg. Sess. __ (Haw. 1996) (written testimony of Robert Toyofuku, Consumer Lawyers of Hawaii).

[61] *See* HAW. REV. STAT. ANN. § 520-4(b) (Michie 1998).

[62] *See* S. 18-1648, 1st Legis. Sess. 837 (Haw. 1996) ("[I]n light of the United States Supreme Court cases of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 1341, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), the issue of taking may arise when a government mandates public access over private property. Although these cases are decided on a case-by-case basis, your committee is concerned that if the government mandates access and subsequently prohibits a landowner from protecting itself from tort liability by way of a waiver, this may exacerbate the current situation and further preclude the provision of public access to recreational areas by private landowners.").

[63] *See Collins v. Maui Land and Pineapple Company, Inc.*, No. 95-00994 HG, slip opinion (D. Haw. Mar. 5, 1997).

[64] *Id.* at 9.

[65] *See* S. 19-1693, 1st Legis. Sess. 1767 (Haw. 1997), S. 19-71, 1st Legis. Sess. (Haw. 1997). *See also*, HAW. REV. STAT. ANN. § 520-4(a)(4) (Michie 1998).

[66] *See* S.B. No. 380 *and* companion H.B. No. 395, 20th Leg., (Haw. 1999), S.B. 622 *and* companion H.B. No. 1705, 20th Leg., 1st Spec. Sess. (Haw. 1999), S.B. No. 965, 20th Leg., 1st Spec. Sess. (Haw. 1999), *and* H.B. No. 582, 20th Leg., 1st Spec. Sess. (Haw. 1999).

[67] *See* S.B. Nos. 380 *and* 622, 20th Leg., 1st Spec. Sess. (Haw. 1999). *See* also H.B. Nos. 395 *and* 1705, 1st Spec. Sess. (Haw. 1999).

[68] *Id.*

[69] Interview with Curt Cottrell, *supra* note 10. While trails under the Na Ala Hele program are presumably protected by the State Tort Liability Act, Mr. Cottrell believes that this "added protection" would induce more private landowners to enter into memoranda of agreement with Na Ala Hele, allowing access to trails across privately held land. *Id.*

[70] Telephone interview with Alika Neves, Land Manager for Bishop Estate (Feb. 22, 1999). Mr. Neves indicated that the Bishop Estate feels more protection from liability by restricting access than by relying on the HRUS. In Mr. Neves opinion, if the HRUS afforded complete immunity except in cases where a dangerous condition existed that the landowner knew about but failed to warn, the trustees would probably feel more comfortable relying upon the protections afforded by the HRUS. *Id.*

[71] President's Commission on Americans Outdoors, *supra* note 49.

[72] *Id.*

[73] Office of the Attorney General for the State of Hawai'i, Report to the Legislature Regarding Senate Concurrent Resolution No. 239, *supra* note 55.

[74] *Id.*

[75] Private land holdings cover many of the original roads into interior hunting lands or paths down to the sea used by fishermen. This is a major problem for hunters and they sometimes get so frustrated by blocked access that they break down gates or drive around trees to get to hunting grounds they have used for generations. Telephone interview with B. Ka'imiloa Chrisman, M.D., Field Representative, National Muzzle Loading Rifle Association; Hamakua Representive, National Wild Turkey Federation; Hawai'i Representative, Big Island Safari Club; Big Island Representative, Physicians for Responsible Gun Ownership (Apr. 7, 1999).

[76] A related issue is that landowners do not want *anyone* coming on their land since the enactment of the federal Endangered Species Act. *Id.* Landowners have informally reported to hunters that they fear discovery of a new endangered species of plant, insect, or wildlife unique to Hawai'i on their property that would force them to stop all use of the land. *Id.* This has frustrated many hunting groups, as "hunters tend to be very individualistic." *Id.* Some hunters feel that large, well funded mainland groups such as the Sierra Club, the Nature Conservancy, and even the federal government are "coming here and telling us what to do." *Id.* Their suggested solution includes offering landowners alternatives in addition to farming and cattle such as hunting, that would help by not only "encouraging the diversification of habitat," but by aiding the State's sagging tourist economy. *Id.*

[77] Office of the Attorney General for the State of Hawai'i, Report to the Legislature Regarding Senate Concurrent Resolution No. 239, *supra* note 55.

