HAWAIIAN BEACH ACCESS: A CUSTOMARY RIGHT

"Et quidem naturali jure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur . . . ."1

Ours is a time of increasing recognition of the fundamental importance of natural resources and of their finite capacities. There is growing concern that our once bountiful assets, through abuse and exploitation, are becoming depleted to the point of extinction. Recent litigation evidences a trend towards treating certain lands2 as a unique natural resource and the use thereof as a public right. This trend may require a restructuring of traditional notions of real property law to protect this newly recognized resource.3

Our shorelands and beaches4 have been made a recent focus of considerable attention.5 Nowhere is this focus more acute than in the island state of Hawaii.6 With the advent of the jet age and the introduction of reduced airfare to Hawaii, the annual influx of tourists who visit and, in some cases, remain has grown in ten years from less than eight hundred thousand to over three million.7 Consequently, high rise condominiums and resort complexes have proliferated along the shore-

1. "By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore . . . ." INSTITUTES 2.1. pr. (emphasis added).


5. See note 12 infra.


land, and the amount of beach front property not committed to the tourist industry has been significantly reduced. Public use of once accessible undeveloped shorelands is now effectively precluded by kapu signs and the enforcement of trespass law.

As evidence of the increased concern with the shorelands, there has been much litigation in the coastal states on the extent of the pub-

8. Since 1961, the number of hotel rooms has increased from 10,193 to 30,323 in 1970. THE QUIET REVOLUTION, supra note 6, at 18.

9. STATE OF HAWAII, DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, DATA BOOK 102 (Sept. 1973); see THE QUIET REVOLUTION, supra note 6, at 18-19.

10. Kapu means taboo. As used in Hawaii a kapu sign has the same effect as a no trespassing sign. All subsequent translations of Hawaiian terms and phrases are taken from M. PUKUI & S. ELBERT, HAWAIIAN-ENGLISH DICTIONARY (1965) and will be included parenthetically within the text.

11. Necessary to an understanding of the problem of shoreland, beaches and access is a description of the area commonly referred to as the “beach” and the extent of public rights therein. Although not susceptible of precise delineation, the beach has four general areas: the submerged lands, the wet sand area, the dry sand area and the uplands.

The area under the navigable water extending seaward from the line of mean low tide for three miles is submerged lands. See United States v. California, 332 U.S. 19, 33-36 (1947). In United States v. California, the question of control of the submerged lands was resolved in favor of the federal government. Id. at 34. See also United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). However, in 1953 Congress relinquished to the states and their grantees the federal government's right to the submerged lands. Submerged Lands Act of 1953, 43 U.S.C.A. §§ 1301-15 (1964).

The wet sand area, also referred to as the tidelands or the foreshore, is generally defined as the beach area lying between the lines of mean low tide and mean high tide. Borax Consol. v. City of Los Angeles, 296 U.S. 10, 22-27 (1935). The state may grant tidelands to private grantees, but members of the public may not be barred from exercising public trust rights on the privately owned tidelands. See, e.g., Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). See generally Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970) [hereinafter cited as Public Trust Doctrine].

The dry sand area is generally defined as the area above mean high tide and below the line of vegetation, which is the extreme seaward boundary of natural vegetation that spreads continuously inland. See Eckhardt, A Rational National Policy of Public Use of Beaches, 24 SYRACUSE L. REV. 967, 969 (1973). The extent of public rights in the dry sand area has been the subject of recent litigation with most courts finding some public right to use the dry sand area. E.g., State ex rel. Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969). For the status of the dry sand area in Hawaii, see text accompanying notes 141-46 infra.

The area inland of the line of vegetation is generally defined as the uplands. The problem of beach access concerns crossing the private uplands to reach the beach. Hence, the upland area with which this note is concerned is bordered by the line of vegetation on one side and the public highway on the other.

For a concise report on the extent of public rights in the shorelands, see R. DEWSNUP, PUBLIC ACCESS RIGHTS IN WATERS AND SHORELANDS (National Water Commission Legal Study 8-B, July 1, 1971).
lic's right in the beaches, with decisions generally favorable to the public. Recently, attention has been focused upon the wet and dry sand areas of the beach in an attempt to define precisely the nature of the public's interest therein.

In Hawaii, however, two recent supreme court cases have eliminated the need for a precise definition of the wet and dry sand areas. The entire area up to the line of vegetation, the "upper reaches of the wash of the waves," has been pronounced public land. In effect, the beaches in Hawaii are owned by the state for the people. On the other hand, however, the question of the public's right to cross private uplands to reach the beaches, while discussed in academic commentaries, has never been litigated. Traditionally, the situation has been treated as one of trespass with no consideration afforded to the public right of access.

Given the general right of the public to use the tidelands, under the public trust doctrine, and Hawaii's recognition of the general pub-


13. See note 11 supra.

14. Because use of the line of mean high tide as the boundary between the wet and dry sand areas (and hence between public and private land in most jurisdictions) is an imprecise standard, much confusion has resulted in attempting to define its location. Compare Borax Consol. v. City of Los Angeles, 296 U.S. 10, 26-27 (1935), with People v. William Kent Estate Co., 242 Cal. App. 2d 156, 161, 51 Cal. Rptr. 215, 219 (1966).


16. 517 P.2d at 62. The term "beach" as hereinafter used refers to the total area lying between the line of mean low tide and the line of vegetation.

17. Town, supra note 6, at 5. The Ashford decision "guarantees far more beach area to the public than the rule in other jurisdictions where the mean high water mark is accepted as the boundary." Id.


20. See generally Public Trust Doctrine, supra note 11.
lic ownership of the beaches, nonrecognition of the public right of access would seem to amount to a de facto appropriation of public land for private use. In fact, the denial of access would deprive the beach use and ownership cases of all practical effect. Yet, at the same time, the upland owner's property rights must be respected. Both the Hawaii Constitution and the Fourteenth Amendment to the federal Constitution dictate that no property may be taken without due process of law and just compensation.

To obtain an effective balance between the conflicting demands of the public and the upland owner, this note proposes that a customary right doctrine be utilized to establish a public right of beach access and that a traditional abandonment concept be applied to preserve upland private property rights. Although other possible legal foundations exist for the right of access, the customary right doctrine is the most appropriate in the context of the history and jurisprudence of Hawaii. When reasonable alternative beach access exists, however, the elements of the widely recognized equitable concept of abandonment appear and the customary right is extinguished.

