

K A N U H O U

The Newsletter of the Real Property & Financial
Services Section of the Hawaii State Bar Association

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From the Chair

Thanksgiving is my favorite holiday. It marks that time of year (before the "holiday-crazies" really set in) when we pause to reflect on the many gifts life has given us. This year, against the backdrop of the September 11th tragedy, ongoing anxiety across the nation, and economic problems here in Hawaii, I believe that remembering to focus on an "attitude of gratitude" could be the best antidote to any feelings of sorrow or worry that we may be experiencing.

This year, I am particularly grateful for the honor of having been able to serve as Chair. I especially appreciate the hard work and support of Chair-elect Rick Kiefer, who did a remarkable job as our newsletter editor and who will make an outstanding Chair in 2002. My thanks also go to Lorrin Hirano and Gail Ayabe for their consistently reliable efforts.

I am also thankful for the active participation of past RPFSS chairs and committee members such as Joyce Neeley and Randy Brooks, who took a leadership role, along with members of the Business Law Section, towards amending the new Hawaii Nonprofit Corporations Act; Gino Gabrio and Gail Tamashiro, who showed tremendous perseverance in successfully publishing a wonderfully informative and completely updated Conveyance Manual; Deb Chun and Bill Deeley, who once again organized excellent educational seminars for our members; and Nancy Grekin, who not only

served as a panelist at the recent Conveyance Manual seminar, but who, as our "Webmistress", continues to provide our section with a first-rate website, www.hsba.org/sections/rpfs, that I think is the best in the entire HSBA.

Finally, thank you all for your membership and your commitment to excellence as real estate and financial services lawyers. Please be sure to attend our Annual Membership meeting on Thursday, December 6th at the Plaza Club at noon. Suzanne Case, Regional Counsel and Acting Executive Director of The Nature Conservancy of Hawaii will be our guest speaker. In the meantime -- Happy Holidays!!

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Land Use & Takings Seminar

The Real Property and Financial Services Section is cosponsoring a seminar on Land Use and Regulatory Takings on January 17 and 18, 2002 at the Ala Moana Hotel in Honolulu. The other cosponsors are The Seminar Group and the William S. Richardson School of Law. The keynote speaker will be Michael S. Berger of the Santa Monica, California, law firm of Berger and Norton.

Mr. Berger will be arguing the regulatory takings case of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency before the United States Supreme Court next spring.

Among the many topics being addressed at the conference are shoreline management permits, traditional and cultural rights (including burials), the role of the State Land Use Commission, the role of the Honolulu Land Use Ordinance and relation to development plans, land development conditions (impact fees) and development agreements, Army Corps of Engineers 404 permits, subdivisions, and the land use implications of the Endangered Species Act.

A \$95 discount off the registration fee is available to Section members. For more information or to register please contact THE SEMINAR GROUP at 800-574-4852.

February Regulatory Takings Symposium

The William S. Richardson School of Law and the University of Hawaii Law Review invite all Real Property and Financial Services Section members to a symposium on property rights and regulatory taking after the United States Supreme Court's 2001 decision in Palazzolo v. Rhode Island.

The symposium, moderated by Professor David Callies, will be held on Friday, February 8th from 3:30 to 5:00 p.m. at the UH Music Building Auditorium (on Dole Street, across Lower Campus Road from the Law School). The distinguished panel includes:

James Burling of the Pacific Legal Foundation, who successfully argued Palazzolo before the Supreme Court;

Steven Eagle, Professor of Law at George Mason University and author of the treatise "Regulatory Taking";

Robert Freilich of Freilich, Leitner and Carlisle, author of "From Sprawl to Smart Growth";

Dwight Merriam, of Robinson and Cole, coauthor of "The Takings Issue"; and

Tom Roberts, Professor of Law at Wake Forest University, coauthor of the treatise "Land Use Planning and Control Law."

New Finance Caselaw

On August 31, 2001, the Hawaii Supreme Court issued a decision in Beneficial Hawaii, Inc. v. Kida, 96 Haw. 289, 30 P.3d 895 (2001), that has implications for table funded and conduit financings. In Kida, a 3-member majority of the Court, in an opinion authored by Justice Levinson, held that where a mortgage loan was table funded, the original mortgagee had acted as a "mortgage broker" within the meaning of Hawaii Revised Statutes Chapter 454. The Court then held that since the original mortgagee was not licensed as a mortgage broker, the mortgage and the promissory note it secured were void and could not be enforced by a subsequent holder. Justice Ramil vigorously dissented from the majority's opinion and its "absurd" result. The opinions in this case are available at the Judiciary's website at www.state.hi.us/jud/.

Loko i'a: A Legal Guide to Restoring Hawaiian Fishponds

By Ian Hlawati

Ancient Hawaiian fishponds change modern peoples' lives. Fishfarmers, preservationists, and chance visitors continue to attest to an inherent magnetism of fishponds. And yet, Hawai'i developers and property owners often curse the fishpond and its attendant burden on coastal development. Restorationists, likewise, have come to fulminate, not about the fishponds themselves, but the federal and state permitting process required to restore a fishpond to an operational state. Moreover, private owners of fishponds may never feel completely secure in their property interest on these unique coastline enclosures.

Considering that a 1990 survey estimated that there were 488 fishponds in the State of Hawai'i, the caselaw on fishponds is remarkably sparse. Until recently, cases relating to fishponds involved, almost exclusively, conflicts over real property interests. Now, however, the process of fishpond restoration has also become the subject of litigation; Wright v. Dunbar, a 2001 federal case involving a Moloka'i property owner's restoration efforts, brought the modern controversies of fishpond restoration to light. Far from the traditional common law, the parties in Dunbar litigated claims stemming from the complexities of the permitting required to restore a fishpond to violations of federal environmental regulations.