[78] Telephone interview with Ben Kudo, *supra* note 11.

A recent decision from the Hawai'i Intermediate Court of Appeals ("ICA") allowed use of the HRUS as an affirmative defense to claims of a landowner's duty to warn and duty to prevent.[79] In the case of *Atahan v. Muramoto* [C.J. Burns], the visiting Atahan family parked their car on a vacant, unimproved parcel of land owned by Muramoto, walked across Muramoto's property to the beach, and then down the beach until they stopped to body surf in front of Makena La Perouse State Park.[80] Mr. Muramoto was aware that other beachgoers had parked their cars on his parcel for years. However, he neither charged nor made any attempt to hinder or aid in such use. Mr. Atahan was injured while body surfing and rendered quadriplegic.

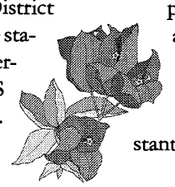
Plaintiff's sued Muramoto alleging that he owed a duty to prevent them from parking their car on and walking over his lot to access the public beach or to warn them that being in the ocean fronting the vicinity of the Muramoto property was dangerous.[81] In granting summary judgment for Mr. Muramoto, the ICA thus focused its evaluation on § 520-4(a)(2) of the HRUS,[82] stating:

> [Atahan] was neither 'an invitee or licensee to whom a duty of care is owed.' The duty to warn and the alleged duty to prevent both arise out of the 'duty of care.' It follows that [Atahan] was not an invitee or licensee to whom Muramoto owed a duty to prevent or warn. . . . We conclude that HRS chapter 520 abolishes any duty to prevent or warn that Muramoto may otherwise have owed to the Atahan family.[83]

Justice Acoba dissented in part to the majority opinion explaining that the language of the HRUS is clear that the land and water areas affected by the statute are those 'owned' by the landowner.[84] However, he would have held that Muramoto owed Atahan no duty under the common law and would affirm summary judgment on that basis.[85]

If one concludes that the ICA analyzed the statute to mean that there is no duty even if the injury occurred in the ocean fronting Muramoto's property, landowners and their counsel can be assured that the intent of the HRUS is being upheld and no liability will attach. Since these were not the facts before the court, however, the opinion cannot be given much weight on that issue.[86] The Hawai'i Supreme Court, after initially granting certiorari to hear this case, has dismissed the writ of certiorari, stating that it was "improvidently granted."[87] Thus, the state court's opportunity to rule on the HRUS has been once again been declined, although ICA opinions do carry considerable weight.[88]

Notwithstanding the *Atahan* opinion, most cases that have applied the HRUS have been heard in the United States District Court for the District of Hawai'i. In general, these cases have yielded positive results for the landowner.[89] However, the landowner in these cases was the United States, and the HRUS was applied in these cases under the Federal Torts Claim Act ("FTCA"). While under the FTCA, the United States is liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.[90] Thus, in reality, the District Courts may be influenced by the status of the defendant when interpreting and applying the HRUS to the United States government.



In any event, this interpretation is not binding upon the Hawai'i state courts. State court law can "trump" federal court law under what is commonly referred to as the "Erie Doctrine" after the 1938 case, *Erie Railroad Company v. Tompkins*, which first expressed these principles.[91] The fundamental principle of the Erie Doctrine is that the federal government's power to make laws is limited to the powers enumerated in the Constitution.[92] Implicitly, the Article III power to adjudicate diversity cases is not a grant of power to make state substantive law.[93] There is no enumerated federal power to make general law, commercial, tort, or otherwise.[94] A federal district court sitting in diversity must apply the substantive law of the state, both legislative and decisional.[95] In the absence of a federal law on point, state law will be applied.[96] In practice, this means that a court sitting in diversity will usually apply state substantive law because, in a typical diversity case, there is no pertinent federal substantive law.[97]

Thus, when no interpretation of a statute from state court decisions exists, federal courts tend to interpret the statute strictly, looking to the literal language of the statute as a foundation for drawing their conclusions.[98] The District Courts for the District of Hawai'i have, accordingly, interpreted the HRUS quite narrowly, supporting landowner rights.[99]

Hawai'i's landowners, however, find little comfort in the "pro-landowner" stance that the federal courts have taken. This is because the Hawai'i Supreme Court has a history of rendering decisions that favor the public or subgroups within the general public over the landowner.[100] The State's political history helps explain this trend.