As an introduction to the customary right doctrine, an overview of its genesis will be provided. Its modern viability will be examined in the light of its recent utilization in Oregon to define a general public easement in the dry sand area of the state's beaches. The aptness of the doctrine to the Hawaiian situation will be considered against the background of that state's unique historical setting, judicial precedents, and its legislative approval, if not actual codification, of the doctrine itself. The prerequisites for the application of the doctrine will next be discussed. The focus will then narrow to the question of whether beach access was an ancient established custom. Analogies will be

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21. See text accompanying notes 15-17 supra.
22. HAWAII CONST. art. 1, §§ 4, 18.
23. See generally THE TAKING ISSUE, supra note 2; Takings, supra note 3.
24. Future dispositions of state-owned upland property does not pose a problem. "Prior to the disposition of any public lands, the board of land and natural resources shall lay out and establish over and across such lands a reasonable number of rights-of-way from established highways to the public beaches . . . in order that the right of the people to utilize the public beach or beaches . . . shall be protected." HAWAII REV. LAWS § 171-26 (Supp. 1973). This note deals only with the uplands that are presently privately owned.
25. See note 147 infra.
26. See text accompanying notes 71-107 infra.
27. See text accompanying notes 159-71 infra.
28. See text accompanying notes 36-53 infra.
29. See text accompanying notes 58-68 infra.
30. See note 11 supra.
31. See text accompanying notes 71-99 infra.
32. See text accompanying notes 100-07 infra.
drawn to earlier cases dealing with piscary and water rights. To balance the discussion of the public right of access, consideration will also be given to the upland owner's rights. The possible characterization of the judicial establishment of such a right as an unconstitutional taking of property will be discussed. Finally, an examination of the equitable power of the Hawaii court will suggest a solution which would preserve the upland owner's rights where reasonable alternative access exists.

Evolution of the Customary Right Doctrine

According to Blackstone

In his treatise on the development of the English law, Blackstone referred to the lex non scripta, the unwritten or common law, and divided it into three parts. Two of these parts are relevant to this discussion. The first he termed "general customs, or the common law." These were "doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage ..." To constitute a universal common law, a rule must have been generally used; proof of which is shown when it appears "that it hath been always the custom to observe it." Therefore, to establish a general rule of common usage, it was necessary to show that a practice had been universally observed throughout England from time immemorial.

Blackstone's second category was "particular customs, or laws which affect only the inhabitants of particular districts." These particular customs or laws, peculiar to a local area, stand in contradistinction to the established general customs of the kingdom, for reasons no longer remembered. Before a particular custom was given the force of a local law, its existence and legality had to be established as well.

33. See text accompanying notes 111-40 infra.
34. See text accompanying notes 149-58 infra.
35. See text accompanying notes 159-71 infra.
36. 1 W. BLACKSTONE, COMMENTARIES *67. The third category, that of particular laws observed only in certain jurisdictions, is of little relevance to this note, and will not be expanded upon.
37. Id. at *68. As an example of a general common law, Blackstone cites the law that the eldest son alone is heir to an estate.
38. Id.
39. Id.
41. 1 W. BLACKSTONE, COMMENTARIES *74. As an example of a particular custom, Blackstone cites the rule in certain boroughs that the youngest son shall inherit the estate, contrary to the general common law rule that the eldest inherits. Id. at *75.
as its construction in the context of the general common law. The question of the existence of a local practice was within the province of a jury. The court would, however, take judicial notice of any prior adjudication thereof. Once the existence of a particular custom had been established, its legal worth was tested. Blackstone posited seven prerequisites for the legality of a particular custom, requiring that it have been: used from time immemorial, continued, peaceable, reasonable, certain, compulsory, and consistent with all other particular customs. Finally, where the particular custom contradicted the general common law, it was to be construed strictly. The effect of each particular custom was limited to the area within which the practice arose and could not be extended by related usages.

Blackstone's particular custom doctrine has never achieved widespread acceptance in American courts. Until 1969, with the exception of Hawaii and New Hampshire, the American jurisdictions which had considered the particular customs doctrine had elected to utilize other legal formulations.

42. Id. at *75.
43. Id. at *76.
44. Id.
45. Id. at *76-78.
46. To establish immemorial usage, it must appear that the particular custom "[has] been used so long, that the memory of man runneth not to the contrary." Id. at *76. This has been interpreted to mean a usage that predates the coronation of Richard I in 1189. J. Lawson, The Law of Usages and Custom 26 (1887). If a statute exists that is contrary to a particular custom, then the particular custom cannot prevail, the statute being prima facie evidence that the custom did not exist from time immemorial. 1 W. Blackstone, Commentaries *76-77.
47. To be continued, it is not necessary that the use be continuous, so long as the right to use the custom is not interrupted by someone with a superior right. 1 W. Blackstone, Commentaries *77. Blackstone uses the example of the customary right of certain inhabitants to water their cattle at a certain pool. Failure to use the right to water cattle does not extinguish that right. Id.
48. The particular custom must be consented to, for it owes its existence to common consent. Id.
49. This requirement is best stated in the negative, that the particular custom not be unreasonable. It is sufficient if no valid legal reason can be asserted against it. Id.
50. Certainty is required so that activity in compliance with the custom may be well defined. Id. at *78.
51. Mandation indicates an even handed, universal compliance with the custom in the community. No one person may disregard the particular custom. Id.
52. Id.
53. Id. at *78-79.
57. See note 54 supra.
Modern Revival of the Doctrine

In 1969, Blackstone's theory of particular customs was applied by the Oregon Supreme Court in State ex rel. Thornton v. Hay. In an action to enjoin resort owners from constructing fences and other improvements in the dry sand area of their property, the court found a public easement which the state could enforce by requiring the removal of fences and other obstacles. To avoid the possibility of piece-meal litigation, the court chose not to rely on the theories of implied dedication and prescription used in the lower court to establish the public easement. Instead, because "[o]cean-front lands from the northern to the southern border of the state ought to be treated uniformly," the particular custom doctrine was used.

Defining custom as "such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates," the Oregon Supreme Court resurrected the particular custom doctrine and expanded it to establish a statewide public easement. Blackstone's seven requirements for the legality of a particular custom were considered summarily by the court and found to exist. Similarly, the court dispensed with the resort owners' two major arguments against the use of the particular custom doctrine: first, that the doctrine was unprecedented and had very little authority in other jurisdictions; and second, that because of the brevity of the American political system, the public use in Oregon was not sufficient to establish long continued usage.

The Thornton court expanded the utility of the particular custom doctrine by giving it a regional application, even though it had origin-
ally been premised upon and restricted to a more geographically con-
strained usage. The court demonstrated the distinct advantages of the
expanded doctrine over other established bases upon which the public
easement could have been founded. Although there has been some
criticism of the particular custom doctrine in *Thornton*, it illustrates
well the doctrine's modern revival. Furthermore, *Thornton* stands as
a landmark on the judicial route of establishing public rights in the
shorelands and beaches where reasonably possible.