The status and ownership of ancient Hawaiian fishponds remains a quiet but potentially complex and dense area of law. This article uses the limited Hawai'i caselaw in this area to catalogue and anticipate legal issues that may arise in relation to the restoration of ancient Hawaiian fishponds. This article then explores the issues in Dunbar, a compelling legal story of a private restorer pitted against a vocal neighbor opposed to restoration, that are indicative of the courts' struggle to balance unique fishpond interests within the confines of the Western legal system.

Ancient Hawaiian Fishponds

Loko i'a, Hawaiian for fishponds, were a fundamental part of the Hawaiian method of subsistence cultivation realized through a complex land and sea farming system. The natural freshwater streams and Hawaiian cultivation in *ahupua'a* created a fertile runoff at the coastline; an ideal environment for fishfarming. The movement away from catching fish to "growing" fish may have begun earlier than the 13th century and continued until the mid-19th century when construction of fishponds ended.

The walls of fishponds are both naturally produced by land mass and enclosed by man-made formations of rocks abutting the coastline. To the first-time observer, the fishpond will appear as a variable line of rock wall enclosing the ocean. The number of people necessary to build a fishpond could number 10,000, but the yield from such an effort provided the native Hawaiians with an abundant supply of fish that would not have otherwise been available in the natural food chain. Investigative reports, made by the United States Fish Commission as late as 1903, documented the success of the fishpond system of aquaculture established by the Native Hawaiians.

Fishponds, however, served more than just a practical purpose. Fishponds were sacred places "because of their spiritual power and presence of *`akua*, gods, and *`aumakua*, ancestral gods." Many of the fishponds served as shrines to particular gods and were earthly mediums through which people could encourage good fortune and demand punishment for wrongdoings. In war, the fishpond was a coveted target for destruction, because it symbolized the agricultural and aquacultural prowess of a chief and his people.

In addition to its religious underpinnings, the cultivation of the fishponds reinforced the hierarchical structure of the native Hawaiians. The *konohiki* were primarily responsible for the stewardship and distribution of the resources of the fishponds. The *konohiki* class would also become the majority of private property owners of the fishponds after the Great Mahele of 1848. The Great Mahele established a nonexclusive form of private property in which *konohiki* owners had the right to transfer the fishponds subject to the existing tenancies and the appurtenant rights of the respective tenants. Tenants could, likewise, transfer their nonexclusive right to fish. These property rights became known colloquially as "*konohiki* fishing rights" and were codified in the Kingdom of Hawai'i statutes, which provided, in part, the basis for property law in Hawai'i today.

The interest in fishponds as private property has continued to this day. Many of the vested rights in this type of private property were extinguished when Congress passed the Organic Act of 1900, which required fishponds to be "established" and claimed in court. However, those that were properly claimed have remained vested. Legislative reports indicate that by 1939, only 35 owners had established their legal rights in

approximately 100 fishponds pursuant to the Organic Act. The beginning of the twentieth century marked not only a decline in private ownership of fishponds, but also marked the decline in the actual use of fishponds for subsistence. Gradually native Hawaiians and other island residents began to replace the growing of fish with local ocean fishing and importation. The coincidence of the Organic Act and the introduction of new means of obtaining fish products may account for the low claims of private property interest in fishponds as mandated by the Act.

The cultural history of the fishpond is also a Western legal history after 1900. Due, in part, to the passage of the Organic Act, the Hawai'i Supreme Court began to substantially alter fishing and property rights as they related to fishponds. In 1902, the first reported case dealing with fishponds reached the Hawai'i Supreme Court. In Carter v. Territory, 14 Haw. 465 (1902), trustees of the Bishop Estate sued to establish *konohiki* fishing rights in certain O'ahu fisheries, but the Hawai'i Supreme Court held that ancient custom and prescription no longer established property and fishing rights after the Great Mahele. The U.S. Supreme Court declined the invitation to reverse the court's holding in that regard, but later contradicted the Hawai'i Supreme Court in a related case Carter v. Territory, 200 U.S. 255 (1906), holding that if a clear conveyance had been made during the Great Mahele, the *konohiki* fishing and property rights were vested.

In general, the federal courts appeared to be less willing to strip away native Hawaiian rights to fishponds as they related to the Organic Act. In 1933, the U.S. District Court for the District of Hawai'i held in United States v. Robinson, Civil No. 292 (D. Haw. 1933), that fishpond tenancies could vest notwithstanding a certain amount of

noncompliance with the Organic Act. The court in Robinson claimed to have reached this result by following *dicta* of the Hawai'i Supreme Court in Smith v. La'amea, 29 Haw. 750 (1927), although the Hawaii Supreme Court would, three years later, reach the opposite result.

On the issue of fishpond divestment, the Hawai'i Supreme Court continued on a disparate path from the federal courts for over fifty years, culminating most significantly in 1964, in State of Hawai'i v. Hawaiian Dredging Co., 45 Haw. 152 (1964). The court in Hawaiian Dredging held that intervenors in a condemnation action could not preserve their *konohiki* fishing rights via the rights of one established co-owner. Firmly abiding by the Organic Act, the court stated that the intervenors claiming to have *konohiki* fishing rights "had ample opportunity to preserve those rights but, in the face of the mandate of the Organic Act that they take action to preserve them, they did nothing." Simply put, from 1900 to 1970, the Hawai'i Supreme Court created a line of caselaw dissolving vested rights of native Hawaiians in favor of opening the coastline to the general public through state ownership. Remnants of this philosophy favoring public access to the coastline continue to exist and permeate both the state and federal caselaw of today.