With the post-World War II election of Governor John Burns in 1962, following years of domination by conservative business interests, Hawai'i's government shifted into the hands of liberal democrats and their supporters, mostly working people and those who had come from a plantation background.[101] William S. Richardson, who served as Lieutenant Governor under Burns, was appointed Chief Justice of the Supreme Court.[102] Chief Justice Richardson was committed to serving the "common people."[103] It is not surprising, then, that the Richardson Court would adopt a very liberal and activist posture in its decisions.[104]

On the other hand, a phenomenon which started in the 1970's and continues through to the present has been the conservative nationwide movement for tort and insurance reform.[105] With regard to those areas of tort law of primary concern to those seeking tort and insurance reform in Hawai'i, the pro-plaintiff revolution of the Richardson era has all but come to an end.[106] Thus, some pro-recovery doctrines adopted during the Richardson years have been overturned, rights of victims have been kept within narrow bounds, and opportunities to expand recovery have generally been rejected.[107]

As far as most landowners are concerned, however, as long as the public re-

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[79] Telephone interview with Terence Yamamoto, counsel for plaintiffs, Price Okamoto Himeno & Lum (Aug. 26, 1999).

[80] *See Atahan v. Muramoto*, Civ. No. 96-0227(3), 1999 WL 353021, at 1 (Haw. App. as amended July 16, 1999) (cert. granted July 16, 1999).

[81] *Id.* at 2.

[82] *See* HAW. REV. STAT. ANN. § 520-4(2) (Michie 1998) ("Except as specifically recognized by or provided in section 520-6, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby: confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.").

[83] *See Atahan v. Muramoto*, Civ. No. 96-0227(3), 1999 WL 353021, at 8 (Haw. App. as amended July 16, 1999)(cert. granted July 16, 1999).

[84] *Id.* at 11.

[85] *Id.* at 19. Indeed, some attorneys find it confusing that the ICA even analyzed Muramoto's liability at all because it could imply that once a landowner's property is used for access to the ocean, the landowner might conceivably be liable for any part of the ocean that a recreational user could access from their property. Interview with Gary Slovin, Goodsill Anderson Quinn & Stifel via e-mail (Aug. 29, 1999). In this case, Mr. Muramoto is defending himself against an injury that didn't even occur on his property. This confusion reinforces the distrust landowners and their attorneys have regarding the protection afforded by the HRUS and attorneys will feel the obligation to tell their clients not to allow recreational access to their property. *Id.*

Other attorneys are finding comfort in the case as being very helpful to "passive landowners" who knowingly, but not intentionally allow their property to be used by beachgoers and the public. Interview with Ben Kudo, Partner, Dwyer Imanaka Schraff Kudo Meyer & Fujimoto via e-mail (Aug. 30, 1999). Many sugar and pineapple lands have for years been used by fishermen, campers, surfers, and others to park on and access beach areas. *Id.* This has been of considerable concern on the part of the agricultural companies who own these lands. *Id.* To have issued an opinion which curtailed the limited liability protection to landowners afforded by the HRUS would create a legal environment contrary to the legislative intent of the statute. *Id.* If the courts rule against landowners like Muramoto, the only alternative left to landowners is to fence off their properties. Telephone interview with John Price, counsel for defendant Muramoto (Sept 2, 1999). Thus, to attorneys and landowners who view the case in this light, the ICA properly interpreted the statute and its goals to provide more public access, not less.

[86] Interview with Gary Slovin, *supra* note 148.

[87] Telephone interview with John Price, counsel for defendant Muramoto (Sept. 15, 1999).