**Development of the Hawaiian Customary Right Doctrine**

In applying the particular custom doctrine in *Thornton*, the Ore-
gon Supreme Court found it necessary to revive and expand a doctrine
rarely utilized in the continental United States. In Hawaii, however,
the particular custom doctrine pervades the case law and reflects the
unique historical development of the land system and governmental
structure. Furthermore, there is legislative ratification of the doctrine
which mandates that Hawaiian customs be given legal effect.

**Historical Setting**

The earliest recorded history of Hawaii reveals a number of small
kingdoms with their own superstitious rules and taboos. Unification
occurred during the years from 1795 to 1810 when the warrior king,
Kamehameha the Great, conquered all of the Hawaiian Islands. After
selecting land for his own personal use, he distributed the remainder to
his warrior chiefs who, in turn, retained part and distributed the rest
to inferior chiefs. The resulting land system was remarkably similar
to the feudal system of ancient England. Land tenure was insecure,
and a superior lord could dispossess an inferior at his pleasure.

The basic unit of Hawaiian property was the *ahupuaa*, which usu-

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author questions the Oregon Supreme Court's finding of a particular statewide custom
whereas Blackstone's treatment was restricted to narrowly confined geographic localities.
However, such an expansive custom doctrine is a part of the law of Hawaii. See text
accompanying notes 71-107 infra.

70. This concern is shared by the courts in other jurisdictions. See cases cited
note 12 supra. However, no other court, with the possible exception of the California
Supreme Court in Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790
(1971), has issued a definitive decision affecting property statewide on the basis of an
isolated fact situation.

71. *See J. Chinien, The Great Mahele* (1958); *J. Chinien, Original Land Ti-
tles in Hawaii* (1961); *R. Kuykendall, The Hawaiian Kingdom 1778-1854* (1957)
[hereinafter cited as KUYKENDALL].

72. Town, *supra* note 6, at 13; *see* Keelikolani v. Robinson, 2 Hawaii 514, 519-
20 (1862).

73. KUYKENDALL, *supra* note 71, at 52.
ally ran from the mountains to the sea, entitling the chief and his people to obtain fish from the ocean and fuel, canoe timber, and birds from the mountains. 74 Within most ahupuaas were a number of subdivisions called ilis that existed for the convenience of the chiefs and were administered by a konohiki (an agent of the chief; later used to refer to the chiefs or landlords). The ilis, with the exception of the independent ili kupono,75 had no separate existence from the ahupuaa, and the konohiki in charge of an ili had to pay tribute to the chief of the ahupuaa. This feudal land system contained none of the traditional English common law notions of real property. All real property was held by the king with discretionary use thereof by the chiefs and konohikis.

With the discovery of the islands in 1778 by Captain James Cook, the isolation of Hawaii ended, and its entrance into the mainstream of world economic activity began. By the beginning of the reign of Kamehameha III in 1824, a large foreign population existed in Hawaii, comprised primarily of individuals who were accustomed to owning land in fee simple and, therefore, resented the right of the king and the chiefs to dispossess them at will. As a consequence of their vigorous opposition to the ancient land system, the Hawaiian Magna Carta was promulgated in 1839.76 During the same year the rudimentary beginnings of a civil code were issued.77 In 1840, Kamehameha III drafted the first constitution of the Kingdom of the Hawaiian Islands,78

75. The ili kupono were independent of the ahupuaas in which they were located and the konohiki of the ili kupono paid tribute and were responsible directly to the king. Territory v. Gay, 31 Hawaii 376, 380-81 (1930).
76. The Declaration of Rights, otherwise known as the Magna Carta, was specifically incorporated in the first Constitution of Hawaii in 1840. Preface to L. Thurston, The Fundamental Law of Hawaii at iii (1904). The Magna Carta stated in part, “[p]rotection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, and nothing whatever shall be taken from any individual, except by express provision of the laws.” L. Thurston, The Fundamental Law of Hawaii 1 (1904) [hereinafter cited as Thurston]. This provision within the Declaration of Rights did not grant title to land but simply prevented the king and chiefs from dispossessing anyone from his property without cause. It was not until after the Great Mahele in 1848 and a Land Commission award that title actually vested. Kenoa v. Meek, 6 Hawaii 63 (1871). See text accompanying note 85 infra.
77. See Thurston, supra note 76, at 21-23. These sections dealt with fisheries and water rights. See text accompanying notes 108-40 infra.
78. Included within the constitution was the following principle: “The origin of the present government, and system of polity is as follows: Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, as is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.” Thurston, supra note 76, at 3.
thereby altering the structure of the government from an absolute monarchy to a constitutional one and acknowledging that "people had some form of ownership in land, aside from an interest in the products of the soil." These first inroads into the power of the monarch were the beginning of the imposition of a foreign system of government and laws that only in certain instances recognized the ancient traditions and customs of the Hawaiians.

In 1846 an act was passed establishing the Board of Land Commissioners to Quiet Land Titles which was charged with the responsibility of investigating and arbitrating all the claims of private individuals to rights in land. In response to this act, the Land Commission, as the board became known, formulated guidelines, commonly known as the Principles, within which the ancient land system and practices of the Hawaiians were recognized. The Principles stated that the Land Commission, "with an authorization to adjust all the past tenures in the manner most equitable," had adopted the whole power of the king to confer and convey land to which equitable claims existed. The nature of that power was the king's private right to participate in the ownership of land and not the public rights that he held as sovereign. These public rights and powers that the Land Commission could not exercise were listed in the Principles. The Principles went on to state: "[T]hese prerogatives, power and duties, His Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board, and the titles consequent upon them, must be understood subject to these conditions."

Two years later in 1848, Kamehameha III and over 240 of the

82. [1925] Hawaii Rev. Laws Vol. II, App. at 2128 (omitted from [1935] Hawaii Rev. Laws). Although title still remained in the king, the Land Commission was to consider if there were any equitable bases for a particular claim. Id.
83. Within the public rights or "sovereign prerogatives" that the king held were two important powers:
   "3d. To encourage and even to enforce the usufruct of lands for the common good.
   "4th. To provide public thoroughfares and easements by means of roads, bridges, streets, etc. for the common good . . . ." Id. For the importance of the Principles, see text accompanying note 122 infra.
highest chiefs and konohikis determined their interests in the lands of Hawaii and effected a mahele (division) of the land between themselves.85 This division of land between the king and the chiefs was made subject to the rights of the hoaainas (land overseers or caretakers, tenants). Subsequent Land Commission awards confirming the mahele, and royal patents contained express provisions preserving the rights of the hoaainas in their capacity as tenants.

In 1850, fearful for the rights of the hoaainas, the legislature confirmed a resolution adopted by the Privy Council and awarded to hoaainas fee title to any land they had occupied and had improved, subject to Land Commission recognition.86 Within the legislation were further guidelines, commonly known as the Further Principles, to guide the Land Commission in making kuleana (small parcel of land) land awards to the hoaainas. A statement of the traditional and established rights of the hoaainas was included and it dictated that they were not to be precluded from exercising these rights.87 Finally, in 1855 the Land Commission was abolished. The courts assumed the role of adjudicating conflicting demands over land. The transition in the system of land tenure was complete.