Current Condition of Fishponds

The fishpond has been a casualty of population growth and Western influence in Hawai'i. In many ways, the current condition of fishponds is a result of the loss of both *konohiki* tenancies and of private ownership interests. Lacking the community or personal property interest for decades, many of the fishponds simply have eroded by wave action or mangrove trees. Many of the walls of fishponds have been damaged and left

unrepaired, allowing further deterioration of the walls in their entirety. Many of the fishponds have simply been dredged and developed. The military installations in Pearl Harbor and housing developments at Kane'ohe Bay, on the island of O'ahu, are noteworthy examples of fishpond loss. Over a thirty year period ending in 1975, the number of fishponds in Kane'ohe Bay dropped from twenty-four to seven. Today there are even fewer. Statewide, the numbers are less dramatic, but still declining. On Moloka'i, once a bastion for native Hawaiian fishponds, less than one hundred remain, a large majority of which are in poor or submerged condition.

Notwithstanding the dramatic reduction in the number of existing fishponds, in the past twenty-five years, both public and private groups have become more interested in the use and revitalization of historic fishponds. This movement is sparked both by native cultural revitalization and private economic interests. Although the cultural reasons are a product of a stronger and more vocal native Hawaiian movement, it was not expected that the native Hawaiian fishponds would once again be viewed as economically viable. The demand for seafood is the primary reason that the fishponds have merited a second look from a market standpoint.

As early as 1977, the State of Hawai'i began commissioning studies through the Department of Planning and Economic Development, Aquaculture Planning Program to research the suitability of fishponds for modern aquaculture. And yet, the interest in the economic revitalization of fishponds is tempered by certain, probably justified, fears that urban runoff may contaminate fish stocks. Such runoff could not have been envisaged by the builders when the ponds were constructed abutting the once pristine shores.

Restoration and Permitting

Fishponds remain an area of quiet interest despite the attention to the greater protection for Hawaiian historical sites. Greater attention was paid to fishponds after the publication in 1997 of Joseph M. Farber's book, *Ancient Hawaiian Fishponds: Can Restoration Succeed on Moloka'i?*. Farber documents the various movements toward restoration beginning in earnest in the mid-1960s. After the destruction of several noteworthy fishponds in the 1960s and 70s, a grass-roots movement emerged to conserve fishponds. The movement recognized and inherent cultural value in the fishpond, which differed from the economic motive of previous restoration efforts under the auspices of the State. In light of the fact that many of the remaining fishponds are State-owned, the government has remained an interested party in the restoration process, albeit ostensibly for commercial benefit. Even after the State began calling for restoration in the 1930s, only five fishponds have been restored to a functional state by 1995.

A noted writer and previous caretaker of the Lokoea fishpond on O'ahu, Carol Araki Wyban, advocates the use of fishponds for both cultural and commercial purposes. She has encouraged the restoration of fishponds based on five principles: 1) Hawaiian fishponds are cultural treasures; 2) fishponds should be used for growing fish and seafood; 3) Hawai'i can continue a tradition of innovation with fishpond resources; 4) appropriate technology can increase yields in fishponds; and 5) fishponds are valuable educational tools. Farber, in contrast, posits that it would be unreasonable to believe that restoration of fishponds would be viable from a "purely economic sense of the world market," because fishponds are such labor intensive endeavors. Irrespective of the

complex interests behind restoration, restoration continues.

Revitalizing a fishpond is not only an area of divergent philosophies, it is a legal matter. Although the state government and certain federal government agencies appear to endorse the restoration of fishponds, the permitting process allowing an interested owner to restore a fishpond is both expensive and cumbersome. There are no fewer than thirteen state, county, and federal permits required to restore a fishpond to an active aquacultural state. The cost of these permits can range from \$16,000 to \$150,000 per fishpond, notwithstanding the actual physical cost of restoration, which has been estimated at \$22,000 in some cases. Farber isolates five fundamental problems associated with permitting, including: 1) permit complexity; 2) permit delays; 3) changes in regulations during planning phases; 4) "miscommunication between regulators and developers"; and 5) project opponents. Citizen streamlining of permits and governmental attempts to, likewise, reduce permit burdens, are some of the continuing measures taken to confront these issues.

There are many double-edged swords affecting the ability of potential restorers to obtain permits and complete work for restoration. The permit process, itself, is a conundrum. Permitting has created a situation whereby conservationists/restorationists are prevented from taking the necessary steps to lawfully restore because the permits, at present, require such intense environmental impact studies. Additionally, because time-worn fishponds now can provide habitats for endangered species, the permitting has become especially sensitive as it impacts the federal and state Endangered Species Acts. Fishponds have, likewise, been converted into wetlands by flourishing mangrove trees and runoff. The conversion of fishponds into wetlands has

given rise to particular problems, not the least of which is the refusal by the U.S. Army Corps of Engineers to approve the necessary permits for fishponds considered to be wetlands. One further example of the restoration dichotomy exists in the government's aversion to the use of machinery to complete work. The Department of Health opposes the use of machinery in the ocean, although modern restoration is unlikely without it. The difficulties of permitting are innumerable for large and small-scale restorationists alike.

Present-day permitting

Widespread attention has been paid to the basic permitting required to begin restoration on a fishpond. Specifically, the communities with an interest in fishpond restoration have developed an aversion to the unmanageable and duplicative nature of the requisite permits. Despite such aversion, the permit process has changed very little since its inception, and there is also a continuing lack of guidance to be found to assist the potential restorer with the permitting system.

Currently, it is estimated that thirteen permits, each of varying complexity, are required to begin restoration. The basic federal permits include: 1) 404 Army Corps of Engineers Permit; 2) 401 Water Quality Certification; 3) CZM consistency statement; and 4) Fish and Wildlife Review. The basic Hawai'i State permits include: 1) revocable permit or lease documents, if the pond is State owned; 2) Environmental Assessment; 3) Conservation District Use Application; 4) Historic Preservation Review; and 5) Fishing Permit. A more comprehensive list of permits required for aquaculture in Hawai'i was compiled by the Aquaculture Department Program in 1994, but has yet to be updated. Not all fishponds will be required to apply for each permit, although there is no identifiable process to

determine whether a fishpond may be excluded from a particular requirement. Although the State and other citizen groups have attempted to streamline the permitting process, negotiating the permitting continues to require guidance. The State Aquaculture Development Program, once under the auspices of the Department of Land and Natural Resources, but now a part of the Department of Agriculture, is primarily responsible for overseeing permitting for fishponds, but there is no representative with knowledge of permitting specific to fishponds. Restorers have, thus, been forced to pay for consultants to negotiate the process.