[88] The court may have decided that *Atahan* was not a suitable case to provide definitive guidance, given the common law tort aspects of the decision. At least one attorney, however, feels that the issues in the *Atahan* case need further legislative definition. *Id.* Rationalizing that most beach injury cases are not going to occur on a landowner's property, but rather after the recreational user has crossed the property to access the beach, defense counsel for Mr. Muramoto see this issue as likely to arise again. *Id.*

[89] *See e.g., Stout v. U.S.*, 696 F. Supp. 538 (D. Haw. 1987) (HRUS precluded liability for injuries sustained by a boy while climbing a tree on a military base); *Palmer v. U.S.*, 742 F. Supp. 1068 (D. Haw. 1990) *aff'd* 945 F.2d 1134 (9th Cir. 1991) (HRUS protected United States from liability for injuries sustained by plaintiff when he fell on steps at Tripler Army Medical Facility swimming pool); *Howard v. U.S.*, No. 95-00642 DAE (D. Haw. Jan. 3, 1997) (HRUS protected the United States from liabilities sustained by a volunteer sailing instructor who injured her foot on a military dock).

[90] *See Proud v. United States*, 723 F.2d 705, 706 (D. Haw. 1984) (held that under the FTCA, the law of Hawai'i governs the federal government's liability in an action to recover damages for injuries sustained by minor in diving accident at Haleakala National Park).

[91] *See Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[92] *See* Allen Ides, *The Supreme Court and the Law to be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19, 27 (1995).

[93] *Id.*

[94] *Id.*

[95] *Id.* at 24.

[96] *Id.* at 20.

[97] *Id.*

[98] Interview with Ted Meeker, Assistant United States Attorney, in Honolulu, Haw. (Mar. 19, 1999).

[99] *Id.*

[100] Interview with Ben Kudo, Partner, Dwyer Imanaka Schraff Kudo Meyer & Fujimoto via e-mail (Mar. 25, 1999).

[101] *See* Richard S. Miller & Geoffrey K.S. Komeya, *Tort and Insurance Reform in a Common Law Court*, 14 U. Haw. L. Rev. 55, 61 (1992).

[102] *Id.*

[103] *Id.* at 62.

[104] *Id.* at 61.

[105] *Id.* at 62.

[106] *Id.* at 66.

[107] For example, Hawai'i's Supreme Court used to be the most liberal court in the United States regarding tort actions for negligent infliction of emotional distress, allowing recovety even for damage to property. *See, e.g., Rodrigues v. State of Hawai'i*, 52 Haw. 156, 472 P.2d 509 (1970). The court, however, has "backed off on emotional distress as an independent cause of action." Telephone interview with Richard

mains so "suit-happy," it would take a definite indication from the court that the HRUS would be interpreted favorably for landowners before they would take much comfort in it.[108] As noted in 1986 by the Commission:

> There is a willingness of the American public to seek compensation for accidents which used to be viewed as a part of life. At the same time that people are more willing to sue, they are more willing to participate in high risk sports. Recreational activities with greater risk, such as hang gliding, rock climbing, and white water rafting are increasing in popularity. While there are more risks people are willing to take there a fewer risks people are willing to accept. . . . Another factor is that insurance companies and others are increasingly willing to settle cases out of court to save time and money. This encourages frivolous lawsuits.[109]

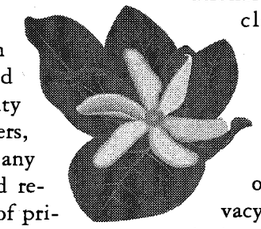
Landowners and their counsel continue to believe that, where there is a seriously injured plaintiff, there will be a creative plaintiff's attorney who will find a way that the HRUS does not apply to the particular circumstances of that case.[110] Some counsel believe that getting past a motion to dismiss or a motion for summary judgment is not that difficult to do in Hawai'i courts.[111] Once this happens, the landowner is on trial and the pressures to settle are tremendous.[112] Thus, the fear of possible liability, coupled with the lack of any significant benefit to the owner from opening the land, causes many landowners to continue to refuse access to their property.[113]

From a landowner's perspective, another major continuing problem with the HRUS is that it contains many ambiguities that can allow an injured party to argue that the statute does not apply in many situations.[114] Unless the law is so clear that the landowner can win on summary judgment, landowners will find it more comforting, legally speaking, to deny access completely than to take their chances with the poorly defined protection the HRUS affords.[115]

For example, although Hawai'i's largest landholder, Bishop Estate,[116] used to hold its extensive land holdings open for recreational use, approximately eight years ago it adopted a policy that denies accessibility to all but their leased lands (on their leased lands, if the lessee has no objection to the public's recreational use, Bishop allows access).[117] This policy came about as a direct result of litigation.[118]