The subsequent history of the islands is a familiar one. A power structure having been established, further inroads into the political power of the monarch were simple. Finally, in 1893, the monarch was overthrown, and a provisional government established. In 1894, the short-lived independent Republic of Hawaii was proclaimed, only to be

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85. This mahele did not convey title to any land. The chiefs and konohikis were required to present their claims to the Land Commission to receive an award of the land. In addition, to receive a royal patent in fee simple from the Minister of the Interior on these awards, the chiefs and konohikis had to pay an amount equal to one-third the value of the unimproved land at the time of the award. Failure to file a claim with the Land Commission prevented title from being transferred from the government.

Because of the shortage of qualified surveyors at the time of the Great Mahele, distribution of the land was accomplished by grant of whole parcels by the ancient name of the ahupuaa or ili. In re Boundaries of Pulehunui, 4 Hawaii 239, 240 (1879). Subsequently, when the land was surveyed, the surveyor was accompanied by several kamaaina (native-born, one born in a place) who told the surveyor where the ancient boundaries of the ahupuaa or ili had existed. The kamaaina witness rule developed from this practice, and it allows the admission of reputation evidence by kamaaina witnesses in land disputes. At the same time, it is a recognition that ancient Hawaiian customs and traditions predated the introduction of the written language and that knowledge of such customs have been handed down by word of mouth. Town, supra note 6, at 9-11.


87. "The people shall . . . have a right to drinking water, and running water, and the right of way. The springs of water, and the running water, and roads shall be free to all, should they need them, on all lands granted in fee-simple . . ." [1925] Hawaii Rev. Laws Vol. II, App. at 2142, as amended, HAWAII REV. LAWS § 7-1 (1968).
supplanted in 1897 by the annexation of Hawaii to the United States. Until her admittance into the Union in 1959, Hawaii was administered as a territory of the United States.88

The swift transition in the space of 150 years from an absolute monarchy to a sovereign state and the coalescence of English real property concepts and traditional Hawaiian practices produced a unique legal system. Whereas recognition was granted to certain English common law rules, established Hawaiian usages were retained as the foundation of the national Hawaiian law. This situation has caused the Hawaii Supreme Court to remark that "Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage."89

Judicial Precedent Establishing the Doctrine of Customary Right

Although explicit recognition of Hawaiian general common law is lacking, the Hawaiian courts have sanctioned particular ancient Hawaiian customs and usages and have given them the force of law.90 Because of the strong influence of the foreign settlers, especially the Massachusetts missionaries, who brought with them the English common law,91 English law was instrumental in the development of the national law of the Hawaiian Kingdom. Nevertheless, the Hawaii courts have adamantly stressed that there was no total incorporation of the English common law into the national Hawaiian law.92 Moreover, in a series of early cases where questions of first impression were presented to the Hawaii courts, the applicable English common law rules were rejected because of the existence of contrary established Hawaiian customs and because of the inappropriateness of the English common law rule to the Hawaiian experience.93

90. See, e.g., County of Hawaii v. Sotomura, 517 P.2d 57 (Hawaii 1973); Branca v. Makuakane, 13 Hawaii 499 (1901); Keelikolani v. Robinson, 2 Hawaii 514 (1862). For a discussion of the distinction between general common law and a particular custom, see text accompanying notes 36-42 supra.
92. The early Hawaii Supreme Court in Kake v. Horton, 2 Hawaii 209 (1860), emphasized that "[w]e do not regard the Common Law of England as being in force here eo nomine and as a whole. Its principles and provisions are in force so far as they have been expressly, or by necessary implication, incorporated into our laws by enactment of the Legislature; or have been adopted by the rulings of the Courts of Record; or have become a part of the common law of this Kingdom by universal usage; but no farther." Id. at 211.
93. In Rex v. Tin Ah Chin, 3 Hawaii 90 (1869), a criminal proceeding for murder in which the validity of a count in the indictment was challenged, the court stated, "our practice has leaned in favor of the common law of England, where the same does
Legislative Incorporation

In order to clarify the situation and to give direction to the court, the legislature in 1892 passed a statute stating that "[t]he common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as . . . fixed by Hawaiian judicial precedent, or established by Hawaiian national usage . . . ." The effect of this statute was to require, as a matter of law, that the judiciary resort to the English common law and apply it uniformly. However, where the court found an established Hawaiian national usage that was contrary to the general common law, they were free to use it. Thus, a unique legal formulation of customary Hawaiian usages was retained. As the Hawaii Supreme Court in Branca v. Makuakane made clear: "[T]he question here, unlike that in the United States, was not whether the court should decline to follow [an English common law] rule, but whether it should adopt a rule."

This statute and its successor, Hawaii Revised Laws (HRS) Section 1-1, seem a fair equivalent to codification of Blackstone's doctrine of particular custom with regional application. A general common law is recognized, but use of particular ancient practices, traditions and customs that had universal acceptance throughout the islands is not precluded. The result is a statute that compels the use of an ancient Hawaiian practice in contravention of the English common law. As confirmation of the practice of employing Hawaiian customs, the Hawaii Supreme Court stated recently, on an issue of first impression, "[I]n the absence of kamaaina testimony or other evidence of

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not conflict with the laws and customs of this Kingdom." Id. at 95 (emphasis added). In Awa v. Horner, 5 Hawaii 543 (1886), the question of whether a royal patent issued to two individuals created a tenancy in common or a joint tenancy was before the Hawaii Supreme Court. The English common law rule dictated that such a conveyance created a joint tenancy because of the feudal aversion to the division of an estate. The Hawaii Supreme Court rejected the English common law rule, asserting that the need for such a rule ceased with the Great Mahele. Id. at 544.

94. Act of Nov. 25, 1892, to Reorganize the Judiciary Department, [1892] Laws of Her Majesty Liliuokalani, Queen of the Hawaiian Islands, ch. LVII, § 5, as amended, HAWAII REV. LAWS § 1-1 (1968) (emphasis added).
95. 13 Hawaii 499 (1901).
96. Id. at 505.
97. "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage." HAWAII REV. LAWS § 1-1 (1968).
98. The courts and legislature of Hawaii have been very aware of the process of development of the English common law. Cf. McBryde Sugar Co. v. Robinson, 504 P. 2d 1330, 1338 n.12 (Hawaii 1973).
Hawaiian custom relevant to the question, we resort to common law principles . . . .”

The Doctrine's Prerequisites

Throughout the development of the Hawaiian customary right doctrine, the general requirements that Blackstone considered necessary were recognized. These same requirements are also necessary under HRS Section 1-1.