Joseph M. Farber, working as a private environmental consultant and with the Pacific American Foundation, has been working to prepare "checklist" type forms, to assist in the negotiation of permitting process. The conversion from the current system to an expedited system remains slow due to a lack of knowledgeable professionals. Farber considers himself to be one of the only people in Hawai'i familiar with the permitting system, but notes that the Department of Land and Natural Resources has been supportive of his endeavors to overhaul the current system, as a part of the larger project to streamline all fishpond permitting.

Streamlining the Permitting Process

In response to the difficulties of permitting, restorationists on Moloka'i and their counterparts have attempted to streamline the process. Moloka'i fishponds are particularly good candidates for restoration, because many are still partially intact. Moloka'i also benefits from both strong community support for the projects and the absence of urban influences. In 1993, the State and the Moloka'i community began to catalogue the remaining fishponds based upon their candidacy for

restoration. The goal was to group fishponds with similar characteristics, so as to be able to create a template permit or a general permit covering all of the included fishponds. Although the community and State differed on exactly which fishponds were candidates for restoration, approximately thirty were chosen to be included in the Master Conservation District Use Application. The State paid for the majority of the costs associated with obtaining the several permits included in the master application. Although the process began in 1993, it has not yet been completed, and promises to be riddled with more hindrances.

The streamlining project has been a partial success. From the original list of 30 fishponds that could be streamlined for restoration purposes, a more limited list of fishponds is now eligible for a nationwide authorization. The nationwide authorization is a mechanism through which many of the State permits are subsumed in a single authorization administered by the U.S. Army Corps of Engineers. In recent history, the State of Hawai'i through the Department of Land and Natural Resources appears willing, if not zealous, to assist in the permitting for fishpond restoration. In the case of Wright v. Dunbar, the State authorized the restoration of Dunbar's fishpond by retroactively including the pond in the list of 17 fishponds eligible for streamlining of permitting. The recent support by the State could not have been anticipated even in the mid-90's.

Permitting, even when streamlined, does not solve the problems associated with private restoration of fishponds. Because the bureaucracy of permitting coincided with a renewed interest in the restoration of fishponds, much has been written on overcoming this process. Irrespective of the attempts to expedite permitting, the process

remains cumbersome and continues to be the principle obstacle for the prospective restorer.

Legal Guide to Restoration *History of Fishpond Litigation*

Little has been written as a legal guide to restoration and permitting. The absence of legal analysis may be due, in part, to a small body of caselaw on a number of diverse subjects. The multiplicity of issues and interests involving fishponds have not lent themselves to a preeminent theme upon which scholarly writing might be based. Notwithstanding this absence, it remains important for restorers to be aware of the current state of the law as it relates to their unique property interests.

Historic loss of land

A fishpond owner must be aware that adverse possession of fishponds is more likely to occur than with other real property interests. The requirements to establish an adverse possession claim -- actual, open, notorious, continuous, and exclusive possession for the statutory period -- arise more often when they involve the customary usages of native peoples. The owner of a fishpond needs to protect both against adverse possession by another private claimant as well as against the State. In particular because the State is the presumptive owner of the submerged land and fast lands below the vegetation line, abandoned or unclaimed fishponds can revert to the State after a period of adverse possession. This would be particularly true of fishponds that remain below the water's surface continually or at high tide. Notably, under the common law, once a fishpond is adversely possessed by the government, it cannot be possessed again thereafter.

In 1978, the Hawai'i Supreme Court addressed the question of adverse possession as it relates to fishponds in In re Kamakana, 58 Haw. 632, 574 P.2d 1346 (1978). In Kamakana, the petitioner sought to quiet title to the Kanoa fishpond on the island of Moloka'i. The court held that Land Commission Award of the Kawela ahupua'a by name only included any adjacent fishpond even where the boundary was described as the shoreline and the fishpond was *makai* of the shoreline. The State attempted to thwart Kamanaka's quiet title action by claiming that it had title to the property or, in the alternative, adversely possessed the fishpond in question. In regard to the adverse possession claim, the court held that the State could adversely possess the fishpond if it had met the requirements of adverse possession for the statutory period. The sole fact that the State is the owner of lands *makai* of the shoreline is not, alone, sufficient to establish adverse possession as to a private landowner. Without evidence of hostility, required to adversely possess against her predecessors in interest, title was quieted in Kamanaka.

Not only must a fishpond owner consider the threat of adverse possession by the State, it is also possible for private claims to be likewise asserted. The question of whether fishponds fall within the purview of Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission, 79 Haw. 425 (1995), allowing for customary gathering rights on undeveloped, or "less than fully developed property," has not been addressed by the Hawaii Supreme Court. The court declined to define "less than fully developed property" in Public Access Shoreline Hawai'i, and again in 1998, declined to answer the question as it related specifically to fishponds in State v. Hanapi, 89 Haw. 172, 970 P.2d 485 (1998). In Hanapi, Alapai Hanapi was arrested for criminal trespass after making numerous

attempts to hinder grade and fill activities near two fishponds on the island of Moloka'i. The Hawai'i Supreme Court affirmed the conviction of Alapai Hanapi for criminal trespass in the second degree. In affirming the conviction, the court entertained Hanapi's defense that he was present on the fishpond property in performance of ancient traditional or customary native Hawaiian practice. The court found that Hanapi had not adduced sufficient evidence to support his claim that "stewardship," not gathering per se, was rooted in traditional or customary Hawaiian practice. Having determined that Hanapi's practice did not conform to the standards as set forth in Public Access Shoreline Hawai'i, the court did not reach the question of whether the fishpond would have been considered "undeveloped" if the practice had been valid. In dicta, the court stated that "we need not discuss the degree of development on [the fishpond] property because the dispositive issue in the instant case is based on the constitutionality of Hanapi's claimed Hawaiian right."