From the perspective of many active hikers, however, while landowners undoubtedly experience difficulties from some users of their lands, there is no evidence that well-established, responsible, organized groups such as Sierra Club or the Hawai'i Mountain and Trail Club have contributed to these problems.[119] A similar argument is made by responsible, organized hunting associations such as the Hawai'i Pig Hunters' Association and the Hawai'i Chapter of the National Wild Turkey Federation.[120] In fact, these groups and other responsible users may deter misuse by trespassers and others.[121] Further, illegal activities such as poaching are not solved and may actually be aggravated by a "no access" policy where no one is on the land to witness and report such transgressions and so they remain hidden from view.[122]

Additionally, it should be remembered that lawsuits resolved by recreational use statutes are very rare.[123] Nationwide, most lawsuits involve cases in which the landowner did something outrageous, charged fees for access, failed to perform simple risk management, or are in states where the courts are allegedly biased against the statute.[124] Except for ocean injury lawsuits directed largely at state and county government or resort owners, there do not appear to be any serious lawsuits reported resulting from public use of private land in Hawai'i.[125]



While it will never be possible to eliminate all disputes, it may be possible to make the HRUS less ambiguous to alleviate landowners' legitimate fears of litigation, while also balancing the protection of the public. Keeping in mind that landowners will continue to doubt the protection of the statute until it is definitively interpreted by the Hawai'i state courts, the remainder of this article will be devoted to exploring problems that might arise under the HRUS should it ever be litigated in state court. By comparing and contrasting District Court of Hawai'i decisions and problems that have led to litigation of recreational use statutes in other states, the intention is to suggest legislative methods that might help further the stated purpose of the HRUS.[126]

## IV. Conclusion

Thirty years after the adoption of the Hawai'i Recreational Use Statute with its attendant high hopes of encouraging more private landowners to provide public access to their recreational lands, one thing remains clear - it is doubtful whether the statute has had any effect on landowner behavior in Hawai'i. Despite the fact that there may be other interests, such as privacy or moral concern for injuries to entrants, legal uncertainty remains high and that means that there are no incentives for landowners to open their lands.

In terms of public policy, the HRUS has yet to prove its wisdom. In one sense, it achieves the departure from the rigidities of common law landowner and occupier liability rules by attempting to distribute responsibility. In another sense, it merely adds another entrant category, the recreational user, to the common law classification scheme.

While the Hawai'i Legislature may be able to look to how other states have dealt with the ambiguities in their recreational use legislation as models for "tightening up" the ambiguities inherent in the HRUS, the tendencies of a more litigious society coupled with the uncertainty of state judicial interpretation, will continue to cause landowners in Hawai'i to doubt the protections afforded under the statute until a definitive ruling has been made by the state courts. Until then, many landowners will prefer to take their chances with the common law of trespass rather than open their lands to the public relying on the HRUS should anyone get injured on their property.

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Miller, professor emeritus, William S. Richardson School of Law (Apr. 11, 1999).

[108] Interview with Gary Slovin, Goodsill Anderson Quinn & Stifel in Honolulu, Haw. (Feb. 13, 1999).

[109] President's Commission On Americans Outdoors, *supra* note 49.

[110] Interview with Gary Slovin, *supra* note 98.

[111] Judges in the Hawai'i courts are reluctant to grant summary judgment motions because they don't want their decisions to be overturned on appeal. Interview with Gary Slovin, *supra* note 98. Unless the case is "absolutely black and white" the Hawai'i Supreme Court disfavors summary judgment and will send the case back to the lower court for a decision. Telephone interview with Jim Mee, Project Attorney, Pacific Legal Foundation Project Hawai'i (Apr. 5, 1999).

[112] Interview with Gary Slovin, *supra* note 98.

[113] *See* Richard Stone, Na Ala Hele, Landowner Liability To Recreational Users: Revisions To Chapter 520 H.R.S. (1990).

[114] *Id.*

[115] Interview with Gary Slovin, *supra* note 98.

[116] Telephone interview with Alika Neves, *supra* note 70.