In the 1858 case of Oni v. Meek, the plaintiff, a hoaaina, was asserting a right, based upon a claim of custom, to pasture his horses on the kula (pasture land) land of the ahupuaa. The defendant answered that before a claim on the ground of custom may be sustained, “the custom attempted to be set up must appear to have existed from time immemorial; to be reasonable, to be certain, and not inconsistent with the laws of the land.” Although the supreme court rejected the claim, the custom doctrine was recognized.

Over a hundred years later, in State v. Zimring, the Hawaii Supreme Court rejected the affidavit of one kamaaina witness regarding the existence of Hawaiian usage that gave title to land created by a volcanic eruption to the shoreland owner, holding that the Hawaiian usage required by HRS Section 1-1 was usage that in fact existed prior to the incorporation of the English common law in 1892. Therefore, at the very least, the custom alleged must be one that was established and accepted throughout the islands before the date of the enactment of the law, November 25, 1892.

To be consistent with Blackstone's theory, however, immemorial usage should be determined relative to the beginning of Hawaii's political history, as evidenced by an institutionalized land tenure system. In Hawaii the year 1846 is recognized as the time of the or-

100. See Town, supra note 6, at 13-14. See notes 45-52 & accompanying text supra.
101. 2 Hawaii 87 (1858).
102. Id. at 90. The claim based upon custom was rejected because “the custom contended for is so unreasonable, so uncertain, and so repugnant to the spirit of the present laws . . . .” Id. Furthermore, the court took judicial notice of two facts. The first, not viewed as conclusive, was evidence that horses, not native to the islands, were first introduced to the ahupuaa concerned in 1833. Hence, the custom could not have resulted from immemorial usage. Secondly, it appeared that after the passage of the Act in 1850 establishing kuleana land for the hoaainas, the plaintiff contracted with the konohiki for the right of pasturage. Id. at 89-91.
104. See note 85 supra.
105. 52 Hawaii at 475, 479 P.2d at 204.
ganization of the government. Therefore, any ancient custom, practice or usage that was in existence throughout the Hawaiian kingdom as of that date, neither abrogated nor changed by statute, should establish a customary right and have the force of law.

**Beach Access as a Customary Right**

The nature and extent of beach access as a customary right can be ascertained through an examination of cases concerning water and piscary rights. The piscary and water rights were two fiercely contested items after the Great Mahele. The outcome of the cases turned upon the recognition accorded ancient Hawaiian usage and custom and the interpretation of the Principles and Further Principles. From the water right cases comes the doctrine that certain customary Hawaiian practices recognized in the Principles and Further Principles are inalienable rights that the sovereign must hold for the public. The piscary right cases establish the existence of a customary right of beach access to exercise fishing rights. Read together, the rules of the two series of cases make it clear that the customary right of beach access was a public right which the king as sovereign could not convey. As a result, all land grants are subject to this right of access.

**Public Rights—The Water Right Cases**

In *Peck v. Bailey*, the plaintiffs, owners of a sugar plantation and successors in title to the konohiki of an ahupuaa through which ran a river, sought to enjoin the defendant hoaaina from taking water from the river to irrigate his taro patches. The court concluded that the defendant had title to his land and all rights appurtenant thereto, including the right to water for his taro, because of the immemorial use of water for the irrigation of taro patches.

Over sixty years later, in *Territory v. Gay*, custom was similarly relied upon when the territory of Hawaii, as the owner of low lands adjacent to the river involved in *Bailey*, sued to enjoin the upstream

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109. The Great Mahele refers to the division of land between King Kamehameha and the chiefs in 1848. See text accompanying note 85 supra.
110. See text accompanying notes 81 & 86 supra.
111. 8 Hawaii 658 (1867).
112. The roots of the taro plant is the basic ingredient in the production of poi, the pastelike substance that is the staple item in the Hawaiian diet.
113. 8 Hawaii at 661-62.
114. 31 Hawaii 376 (1930).
owner from diverting water from the river. The court defined appurtenant water rights as those which attached to the land by virtue of the fact that water was being used on those lands prior to the Land Commission award. According to ancient Hawaiian custom, any water not necessary to satisfy the appurtenant water needs of a land owner was surplus and, therefore, belonged to the konohiki of the ahupuaa in which the river originated. Both the English common law doctrine of riparian rights and the prior appropriation doctrine were rejected as unsuited to the agricultural conditions within the territory and contrary to established Hawaiian practice.

A judicial gloss was placed upon Gay in McBryde Sugar Co. v. Robinson, an action to determine the surplus water rights of owners of the lands involved in Bailey and Gay. The Gay case was held to be binding on the state of Hawaii with respect to the defendants Gay and Robinson. However, the ruling was not conclusive as to the water rights of Gay and Robinson and of the state with respect to McBryde Sugar Co. In reaching its decision, the court found both the history of the Great Mahele and the Principles and Further Principles enacted by the Land Commission instrumental. Emphasis was placed upon the third prerogative of the Principles, "[t]o encourage and even to enforce the usufruct of lands for the common good." The court concluded "that the right to water is one of the most important usufructs of lands, and . . . was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants." Therefore, the state holds the right to running water in trust for the Hawaiian public.

The court's analysis of Hawaiian law has led commentators to the conclusion that:

The McBryde ruling must be considered one of the most significant decisions handed down in Hawaii on the question of natural resource allocation. The relevance of McBryde to public access to beaches lies in the Court's use of the 1847 'Principles Adopted by the Land Commission' and the 1850 'Enactment of Further Principles' to prove claims for land patents. According to McBryde those principles represented an authoritative codification of Ha-

116. See generally id. §§ 15.1, 18, 19.2, 51.5-.8.
117. 31 Hawaii at 399-400.
119. 504 P.2d at 1335.
120. See note 83 supra.
121. 504 P.2d at 1338,
waiian land custom.\textsuperscript{122}

Even more importantly, McBryde stands for the proposition that the Principles and Further Principles contain public rights to which all land awards are subject.\textsuperscript{123} Among those is the right of way and easement necessary for the common good.\textsuperscript{124} McBryde suggests that beach access, if it existed as a customary right, is a public right and, like the water right, is held by the state for the public.

Existence of Ancient Beach Access—The Piscary Right Cases

Essential to the entire question of a customary right of beach access is the establishment of the existence of an access right in ancient Hawaii. The extent to which such beach access existed can be determined from cases dealing with piscary rights and exclusive fisheries. Fishing rights and fisheries were among the subjects of the first laws passed by Kamehameha III.\textsuperscript{125} In the Act of 1846, the fishing rights were further delineated, and the fishing grounds within the reefs were proclaimed to be the private property of the konohiki to whose ahupuua the fisheries had, by “ancient regulation,” belonged.\textsuperscript{126} In 1851 two acts were passed. One transferred to the people the government’s piscary right,\textsuperscript{127} and the second denied the upland owner the right to any superior fishing right.\textsuperscript{128}

Upon admittance to the United States, the Hawaiian Organic Act\textsuperscript{129} required that the exclusive fisheries and fishing rights be repealed.\textsuperscript{130} A provision was included, however, which allowed anyone claiming a vested private right to a fishery to petition the attorney

\textsuperscript{122}. Town, supra note 6, at 15 (emphasis added).