Thirty years before Hanapi, the opposite result was reached in Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968). In Sheehan, the defendants in a quiet title action claimed fishing rights and a right of way to the Nomilo Pond on Kaua'i, basing their claim on both Hawaiian custom and the doctrine of necessity. The court found sufficient evidence that the Sheehan defendants and others had accessed the trail on the plaintiff's property to reach the Nomilo fishpond and the coastline for generations. Avoiding the issue of Hawaiian custom, the Supreme Court of Hawai'i affirmed the lower court's finding that a right of necessity existed, albeit not one of strict necessity. The plaintiffs could not, thereafter, restrict the right of way "to pedestrian and equestrian use as it [had] existed prior to 1910." The court cites Sheehan in Public

Access Shoreline Hawai'i, but does not address whether their holding in Public Access Shoreline Hawai'i would have allowed the result in Sheehan to be based on the customary use claimed by the defendants.

The use of a fishpond by a private individual has also formed the direct basis for a successful claim of adverse possession. In a 1902 case, the Hawai'i Supreme Court found that the acts of a non-owner could overcome the interests of the actual land grant awardee. In Sister Albertina v. Kapiolani Estate, 14 Haw. 321 (1902), the court found that because Kapi'olani's claim to the Honuakaha parcel in Honolulu, O'ahu, was evidenced by a history of cleaning the fishpond on the parcel, fishing in the pond, and objecting to various environmental hazards affecting the pond over a sufficiently long period of time, she had acquired title to the fishpond property. Because the true owners had not exercised the corollary rights exercised by Kapi'olani, the court felt an actual, open, notorious, continuous, and exclusive possession had occurred for longer than even the required statutory period. For the modern fishpond owner, exclusive use by a non-owner must occur for a period of 20 years to satisfy the statutory requirement for adverse possession. In keeping with Sister Albertina, families or individuals who may have used a particular fishpond over generations, and not necessarily as *konohiki* tenants may someday have an adverse possession claim, depending on the actions of the owner toward the same piece of property. Claims arising from such customary practices are further legitimized in Public Access Shoreline Hawai'i, where the court stated that "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state."

In addition to the open and notorious use of a fishpond, the maintenance of a fishpond over

time may also have legal significance for the owner or restorer. Title can not only be usurped through adverse possession, but also through federal concepts of navigational servitude. Navigable servitude arises out the Commerce Clause of the United States Constitution, wherein the power to regulate navigable water is "coextensive with . . . the power to regulate commerce generally." The U.S. Court of Appeals for the Ninth Circuit addressed this issue in 1989 in Boone v. United States, 944 F.2d 1489 (1991). In Boone, representatives of the Maud Van Cortland Hill Schroll Trust brought an action against the United States for the right to deny access to the *Puko'o* fishpond on Moloka'i, notwithstanding the fact that the fishpond wall had been damaged or destroyed by a 1946 tsunami. The parties were, thus, required to examine the historical state of the pond to determine prior navigability for the servitude inquiry. The government introduced evidence supporting the navigability of the area encompassed by the remaining fishpond wall, but the trust rebutted the government's claim with contrary evidence of non-navigability. The court of appeals, however, agreed with the district court's finding that the trust's witnesses testifying to the non-navigability of the fishpond were more credible.

Navigability alone was not the dispositive factor in the Boone case. The Ninth Circuit found that the water, although navigable in fact, was not subject to a navigable servitude. The court relied on the U.S. Supreme Court's holding in Kaiser Aetna v. United States, 444 U.S. 164 (1979). In Kaiser Aetna, the lessee of land on O'ahu, including the Kuapa fishpond, sought to dredge the fishpond and create a private marina in Hawai'i Kai. Kaiser Aetna remains the benchmark for determinations of navigable servitude of Hawaiian fishponds, wherein the Court held that the determination of navigability differs in

different contexts. Refusing to establish a blanket rule imposing servitude on all waters that are navigable in fact, the Court found that the Hawaiian fishpond in question was 1) "[c]apable of private ownership;" 2) had characteristics militating against a finding of navigability; 3) was always considered private property under ancient Hawaiian law; and 4) had investment-backed expectations of the fishpond's privacy. The Ninth Circuit found Boone and Kaiser Aetna to be indistinguishable insofar as the inquiry regarding navigable servitude, and held that the owners of *Puko'o* fishpond had the right to deny public access. The court agreed that fishponds have historically been considered private property in Hawai'i, but did not reach the question of whether traditional and customary rights of Native Hawaiians are coextensive with that interest.

A showing of non-navigability continues to be part of the required proof by a fishpond owner to avert a claim of federal navigable servitude. If a boat can breach the wall of a fishpond or if the water is sufficiently deep within the remnants of a fishpond wall, the pond owner may be subject to a claim of servitude for which there is no compensation. Several courts have intimated that they will continue to use such an analysis for the finding property interests in fishponds or other shoreline waters. In 1996, the District Court for the District of Hawai'i in Napeahi v. Wilson, U.S. Dist. LEXIS 21851 (D. Haw. 1996), found that the State of Hawai'i breached its fiduciary responsibility by granting a permit to dredge and fill "ceded" coastal land on the island of Hawai'i. Napeahi claimed that the land could not have been considered submerged and was, thus, still considered "ceded land" within the meaning of the Hawaii Admission Act. The court reasoned that the property boundary was unascertainable because the State had no "evidence in 1984 that a fishpond wall existed

on which the State could base his conclusion about the location of the shoreline in this area." The court in Napeahi indicated that the existence of fishpond wall, between the ocean and the tidal pond area was dispositive in determining property rights involving submersion and servitude.