[117] This is because the lease requires insurance in addition to the insurance Bishop Estate already carries for its own protection. The lessee indemnifies Bishop Estate should a suit be brought. *Id.*

[118] *Id.* Mr. Neves recalls one case in which a woman sued Bishop Estate when she slipped on a public boat ramp on adjacent lands. Bishop Estate won that case, but the cost and time involved in defending the suit caused the trustees to close down the estate lands. In another case Mr. Neves recalled, a "Good Samaritan" sued Bishop Estate after following a fire truck to the scene of a rescue where he fell from a cliff on Bishop Estate land while trying to aid the firefighters. While there had been other incidents prior to these, these were the two that ultimately caused Bishop Estate to adopt its current policy. *Id.*

One result of this policy has been that the Hawai'i Trail and Mountain Club has lost long-time access to land that used to be leased by Wailua Sugar Company from Bishop Estate. This means the loss of access to six trails in the mountains above Haleiwa on the north shore of O'ahu. Telephone interview with Steve Brown, Trails Committee Chair, Hawai'i Trail and Mountain Club (Feb. 16, 1999). Similarly, the O'ahu Pig Hunter's Association reports that they cannot access this land either, although they continue to try to work out an arrangement with Bishop Estate. Telephone interview with Rodney Jose, Former President, O'ahu Pig Hunter's Association (Apr. 10, 1999).

[119] *See* Stone, *supra* note 103.

[120] Hunters who belong to hunting associations are more informed about hunting laws because they must take a hunter's education course required by the State in order to obtain a hunting license. Telephone interview with Greg Gillia, *supra* note 2. Because of this hunting course, they are more likely to abide by the law. *Id.* It is people hunting without a license "who could care less," and will cut fences or break locks to gain access to restricted private lands. *Id.* A lot of non-registered hunters "just go anywhere they want to go" and wind up doing a lot of damage (i.e., destroy vegetation, cut their own trails, and steal). *Id.* Hunting associations stress responsibility and feel that these "poachers" give hunters a bad name. *Id.* Many of the people hunting on private lands without permission, however, feel that they have a right to be there because they know the land and have lived in the area for generations. Telephone interview with B. Ka`imiloa Chrisman, M.D., *supra* note 75. Many of the original roads into hunting lands or down to fishing areas have since been blocked by private land ownership. *Id.*

A related issue is the controversial decision handed down from the Hawai'i Supreme Court in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Haw. 425, 903 P.2d 1246 (1995) ("PASH"), which upheld the practice of traditional and customary rights of native Hawaiians on undeveloped land for those who can prove native Hawaiian ancestry. While discussion of the PASH decision is beyond the scope of this paper, it has been suggested that immunity could be provided to landowners for injuries to practitioners of native Hawaiian traditional and customary rights on others' private land by amending the HRUS or implementing a new law incorporating similar language specifically for practitioners. *See* Assistant Professor Denise E. Antolini, *PASH Study Group Materials: Issues Related to the PASH/Kohanaiki Decision* (1997 Hawai'i State Bar Association Convention, "Life With PASH!"), Dec. 9 1997 at 11.

[121] Stone, *supra* note 103.

[122] For example, when negotiating with Bishop Estate to regain access to lands formerly leased by Wailua Sugar Company, the O'ahu Pig Hunters Association pointed out that if their members were allowed access, they would provide a means for Bishop Estate to monitor the remote mountain areas where the group hunts, as they could report any suspicious or illegal activities they witnessed directly to Bishop Estate. Telephone interview with Pascal Dabis, President, O'ahu Pig Hunters Association (Apr. 10, 1999).

[123] *See* Charles A Flink & Robert M. Searns, *Greenways: A Guide To Planning, Design, And Development* 286 (Island Press 1993).

[124] *Id.*

[125] Stone, *supra* note 103.

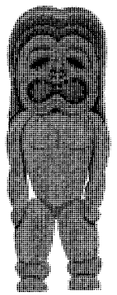
[126] *See* HAW. REV. STAT. ANN. § 520-1 (Michie 1998): "The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes."

# WHAT HAS YOUR BOARD BEEN UP TO?

The Board of Directors of the Real Property and Financial Services Section holds its monthly meetings at the HSBA offices on the third Friday of each month. Members of the Section are welcome to attend. The following is a brief summary of the minutes of the July, August and September meetings.