\textsuperscript{123}. But see Territory v. Liliuokalani, 14 Hawaii 88 (1902), where the Hawaii Supreme Court, in reversing an order dismissing a demurrer to the territory’s suit to enjoin the defendant from removing sand and gravel from the tideland, held that the provision, “koe nae ke kuleana o na kanaka” (reserving however the people’s kuleana therein), in a Land Commission award and a royal patent did not reserve public rights that the territory could protect but only private rights. In reaching this holding, the court did not refer to the Further Principles in construing the provision. The court did, however, refer to the Principles and stated that the sovereign prerogative contained therein are “public rights to which the grant is subject.” Id. at 95.

\textsuperscript{124}. See notes 83 & 87 supra.

\textsuperscript{125}. THURSTON, supra note 76, at 21-23.

\textsuperscript{126}. Hawaii Civil Code § 387 (1859), as amended, HAWAII REV. LAWS § 188-4 (1968).

\textsuperscript{127}. Hawaii Civil Code § 384 (1859), as amended, HAWAII REV. LAWS § 188-1 (1968).

\textsuperscript{128}. Hawaii Civil Code § 393 (1859), as amended, HAWAII REV. LAWS § 188-3 (1968).


\textsuperscript{130}. Id. § 95.
general for a condemnation proceeding. In *Carter v. Territory*, the plaintiffs sought compensation pursuant to the Organic Act for an exclusive fishery in the sea adjoining their land. The plaintiffs asserted conjunctively that the right was appurtenant to their land, that it was based upon prescription, and that it was established by ancient Hawaiian custom. The Hawaii Supreme Court rejected the claims on all grounds, concluding that, with respect to the ancient Hawaiian custom claim, the statutes defining the fishing rights abrogated any rights based upon established custom. The United States Supreme Court reversed. In an opinion by Mr. Justice Holmes in a companion case, the Court stated:

> The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use . . . . A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanction by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.

Subsequently, in *Bishop v. Mahiko*, the Hawaii Supreme Court was confronted with an attempt to quiet title to a fishery that was appurtenant to an *ahupuaa* originally granted to the plaintiff's predecessor in title. It appeared from the record that the boundaries of the fisheries in ancient Hawaii were not officially established or recorded; rather, the boundaries, by verbal communication, were universally known and understood to belong to the *ahupuaas* and *ili kuponos*, in accordance with ancient practice. Furthermore, there were *konohikis* of certain landlocked *ili kuponos* who possessed fishing rights and a fishery separate and distinct from the fishery of the *ahupuaa* in which the *ili kupono* was located. It is apparent that, at least with respect to these

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131. *Id.* § 96.
132. 14 Hawaii 465 (1902).
133. *Id.* at 467. A companion case, *Damon v. Territory*, involved the same three grounds plus an additional one based upon an express grant of the fishery from the king. 14 Hawaii 465 (1902).
134. *Id.* at 473.
137. *Id.* at 158 (emphasis added). It may be argued that at least with regard to property, the customary right doctrine has received Supreme Court recognition.
138. 35 Hawaii 608 (1940).
139. *Id.* at 650.
landlocked *ili kuponos*, the right of access to the fisheries in the oceans must have existed.\textsuperscript{140}

**Precedent of Judicial Protection—The Beach Ownership Cases**

That judicial protection be given to the customary right of public access has been presaged by the two cases dealing with the ownership of the beaches in Hawaii. These cases evidence a judicial concern over the public's interest in the shoreland. The Hawaii Supreme Court, in *In re Ashford*,\textsuperscript{141} concluded that a royal patent issued by king Kamehameha V could not have conveyed land beyond the high water mark, because of the customary method of locating seaward boundaries of the land.\textsuperscript{142} A royal patent provision, *ma ke kai*, was construed to mean “along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves . . . .”\textsuperscript{143}

In *County of Hawaii v. Sotomura*,\textsuperscript{144} the same court reiterated its *Ashford* holding of “upper reaches of the wash of waves” as the boundary between public and private land, but redefined how it was to be established. It was broadly stated, “as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka [inland]; the presumption is that the upper reaches of the wash of the waves . . . lies along the line marking the edge of vegetation growth.”\textsuperscript{145} Moreover, the court evidenced its judicial concern with ocean front property stating:

The *Ashford* decision was a judicial recognition of long standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right. Cf. State ex rel. Thorton v. Hay . . . . Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.\textsuperscript{146}

The recent Hawaii Supreme Court cases of *Ashford*, *McBryde*, and *Sotomura* make it evident that recognition of a public right of beach access can be best achieved through the use of the customary

\textsuperscript{140} The *kamaaina* witness rule may also be used to establish the customary right of beach access. See note 85 supra. Testimony by *kamaainas* could be used to establish the custom in ancient Hawaii regarding beach access. “[P]laintiffs will have to find enough *kamaaina* witnesses who can testify that a uniform custom of unrestricted access prevailed throughout the Islands.” Town, *supra* note 6, at 12.

\textsuperscript{141} 50 Hawaii 314, 440 P.2d 76 (1968).

\textsuperscript{142} Id. at 316, 440 P.2d at 77. See note 14 supra.

\textsuperscript{143} Id. at 315, 440 P.2d at 77.

\textsuperscript{144} 517 P.2d 57 (Hawaii 1973).

\textsuperscript{145} Id. at 62.

\textsuperscript{146} Id. at 61-62 (emphasis added).
right doctrine. In an extra-judicial statement, the Chief Justice of the Hawaii Supreme Court has emphasized the importance attached to a Hawaiian custom. More significantly, it is the public policy of the

147. The various theories that may be available to develop a public right of beach access include implied dedication, prescription, way of necessity and the public trust doctrine. However, because there are distinct disadvantages to each theory, and because the customary right doctrine is particularly suited for recognition of the public right of beach access in Hawaii, this note focuses upon the customary right doctrine.


Prescription involves basically the same elements as implied dedication with one major exception. The use necessary to obtain an easement through prescription must be adverse or under a claim of right. See Degnan, Public Rights in Ocean Beaches: A Theory of Prescription, 24 Syracuse L. Rev. 935 (1973). See also 3 Powell, supra note 40, at ¶ 413.