Other essential considerations for the restorer

Successful restoration requires meticulous adherence to the terms of state and federal permits. Non-adherence to the strict term of permits can create innumerable problem for the potential restorer. Many of the obstacles to restoration are vitiated by the issuance of permits, such as when the restoration of a fishpond may implicate endangered species as determined by the Fish and Wildlife Service. Because the individualized environmental impacts of restoration are not known in all cases, the issued permits serve only as an endorsement to begin restoration, not necessarily a mandate to continue. In Wright v. Dunbar, discussed below, the Nationwide Permit granted by the Army Corps of Engineers was revoked for alleged non-conformation to the terms of the authorization, and the fishpond currently remains half completed. The restorer in Dunbar was also challenged for non-adherence to the native model of fishponds as a guide for construction or rebuilding of the retention wall.

Most significantly, the State Department of Health 401 Water Quality Certification, essentially a building permit for projects involving States waters, has caused the greatest backlog in permitting and the greatest expense to the potential restorer. To obtain the 401 Certification, the restorer must essentially certify that a restoration project will not lower the water quality in the area to be restored. But how can restorers be sure that they will remain in compliance? It may be a tenuous

proposition to think the restorer can restore a fishpond without some water degradation, in particular on Moloka'i, where the waters are classified as class AA (extraordinary). More troublesome, degradation or turbidity may be the basis of a citizen suit against the restorer for violations of the federal Clean Water Act.

Government or citizen suits against restoration may take the form of "1) failure to certify compliance with State Water Quality Standards pursuant to [Section] 401 of the Clean Water Act; 2) violation of EPA-Corps Guidelines for issuance of a [Section] 404 dredge and fill permit; 3) violation of the National Environmental Policy Act; 4) failure to remove illegal fill; 5) violation of the Rivers and Harbors Act; and 6) violation of the Hawaii State Constitution Art. XI § 9." The Clean Water Act implicates both state and federal responsibilities, however the issuance of a 401 permit under the Act assumes that a State has approved of the restoration activities. Thereafter, violation of the Act can be pursued by the Environmental Protection Agency or, under some circumstances, by a citizen suit in federal district court. The State may, however, intervene in a citizen suit if there are cognizable state interests implicated by violations of federal environmental regulations as promulgated by Congress.

In Wright v. Dunbar, the only case of record where a citizen claimed violations of the Clean Water Act as they related to restoration of a Hawaiian fishpond, the plaintiff sought damages for daily violations of the Act chargeable at \$25,000 a day for a period of over eight years. The claim related to the turbidity caused by the fishpond to adjacent properties. The Court of Appeals for the Ninth Circuit, however, affirmed a district court finding that the navigable waters had not been adversely affected by the restoration of the fishpond. The Dunbar case's value, as it

relates to potential Clean Water Act claims, is more profound for what it does not say, namely, that a finding of turbidity or degradation of water not authorized under the 401 permit is a question of fact. For the potential restorer who may worry about violations of the Clean Water Act in violation of the 401 permit will, thus, be forced to prove that the respective water quality has not been affected, if challenged.

Albeit another double-edged sword in the process of restoration, a 401 permit is not a license to compete a fishpond restoration if it is found to have an adverse water quality impact that was not anticipated. Data collected from previous restoration efforts provides the only baseline, in terms of water quality impact, for the potential restorer. The streamlining process, is meant in part, to provide models for subsequent restoration and address the environmental impact of altering the coastline. Unlike other areas, the restorer cannot fully anticipate the effects of a restoration project on the environment and, hence, restoration in this regard can be a leap of faith. There are, to date, no clear solutions in the area of water quality, although the continuing attempt to standardize permitting does hold promise for the potential restorer.

Modern Trends and Concerns

Common law claims, such as those based on adverse possession, may seem passé in light of the fact that fishponds are no longer mere appurtenances, but rather property interests in their own right. State and private owners alike have come to realize that fishponds are property interests of a limited and valuable character. Thus, it may be unlikely that an adverse possession claim might be successfully litigated by anyone other than the government. The question, thus, remains: What would a prospective restorer who obtains the proper

permits and begun the restoration process need to worry about? The answer is best illustrated in the reality of the the most recent litigation in Wright v. Dunbar.

Wright v. Dunbar

Lance "Kip" Dunbar, a lifetime resident of Moloka'i and O'ahu, decided to begin restoration on the Ipuka'iole fishpond on Moloka'i, in which he claims his ownership arises from land grants beginning in 1866. Originally, Ipuka'iole was about 3.2 acres in size, having a 590 foot perimeter wall and was a smaller "keiki" pond adjacent to the 19-acre Kainalu fishpond. Catherine C. Summers, a noted anthropologist who worked on Moloka'i, stated, in regard to Ipuka'iole, that "[i]n 1938 the wall was broken, and by 1957 it was completely destroyed." Dunbar says he was inspired to restore Ipuka'iole because it was a fishpond he "grew up with," the purpose being that he could return the fishpond to its original majestic state and use it for personal aquaculture. On May 17, 1990, the U.S. Army Corps of Engineers authorized Dunbar to begin restoration of the fishpond, which had been part of his family's ahupua'a parcel. On June 28, 1991, Dunbar had completed about 300 feet of the wall when the Corps rescinded its approval for the restoration. The commencement and subsequent halt of the restoration of Ipuka'iole occurred with substantial outside influences.