JULY MEETING

- JULY NEWSLETTER. Chair Randy Brooks reported that the July 1999 newsletter was on schedule and that footnote references made in the July article would be separately available.



- OPINION LETTER SEMINAR. The issues of content, scheduling and work product of the seminar were once again discussed by the Board against the backdrop of Coralie Matayoshi's visit to our Board meeting last month and a subsequent ad hoc opinion letter committee meeting. Gail Ayabe, who is a committee member, reported that the committee had agreed to condense its seminar to 3.5 hours in order to achieve the form of seminar Coralie was requesting for this December's Bar Convention. Several board members had independently tried to come up with alternative seminar topics that would fit in with Coralie's proposed format, including Bill Byrns, who had spoken with three appraisers, and Randy Brooks, who had obtained John Jubinsky's tentative agreement to speak on title endorsements. After further board discussion, Bill Deeley moved as follows:

1. Motion. That the Board select Nancy Grekin to communicate with the ad hoc opinion letter seminar committee, and anyone else necessary, in order for her to arrive at a proposal for two (2) RPFSS December seminars to substitute for the opinion letter seminar, which proposal she would then present to the officers of the RPFSS Board within the next two (2) weeks. Seconded and unanimously approved.

2. Motion. That the RPFSS Board authorize its officers to make a final decision about the December 1999 seminars on behalf of the entire Board. Seconded and unanimously approved.

   The Board expressed its thanks to the members of the ad hoc opinion letter seminar committee. The Board plans to hold a separate seminar on the topic early in 2000.

- TREASURER'S REPORT. Randy Brooks reported on the June 30, 1999 financial report, which showed a balance of $9,650.97. The report was seconded and approved.

- OLD BUSINESS. Chair Randy Brooks commented on a "wonderful" July 14th Legislative Update, chaired by Deb Chun, which 147 people attended (a full house!!). Bill Deeley then gave his report on the annual Real Property Litigation seminar.

- NEW BUSINESS. David Callies reported on several different cases including the following:

   1. A circuit court decision in which Judge Ibarra voided several shoreline management permits because they failed to contain input from environmental advisory councils. Professor Callies pointed out the fact, however, that none of the counties have such a council in place at the moment.

   2. *City of Monterey vs. Del Monte Dunes at Monterey, Ltd.*, No. 97-1235, decided on May 24, 1999, in which the U.S. Supreme Court, by a five to four decision, held that a landowner who was denied the right to develop its property, had the right to a jury trial on the issue of damages for an uncompensated taking. Professor Callies agreed to write up something on this case for the section newsletter and/ or website.

   3. *Bay Area Addiction Research and Treatment Center vs. City of Antioch*, 1999 Westlaw 351126 in which the Ninth Circuit held that Title II of the ADA applies to local land use decisions and zoning ordinances.

   4. *Hiner vs. Hoffman*, Hawaii Supreme Court No. 21408, May 18, 1999. Professor Callies commented that the decision was "unfortunate", and that it focused on "form over substance." Bill Deeley commented on a case he is handling in which the issue was the definition of the word "townhouse" as it applies to the installation of solar panels and the impact that a case like *Hiner* could have on such a dispute.

   5. Professor Callies related that the new LUO would be available in August 1999. The Board discussed asking Randall F. Sakumoto, who helped draft the new LUO, to participate in a section seminar on the new LUO next year.

   6. Professor Callies confirmed that the ceremony at the UH law school at which the Real Property & Financial Services Section's scholarships will be awarded is scheduled for August 30, 1999 at 12:45 p.m. This year's award recipients will be Julia B. L. Worsham and Amy M. Cardwell.

AUGUST MEETING

- JULY AND OCTOBER NEWSLETTERS. Jon Pang reported that the July edition of the newsletter went out with the assistance of Randy Brooks and Richard Asato. The newsletter included an article from UH law student Julia Worsham regarding environmental law. The next newsletter will be distributed in October with a featured article by UH law student Amy Cardwell on land use and possibly a discussion of the *Del Monte Dunes* case.