Inherent in both concepts of implied dedication and prescription is the restriction of their applicability to a local area. The Oregon Supreme Court recognized this handicap and discarded the theories of prescription and implied dedication and used the customary right doctrine. See text accompanying notes 58-70 infra. Furthermore, the repercussion after Gion in California revealed another shortcoming in the theory of implied dedication. Upland owners simply fenced off their property precluding any access to beaches. See L.A. Times, Mar. 21, 1971, § C, at 1, col. 6. See also Note, This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches, 44 S. Cal. L. Rev. 1092 (1971).

The theory of a way of necessity involves a requirement that no other way exists to reach a piece of property. See 3 Powell, supra note 40, at ¶ 410. However, this theory requires, in addition to necessity, unity of title in the servient and dominant estates. Id. at ¶¶ 432-33. Although there is some authority to the effect that unity of ownership may be based upon the original ownership by the government, the majority of jurisdictions reject this approach. Id. at ¶¶ 443-44.

A public right of beach access may be inferred from the public trust doctrine. The tidelands are held by the state in trust for the public and the public cannot be precluded from using the tidelands. See note 11 supra. As a necessary adjunct to this public right, a similar right of access to the tidelands must exist. However, the problem with this approach is that it must be applied to property normally not associated with the public trust. The doctrine was originally restricted to navigation and fishing. See Public Trust Doctrine, supra note 11, at 475. There has been, however, some expansion of the doctrine to allow water-related uses of the tideland to be protected by the public trust and it may be possible to structure an argument to obtain beach access through the public trust doctrine. See Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972). See also Note, Environmental Law—Expanding The Definition of Public Trust Uses, 51 N.C.L. Rev. 316 (1972).

148. "We all know from our history that in the last century, a foreign system of laws and government was imposed upon the Hawaiian people.

. . . .

"The Hawaiians had a difficult time conforming to the European and Calvinist concepts of conduct and property . . . . Yet, we were not victims of the courts but of the standards the courts had to impose. Those standards have changed . . . .
highest court in the state to favor maximum utilization of the public beaches. A logical development in achieving the objective of that policy would be to recognize the existence of a customary right of beach access as a necessary usufruct of land that has ripened into an inalienable public right.

The Balancing of Private and Public Rights

The recognition of a general public easement to cross private uplands to reach the beach should have favorable results for the public. Overcrowding should be reduced on those beaches where public access currently exists. Logically, greater utilization of beaches now generally inaccessible should occur. However, the recognition of such an easement could pose serious problems for the upland owner who purchased the land because of its proximity to a beach circumscribed by private property. The value of his property would be reduced, and the physical condition of the land possibly impaired by a multitude of bathers and surfers crossing his land.

The "Taking" Issue

To what extent would a judicial decision affirming the right of public access be an unconstitutional taking of property? Although the normal activity attacked as a "taking" under the due process clause is legislative, certainly a state judicial decision changing an established precedent could be equally subject to higher judicial review. For example, in Hughes v. Washington, wherein the accretion right of tideland owners as successors in title to a federal grantee was at stake, the United States Supreme Court reversed a decision of the Washington Supreme Court concluding that federal law controlled because of the proximity of the land in question to the boundary of the nation.

"We must scrutinize the area of civil laws that are in conflict with Hawaiian interests—such as adverse possession. These laws were brought in by the haoles caucasians who understood them." Speech by William Richardson, Chief Justice of the Hawaii Supreme Court, to Hawaiian Civic Clubs, Annual Convention Feb. 8, 1974, printed in the Honolulu Star-Bulletin, Feb. 14, 1974, opinion page.

149. Some commentators feel that traditional real property notions concerning the "taking" issue must be scrapped, particularly where public rights are involved. See The Taking Issue, supra note 2, at 256-65; Takings, supra note 3, at 150. However, in this context traditional theories will suffice.


Mr. Justice Stewart, in a concurring opinion,152 approached the issue in another manner. Conceding that property law is a local matter to be determined by a state legislature or judiciary, he stated the test to be applied:

To the extent that the decision of the Supreme Court of Washington... arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate.153

Whether or not a state court's decision was unpredictable should be, then, a federal question, reviewable in the federal system.154

Justice Stewart's approach was relied upon in Hay v. Bruno,155 an action in federal district court before a three judge panel. In Hay, the defendants from Thornton attacked the Oregon Supreme Court decision as an unconstitutional taking of property, alleging an unpredictable change in Oregon property law. The three judge panel unanimously dismissed the claim and found no unpredictable change in state law: "[T]he action of the Supreme Court of Oregon was consistent with and is supported by a number of decisions from other jurisdictions which confirm the right of a state under similar circumstances to protect and preserve its beaches for the benefit of the people."156

This district court decision implies that reasonable state action regarding the shoreline and use thereof that changes a previous rule of state property law will not be held to constitute a taking. The predictability of a state court's decision may be determined in accordance with national judicial trends. Moreover, use of the custom doctrine to create prescriptive easements for public recreational use does not constitute a violation of the Fourteenth Amendment.157

In light of the Bruno and Sotomura cases, it would seem that a judicial recognition of a customary right of public beach access in Hawaii would not be unpredictable. Demands for public use of the beaches are receiving widespread judicial response.158 The court in Hawaii has seen fit to protect and to enforce the public ownership of the beaches. A logical extension of public beach ownership would be

152. 389 U.S. at 294-98.
153. Id. at 296.
154. Id. at 297.
156. 344 F. Supp. at 289 (emphasis added).
157. "The decision of a state court on a question of law, even though wrong and contrary to previous decisions, does not constitute a violation of the Fourteenth Amendment merely because it is wrong or because it reverses earlier decisions (citation omitted)." Id.
158. See cases cited note 12 supra.
the public's correlative right to get to the beach. Public policy should dictate recognition of such a public right of access.

Extinguishment of the Access Right

The primary public policy objective of maximum utilization of the beaches is achieved when the public has reasonable access. Beyond this, an equitable approach that effectively balances public and private rights might well allow curtailment or modification of a public easement. It is within the equitable powers of a Hawaii court to fashion a remedy that weighs both the need for reasonable beach access and preservation of the upland owner's rights.

Under traditional legal analysis, an easement or right of way may be extinguished by several methods. In Goo v. Young, an action for damages and ejectment from land over which the defendant claimed an easement, the plaintiffs alleged that the defendant had abandoned the easement because of nonuser and because the defendant and his predecessor in title had allowed the plaintiffs and their predecessors in title to obstruct the easement. The Hawaii Supreme Court found no abandonment of the easement since retention of the easement is not conditioned upon continued use thereof. However, the court noted that any easement might be extinguished by abandonment with nonuser as one factor tending to establish the controlling element, the intention to abandon. In addition, the court asserted that

159. See generally 2 AMERICAN LAW OF PROPERTY §§ 8.87-8.104 (A.J. Casner ed. 1952); 3 POWELL, supra note 40, at ¶¶ 421-26; RESTATEMENT OF PROPERTY §§ 497-509 (1944). Although some cases make a distinction between easements obtained by deed and those obtained through operation of law, such distinction is without meaning. See 3 POWELL, supra note 40, ¶ 423, at 526-34. Furthermore, since it is more difficult to extinguish an easement obtained by deed, any rule that would allow an express easement to be extinguished would likewise apply to an easement obtained through operation of law, such as a right of beach access obtained through the customary right doctrine.

