HB2591

RELATING TO ACCRETED LANDS.
Clarifies that land accreted after May 20, 2003, shall be public land except as otherwise provided by law.
(HB2591 HD2)

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

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CHAIRPERSON
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BOATING AND OCEAN RECREATION
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CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Testimony of
WILLIAM J. AILA, JR.
Chairperson

Before the Senate Committees on
WATER, LAND AND HOUSING
and
JUDICIARY AND LABOR

Tuesday, March 20, 2012
12:30 P.M.
State Capitol, Conference Room 016

In consideration of
HOUSE BILL 2591, HOUSE DRAFT 2
RELATING TO ACCRETED LANDS

The purpose of House Bill 2591, House Draft 2 is to relieve the State from the obligation to pay compensation resulting from a constitutional taking of accreted lands. The Department of Land and Natural Resources (Department) strongly supports this Administration measure.

Act 73, Session Laws of Hawaii 2003, disallowed the registration of accreted lands by private landowners. A class action suite was filed alleging that Act 73 affected a constitutional "taking" of privately owned land for which the State owned "just compensation." Both the Circuit Court and the Intermediate Court of Appeals have ruled that Act 73 was a constitutional "taking" as to accreted land that accreted before and existing when the Act became effective (May 20, 2003). Both courts ruled that accretion occurring after May 20, 2003, could be public land without affecting any privately owned vested rights.

This measure tailors the State's accretion laws so that it only affects land that accreted after May 20, 2003.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:
H.B. NO. 2591, H.D. 2, RELATING TO ACCRETED LANDS.

BEFORE THE:

SENATE COMMITTEES ON WATER, LAND, AND HOUSING AND ON JUDICIARY AND LABOR

DATE: Tuesday, March 20, 2012 **TIME:** 12:30 p.m.

LOCATION: State Capitol, Room 16

TESTIFIER(S): David M. Louie, Attorney General, or
William J. Wynhoff, Deputy Attorney General

Chairs Dela Cruz and Hee and Members of the Committees:

The Department of the Attorney General (the "Department") supports this bill.

The purpose of this bill is to correct and clarify existing law, which constitutionally "takes" an undefined amount of privately owned oceanfront land. Existing law requires the State to pay an indefinitely large sum – perhaps hundreds of millions of dollars – of just compensation for the land taken.

Background – legislation and litigation

Act 73, 2003 Hawai'i Session Laws 128, changed the definition of "public lands" in section 171-2, Hawai'i Revised Statutes (HRS). As amended, public lands means and includes "all accreted land not otherwise awarded." Act 73 made related changes to sections 501-33 and 669-1, HRS.

On May 19, 2005, a class action lawsuit was filed on behalf of all "owners of oceanfront property in the State of Hawai'i." The lawsuit contends that Act 73 took accreted land belonging to oceanfront owners and that the State must pay just compensation for the land taken. See Hawai'i Constitution, article I, section 20 ("Private property shall not be taken or damaged for public use without just compensation.").

The Hawai'i Intermediate Court of Appeals decided certain aspects of the case in Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 222 P.3d 441 (Haw. App. 2009).[1]

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[1] Both the Hawai'i Supreme Court and the United States Supreme Court declined to review this ruling.

Specifically, the court ruled: (1) Act 73 is a taking as to all privately owned land that accreted before May 20, 2003 (effective date of Act 73); and (2) Act 73 is not a taking as to all privately owned land that has accreted on or after May 20, 2003, or that may accrete in the future.

The court did not determine the exact meaning of the phrase "all accreted land." Plaintiffs argue the phrase means (roughly) all land that has accreted since 1920. The State proposes a less expansive reading of the phrase.

The intermediate court remanded the case to the circuit court for further proceedings.

The proposed legislation

This bill proposes to modify Act 73 so that the State is the owner of all "lands accreted after May 20, 2003." In other words, the bill disclaims ownership of accreted land that was privately owned before Act 73 and for which "just compensation" would otherwise be due.

The Department believes this amendment is prudent and appropriate. It does not appear the Legislature was aware of the takings issue when it passed Act 73. If, going forward, the Legislature decides to take some or all accreted land, the Legislature would likely wish to consider all aspects of the issue.

Moreover, Act 73 does not adequately define exactly what accreted land it intended to cover. This leads to uncertainty as to both ownership of specific property and the amount of just compensation that might ultimately be owed by the State.

We respectfully ask the Committee to pass this bill.