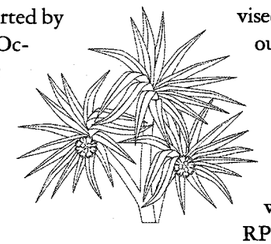
- NEW BUSINESS. Chair Randy Brooks is working with Sheila Sakashita on the Nominating Committee for the upcoming December elections. The committee for the opinion letter seminar has agreed that the seminar will be a stand-alone seminar and not part of the December Bar convention.

- TREASURER'S REPORT. Treasurer Stan Kuriyama submitted his Treasurer's Report for the period ending June 30, 1999. The report was approved by the Board.

- HSBA CONVENTION SEMINAR. Bill Byrns has confirmed participation by Honolulu appraisers Richard Stellmacher, James Hallstrom and Jan Medusky for the December seminar. KPMG has indicated its willingness to participate with a presentation on business valuation. Mr. Byrns will determine whether this will be feasible given the time limitations. John Jubinsky has agreed to do a presentation on title insurance indorsements.

SEPTEMBER MEETING

- OCTOBER NEWSLETTER. Vice-Chair Jon Pang reported by telephone that the October newsletter would include an article by one of our scholarship award winners, UH law student, Amy Cardwell.



- OPINION LETTER SEMINAR. Jon Pang reported that the committee had held a meeting and agreed that, rather than preparing a sample opinion letter, they would instead endorse the ABA Accord as being consistent with customary practice in Hawaii. They would recognize situations where the Accord opinion would be not appropriate or desirable and would include a checklist for exceptions and qualifications. The committee suggested having a seminar in March or April of 2000. A large portion of the seminar will focus on educating people about the ABA accord. In addition, a second year UH law student is planning to write an accompanying recent developments article for the UH law review. Finally, Jon reported that the ABA Real Property Probate and Trust Journal has indicated that it will review and may publish the work product of our ad hoc committee in its journal.

- DECEMBER HAWAII BAR CONVENTION SEMINAR. Randy Brooks confirmed that the RPFSS has arranged two seminars to be held on the morning of the first day of the two day seminar with one focusing on appraisers and their methodology and the other on title endorsements.

- DISCUSSION REGARDING YEAR 2000 SECTION BUDGET. Tom Rosenberg advised the Board that over the years our budget was based upon estimates only. David Callies suggested that we be mindful of the costs that HSBA charges the RPFSS for faxing, photocopying and the like and that we monitor whether or not the RPFSS is receiving the same level of service from the HSBA that it was receiving from HICLE (for example, with regard to the handling of RPFSS seminars).

- OLD BUSINESS. Chair Randy Brooks distributed a letter from Bill Deeley reporting on the 1999 Real Property Litigation Update seminar. Bill confirms that he, Judge King, and David Callies will be discussing various topics pertaining to bankruptcy and real property litigation and non-litigation practice. David Callies had agreed to discuss the following cases: *Pelosi, Hiner, City of Monterey, Bay Area Addiction Research and Treatment Center,* and *Hanapi*. The litigation seminar is scheduled for October 21, 1999 from 7:30 to 10:00 a.m., in the HEI Conference Room, 8th Floor, Pacific Tower, 1001 Bishop Street.

*Real Property and Financial Services Section*
*Hawaii State Bar Association*
*c/o Dwyer Imanaka Schraff Kudo Meyer & Fujimoto*
*1800 Pioneer Plaza*
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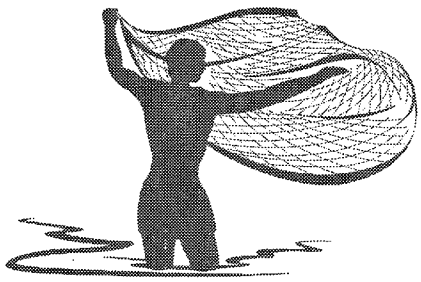

## CALENDAR OF EVENTS

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|---|---|
| Nov 19 | Board of Directors' Meeting<br>1136 Union Mall, Penthouse 1<br>12:00 Noon |
| Dec 9 | Annual Meeting<br>Plaza Club<br>Pioneer Plaza<br>20th Floor<br>12:00 noon |
| Jan 21 | Board of Directors' Meeting<br>1136 Union Mall, Penthouse 1<br>12:00 Noon |