The main obstacle to the extinguishment of a public easement is the question of whether the public as a whole may lose such a right. However, where the public evidences an intent to abandon an easement, a public easement may be extinguished. See, e.g., Porter v. International Bridge Co., 200 N.Y.2d 234, 93 N.E. 716 (1910). See also 2 AMERICAN LAW OF PROPERTY § 9.55 (A.J. Casner ed. 1952). There is no reason why an easement held by the public cannot be lost if the public is capable of obtaining an easement. Cf. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). Likewise, the law regarding extinguishment of easements should also apply to general public easements.

160. Of these methods, the least likely to succeed is that of adverse possession. The public right of way is a public right held by the state, and under the rationale of McBryde adverse possession does not operate against the sovereign as trustee of public rights. 104 P.2d at 1344-45.

161. 36 Hawaii 132 (1942).

162. Id. at 148-49. See also Suzuki v. Garvey, 39 Hawaii 482 (1952); 3 POWELL, supra note 40, ¶ 423, at 526.32.
all the elements of equitable estoppel must exist to establish an abandonment of an easement.¹⁶³

In the situation where reasonable¹⁰⁴ alternative public access currently exists¹⁶⁵ and the public has utilized that right of way, it is extremely likely that the general customary right of public access over adjacent private uplands has been extinguished. Evidence of the public's collective intention to abandon this customary right of access is present. Nonuser of the general easement has occurred. In addition, the permanent substitution and use of a defined right of way for the customary right is also indicative of the intention to abandon.¹⁶⁶ Furthermore, all the elements of estoppel are present.¹⁶⁷ The upland owner, relying upon the acquiescence of the public in using the defined, existing right of way in lieu of asserting their customary right of beach access, may have incurred expenses in improving his property in the belief that his land was his to enjoy.¹⁶⁸ To allow the public to assert its general access right in this context would cause "unreasonable harm to the owner of the servient tenement."¹¹⁰ Therefore, where reasonable alternative public access exists, the customary right of public access to the beaches has been extinguished.

However, where no reasonable public access exists, no extinguishment has occurred.¹⁷⁰ The requisites for extinguishment are simply not present. With respect to these uplands, the customary right of public access continues to exist and may be asserted by the public. When,

¹⁶³. 36 Hawaii at 149. The Hawaii court seems to have combined two separate theories for extinguishment of an easement, in spite of Powell's contention that they should remain distinct. 3 POWELL, supra note 40, ¶ 423, at 526.38. The two theories are extinguishment by abandonment, wherein the material factor is the easement owner's intention, and extinguishment by estoppel, wherein the action of the dominant and servient estates' owners are controlling. Id. at 526.50. See also C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 35 (2d ed. 1947).

¹⁶⁴. Reasonableness of the accessibility of the beach may be determined in the same manner as that utilized for the reasonableness of the beach access which is provided when there is a sale or lease of state owned upland property. See note 24 supra.

¹⁶⁵. It is immaterial for this analysis whether access was acquired through dedication or condemnation.


¹⁶⁷. See RESTATEMENT OF PROPERTY § 505 (1944).

¹⁶⁸. See 3 POWELL, supra note 40, ¶ 425, at 526.51.

¹⁶⁹. RESTATEMENT OF PROPERTY § 505 (1944).

¹⁷⁰. A Hawaii court sitting in equity "has plenary power to mold its decrees in such form as to conserve the equities of all parties . . . ." Fleming v. Napili Kai, Ltd., 50 Hawaii 66, 70, 430 P.2d 316, 319 (1967), quoting Baker Sand & Gravel Co. v. Rogers P. & H. Co., 228 Ala. 612, 619, 154 So. 591, 597 (1934). Therefore, it is within the court's power to decree that the general public easement is extinguished only when public access has been provided and the public has acquiesced therein. Cf. Baptist Church v. Urquhart, 406 Pa. 620, 178 A.2d 583 (1962).
However, reasonable alternative public access is provided, and the public makes use thereof, a waiver of the public right occurs and the customary right may no longer be asserted.\footnote{171}{A waiver of a known right may be accomplished by an intentional relinquishment or by such conduct that warrants an inference of the relinquishment of the known right. Hewahewa v. Lalakea, 35 Hawaii 213, 219 (1939). See also 28 Am. Jur. 2d Estoppel and Waiver § 154 (1966).}

Such an approach to the problem of balancing the competing demands of the upland owner and the public adequately recognizes and protects the rights and expectations of both sides. The public's ownership of the beaches is given vitality by allowing the public to reach them; the upland owner's right to quiet enjoyment of his land is protected wherever the public has a reasonable alternative means to utilize the beaches.

\section*{Conclusion}

In an island state circled with a wealth of public beaches uncommonly suited for recreational purposes, the use and enjoyment of the shorelands should be encouraged. The first step toward the accomplishment of this objective has taken place. The Hawaii Supreme Court has recently reaffirmed the public's customary right of beach ownership. However, the second step, the recognition of a public right of beach access has not yet been sought from the court. It is necessary to insure beneficial enjoyment of the beaches that such an access right be recognized.

Through the use of the doctrine of ancient Hawaiian customary rights, this public right of beach access can best be established. Hoary common law property notions should be ignored as irrelevant to the Hawaiian experience and traditional Hawaiian practices that recognized the public nature of the shorelines given consideration. Coupling the customary rights doctrine with an abandonment theory allows the Hawaii court to utilize its equitable powers. The public is allowed to utilize the shorelands of Hawaii while the upland owner's right to privacy is preserved. Therein lies the virtue of the proposed approach. Competing demands are compromised and resolved. Through the use of this balancing, the public policy announced in \textit{Sotomura} of the "extending to public use and ownership of as much of Hawaii's shoreline as is reasonably possible"\footnote{172}{County of Hawaii v. Sotomura, 517 P.2d 57, 61-62 (Hawaii 1973).} will be met.

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\footnote{171}{A waiver of a known right may be accomplished by an intentional relinquishment or by such conduct that warrants an inference of the relinquishment of the known right. Hewahewa v. Lalakea, 35 Hawaii 213, 219 (1939). See also 28 Am. Jur. 2d Estoppel and Waiver § 154 (1966).}
\footnote{172}{County of Hawaii v. Sotomura, 517 P.2d 57, 61-62 (Hawaii 1973).}
\footnote{*}{Member, Third Year Class}