Harold S. Wright, a landowner two parcels away from Dunbar and Ipuka'iole, believed that the fishpond restoration was adversely affecting his oceanfront property through erosion of the shoreline. The basis of Wright's claim was that the prevailing currents on the Moloka'i coast made the area inappropriate for restoration without causing erosion to adjacent property owners. In his view, Dunbar's activities constituted an unconstitutional

private taking. Wright had allegedly attempted several methods of self-help to halt Dunbar's restoration, which Dunbar claimed caused the revocation of the Corps' permit. Wright's displeasure with Dunbar's activities formed the basis of the complaint he filed in the United States District Court for the District of Hawaii, Wright v. Dunbar, et al., Civil No. 97-00137 HG (D. Haw. 1997). Wright sued both Dunbar and several state actors alleging in his First Amended Complaint that Dunbar's restoration of the partial fishpond wall "violated and continues to violate the CWA," and that "Dunbar and the State Defendants, under color of state law and acting in concert, have subjected Plaintiffs to the deprivation of their constitutional rights within the meaning of 42 U.S.C. § 1983."

Between March and June of 1999, Judge Helen Gillmor granted the entirety of Dunbar's motion to dismiss or, in the alternative, for summary judgment. In a series of orders disposing of the case on an issue by issue basis, Gillmor decisively ruled in the defendants' favor. The court found no presence of a state actor to substantiate Wright's Section 1983 civil rights claims. Wright had claimed a form of collusion between Dunbar and the State permitting agencies, which allowed him to continue with his restoration activities under a Nationwide Authorization by the Army Corps of Engineers. The court found that the State defendants were entitled to qualified immunity under the Eleventh Amendment and that State action could not be imputed through a nexus theory. Wright had also contended that because Dunbar had previously participated in a volunteer stream clean-up, in addition to the restoration of the fishpond wall, the State was acting in a public function capacity. The court declined the invitation to rule that dredging via the stream clean-up, although ostensibly a

State activity, was a public function for state-action purposes.

Having dismissed Wright's Section 1983 claim, the court addressed the more substantial aspects of Wright's claims. Wright asserted that although Dunbar had obtained some of the permits required for the restoration of Ipuka'iole, he had not obtained the proper permits from the State Department of Land and Natural Resources and had violated the terms of the Army Corps of Engineers permit. Additionally, Wright brought a citizen suit for violations of provisions of the Clean Water Act, and alleging that the unfinished wall was a continuing violation of that Act.

An ongoing violation of the Clean Water Act may be assessed a fine of \$25,000 per day, which was an important consideration for Dunbar and his attorneys. In defense, Dunbar claimed that he was exempted from obtaining certain permits under the Nationwide authorization and had other waivers of requirements by various State actors, including the Governor. In particular, the Department of Land and Natural Resources facilitated the restoration of Dunbar's fishpond, in accordance with what the department construed as a State law "mandate to facilitate the restoration of ancient Hawaiian fishponds."

The district court found that Dunbar had substantially complied with the permitting via the Nationwide authorization and that waiver by State agencies was appropriate under the law. In regard to violations of the Clean Water Act, Judge Gillmor found that because the partial wall was completed under a valid permit, additional permits were not necessary to protect its continuing presence. Further, the court made a specific finding of fact that the unfinished wall *did not* release silt or sediment. Wright appealed Gillmore's findings in the defendant's favor.

In 2001 the Ninth Circuit Court of Appeals issued an unpublished opinion affirming the district court's judgments. Wright v. Dunbar, 2001 U.S. App. LEXIS 439 (2001). On Wright's Section 1983 claims, the court refused to decide the property interests in the case, stating that such a decision could "diminish, even extinguish, the State's control over . . . lands and waters long deemed by the State to be an integral part of its territory." Nor did the Ninth Circuit agree that Dunbar was a state actor based on an interdependence or nexus with the state. The court held that Wright's Clean Water Act citizen suit was properly dismissed because the revocation of the permit granted by the Army Corps of Engineers did not invalidate the work already completed in the fishpond restoration. In regard to the continued existence of the unfinished fishpond wall, the heart of Wright's claim, the court agreed with Judge Gillmor's finding of fact that the wall did not constitute "an on-going violation of the [Clean Water Act]." Wright's attorneys did not file a petition for certiorari to the United States Supreme Court.

What can be learned from Wright v. Dunbar? For the restorationist, Dunbar imparts the lesson that permitting is not failsafe. The prospective restorer must be aware of the potential for dispute and the politics of stopping or starting restoration. In Dunbar, the courts were primarily faced with deciding the propriety of administrative agency actions, and not whether the actual act of restoring Ipuka'iole was proper. Wright's attorneys claim that the State has placed itself in an untenable position by attempting to facilitate the restoration of fishponds through the Conservation District Use Application while concurrently upholding the public policy to preserve beaches and coastal land. The case also represents the first case of record whereby a litigant attempted to use the federal civil

rights statute as a means to stop fishpond restoration, as opposed to the use of the statute to protect Native Hawaiian rights, including the right to restore native sites. Dunbar, himself, says that the ensuing litigation could not have occurred but for the extrinsic influences of money and politics. Dunbar claims that the point of the litigation was to allow Wright to acquire real property, namely the accretions to his shoreline, by prevailing on a takings claim to property he did not own. Wright claims that that Dunbar's intention was to, likewise, accrue sandy shoreline. Regardless of the reason, Dunbar says the experience was "horrible" and that "[his] wife and [he] went through a lot of ordeal over this." Dunbar claims that he will someday continue the restoration of the Ipuka'iole fishpond.

Success stories

Although Wright v. Dunbar is the only example of fishpond restoration undertaken by a private property owner, there are several success stories of restoration of fishponds leased by the State. On Moloka'i, the Honouliawai fishpond wall is complete after a three year process to obtain the permits for this state-owned site. The State undertook this endeavor to provide a working model for potential restorers, and a guide emphasizing "a cautious approach to permit approval and compliance." Likewise, the Keawanui fishpond on Moloka'i and the He'eia fishpond on O'ahu, have been restored to their functional state and are serving as models for restorers and teaching tools for local universities.

Community activists are hopeful that information will be compiled from the operation and maintenance of the working fishponds to assist in actual, rather than projected, environmental impacts. A

compilation of such information should provide a basis for more successful restorations in the future. Other benefits of fishpond success stories include a program initiated by the State Aquaculture Development Program to provide low-interest loans for commercial aquaculture. Such a program would not have been possible without the tested viability of fishpond aquaculture. Today, several fishponds are successfully producing mullet, barracuda, papio, tilapia, blue pincher crab, and salmon crabs.

Successful Restoration Within the Western Paradigm

Concepts of success vary. Fishpond restoration has been touted by some as a model community project and cultural renaissance, a forum whereby interested people work together for a common good. Success may also be subsistence or aquaculture for the restorer. And lastly, success may be the mere act of restoration, a revisiting of the majesty of fishponds in their original state. Irrespective of the restorer's view of success, much depends on adaptation to the legal process required under the current system of government in Hawai'i and the United States. Permitting is difficult in itself, but successful permitting is only one step in a process that is inherently "legal." The days of demarcating property interests in Hawai'i by "this is mine" and "that is yours" have irreversibly been replaced with Western notions of real property under the common law and environmental statutes. Notorious ownership of a fishpond through generations of an *ahupua'a* tenancy no longer conveys the concurrent right to restore.

To achieve legal success, a potential restorer would be wise to consider the legal issues that have thwarted previous endeavors. Although issues of cloud on title, adverse possession,

navigable servitude, and federal regulations are uniquely Western concepts, these issues present only one part of the inquiry into successful fishpond restoration. The law of learning to avoid conflict and following one's wiser contemporaries form another important part of the inquiry, and it is these maxims that are particularly Hawaiian. Similar to the multi-cultural basis of the law, the varying motivations behind restoration are inextricable from the Western paradigm in which the restorer must function. Ancient Hawaiian fishpond restoration remains important enough that it can, and should, be done within the current system of law. As Carol Araki Wyban wisely notes in her study on fishponds, "[u]ltimately, the restoration of fishponds and the revitalization of fishpond aquaculture depends upon cooperative work among the Hawaiian community, the government, and private and public sectors in the modern-day 'ohana."

Conclusion

Success in Hawaiian fishpond restoration may very well depend on the ability of the restorer to negotiate the Western legal paradigm. Although some feel that the restoration of fishponds within the foreign legal construct is unjust and unwarranted, the success of restoration may very well depend thereon. This paper has attempted to catalogue the most important legal considerations in regard to fishpond ownership and restoration outside of permitting. Only with increased awareness of this legal foundation can restoration begin to be completed both lawfully and more efficiently.

Ian Hlawati is the recipient of the Real Property and Financial Services Section's 2001 Scholarship. Mr. Hlawati is a third-year student at the William S. Richardson School of Law and a Casenote Editor with the University of Hawaii Law Review.

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Due to space constraints, this article is published in edited form and without accompanying footnotes. If you would like a copy of the complete article, please contact newsletter editor Rick Kiefer at RKiefer@carlsmith.com.

What Has Your Board Been Up To?

September 2001

At the Board's September meeting, the Board discussed amendments to the new Non-Profit Corporations Act that will be submitted to the 2002 legislature in order to prevent adverse effects on home owner associations when the new Act becomes effective on July 1, 2002.

October 2001

At the Board's October meeting, Chair Trudy Burns Stone reported that the Section's Conveyancing Manual Seminar had over 150 attendees and that over 200 copies of the new Conveyancing Manual have been sold. Gino Gabrio and Gail Tamashiro were commended for their hard work in putting together the new Manual.

Ms. Stone reported that the State is revising its Administrative Rules regarding compliance with the Americans with Disabilities Act.

The Board discussed whether to urge the incorporation of the principles of the Restatement (Third) Property, Servitudes, into the pending recodification of H.R.S. Chapter 514A and also possibly H.R.S. Chapter 421J (Planned Community Associations), as a legislative solution to the problems created by the Hawaii Supreme Court's Hiner and Hashimoto decisions.

Lorin Hirano reported that the United States Supreme Court has agreed to review the Sixth Circuit Court of Appeals' holding in Craft v.

United States (Commissioner of the IRS), 140 F.3d 638 (6th Cir. 1998), that a federal tax lien against a husband did not attach to property held in tenancy by the entirety under Michigan law.

November 2001

At the Board's November meeting, the Board discussed the Bar Association's proposed restrictions on the HSBA and Section websites, which would sharply restrict access and the information available online. The general consensus of the Board was that the proposed restrictions were inappropriate and unjustified and Trudy Stone will, on behalf of the Section, strongly urge the HSBA Board not to adopt them.

The Board also decided that, effective in 2002, the Section's two scholarships would be awarded to the authors of two outstanding papers from the Law School's Advanced Real Property Seminar, rather than one paper from that seminar and one from an environmental law seminar.

Comments?

Please send them to:

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And check our website:

<http://www.hsba.org/sections/rpfs>

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CALENDAR OF EVENTS

Thursday, December 6, Noon to 1:30 p.m.

Real Property and Financial Services Section Annual Meeting
Plaza Club

Friday, January 11, Noon to 1:30 p.m.

Board of Directors' Meeting
Pacific Tower, 22nd Floor

Thursday and Friday, January 17 & 18, 9:00 a.m.

Hawaii Land Use and Takings Law Seminar

Friday, February 8, 3:30 to 5:00 p.m.

Regulatory Takings Symposium
UH Music Building Auditorium

Friday, February 15, Noon to 1:30 p.m.

Board of Directors' Meeting
Pacific Tower, 22nd Floor