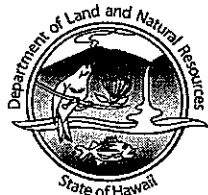


NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI  
FIRST DEPUTY

WILLIAM M. TAM  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
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 House Committee on**  
**WATER, LAND & OCEAN RESOURCES**

**Tuesday, February 3, 2012**  
**9:00 A.M.**  
**State Capitol, Conference Room 325**

**In consideration of**  
**HOUSE BILL 2591**  
**RELATING TO ACCRETED LANDS**

The purpose of House Bill 2591 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 owed "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.

The Department strongly supports Administration measure, House Bill 2591 for this reason.

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A BILL FOR AN ACT

RELATING TO ACCRETED LANDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 171-2, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 "§171-2 Definition of public lands. "Public lands" means  
4 all lands or interest therein in the State classed as government  
5 or crown lands previous to August 15, 1895, or acquired or  
6 reserved by the government upon or subsequent to that date by  
7 purchase, exchange, escheat, or the exercise of the right of  
8 eminent domain, or in any other manner; including [~~accreted~~]  
9 lands accreted after May 20, 2003, and not otherwise awarded,  
10 submerged lands, and lands beneath tidal waters which are  
11 suitable for reclamation, together with reclaimed lands which  
12 have been given the status of public lands under this chapter,  
13 except:

- 14 (1) Lands designated in section 203 of the Hawaiian Homes  
15 Commission Act, 1920, as amended;
- 16 (2) Lands set aside pursuant to law for the use of the  
17 United States;
- 18 (3) Lands being used for roads and streets;

- 1           (4) Lands to which the United States relinquished the  
2           absolute fee and ownership under section 91 of the  
3           Hawaiian Organic Act prior to the admission of Hawaii  
4           as a state of the United States unless subsequently  
5           placed under the control of the board of land and  
6           natural resources and given the status of public lands  
7           in accordance with the State Constitution, the  
8           Hawaiian Homes Commission Act, 1920, as amended, or  
9           other laws;
- 10          (5) Lands to which the University of Hawaii holds title;
- 11          (6) Lands to which the Hawaii housing finance and  
12          development corporation in its corporate capacity  
13          holds title;
- 14          (7) Lands to which the Hawaii community development  
15          authority in its corporate capacity holds title;
- 16          (8) Lands to which the department of agriculture holds  
17          title by way of foreclosure, voluntary surrender, or  
18          otherwise, to recover moneys loaned or to recover  
19          debts otherwise owed the department under chapter 167;
- 20          (9) Lands which are set aside by the governor to the Aloha  
21          Tower development corporation; lands leased to the  
22          Aloha Tower development corporation by any department  
23          or agency of the State; or lands to which the Aloha

1 Tower development corporation holds title in its  
2 corporate capacity;

3 (10) Lands which are set aside by the governor to the  
4 agribusiness development corporation; lands leased to  
5 the agribusiness development corporation by any  
6 department or agency of the State; or lands to which  
7 the agribusiness development corporation in its  
8 corporate capacity holds title; and

9 (11) Lands to which the high technology development  
10 corporation in its corporate capacity holds title."

11 SECTION 2. Section 501-33, Hawaii Revised Statutes, is  
12 amended to read as follows:

13 "**§501-33 Accretion to land.** An applicant for registration  
14 of land by accretion shall prove by a preponderance of the  
15 evidence that the accretion is natural and permanent[+] and that  
16 the land accreted before or on May 20, 2003; provided that no  
17 applicant other than the State shall register land accreted  
18 along the ocean[+] after May 20, 2003, except that a private  
19 property owner whose eroded land has been restored by accretion  
20 may file an accretion claim to regain title to the restored  
21 portion. The applicant shall supply the office of environmental  
22 quality control with notice of the application, for publication  
23 in the office's periodic bulletin in compliance with section

1 343-3(c)(4). The application shall not be approved unless the  
2 office of environmental quality control has published notice in  
3 the office's periodic bulletin.

4 As used in this section, "permanent" means that the  
5 accretion has been in existence for at least twenty years. The  
6 accreted portion of the land [~~shall be state land except as~~  
7 ~~otherwise provided in this section and~~] shall be considered  
8 within the conservation district. Land accreted after May 20,  
9 2003, shall be public land except as otherwise provided in this  
10 section. Prohibited uses are governed by section 183-45."

11 SECTION 3. Section 669-1, Hawaii Revised Statutes, is  
12 amended by amending subsection (e) to read as follows:

13 "(e) Action may be brought by any person to quiet title to  
14 land by accretion; provided that no action shall be brought by  
15 any person other than the State to quiet title to land accreted  
16 along the ocean[~~r~~] after May 20, 2003, except that a private  
17 property owner whose eroded land has been restored by accretion  
18 may also bring such an action for the restored portion. The  
19 person bringing the action shall prove by a preponderance of the  
20 evidence that the accretion is natural and permanent[~~r~~] and that  
21 the land accreted before or on May 20, 2003. The person  
22 bringing the action shall supply the office of environmental  
23 quality control with notice of the action for publication in the

H. B. NO. 2591

1 office's periodic bulletin in compliance with section 343-  
2 3(c)(4). The quiet title action shall not be decided by the  
3 court unless the office of environmental quality control has  
4 properly published notice of the action in the office's periodic  
5 bulletin.

6 As used in this section, "permanent" means that the  
7 accretion has been in existence for at least twenty years. The  
8 accreted portion of land [~~shall be state land except as~~  
9 ~~otherwise provided in this section and~~] shall be considered  
10 within the conservation district. Land accreted after May 20,  
11 2003, shall be public land except as otherwise provided in this  
12 section. Prohibited uses are governed by section 183-45."

13 SECTION 4. Statutory material to be repealed is bracketed  
14 and stricken. New statutory material is underscored.

15 SECTION 5. This Act shall take effect upon its approval.

16  
17 INTRODUCED BY: \_\_\_\_\_

*Calvin K. Y. Song*

BY REQUEST

JAN 23 2012

H.B. NO. 2591

**Report Title:**

Accreted Lands

**Description:**

Clarifies that land accreted after May 20, 2003, shall be public land except as otherwise provided by law.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO ACCRETED LANDS.

PURPOSE: To clarify that land accreted after May 20, 2003, shall be public land except as otherwise provided by law.

MEANS: Amend sections 171-2, 501-33, and 669-1(e), Hawaii Revised Statutes.

JUSTIFICATION: Act 73, Session Laws of Hawaii (SLH) 2003, asserted that "accreted land" was public land. The Act however did not define the scope of that term "accreted land."

A class action lawsuit was filed alleging that Act 73, SLH 2003, effected a constitutional "taking" of privately owned accreted land for which the State owed "just compensation." Both the Circuit Court and the Intermediate Court of Appeals have ruled that Act 73, SLH 2003, was a constitutional "taking" as to accreted land that accreted before and existed when the Act became effective (May 20, 2003). Both courts ruled that accretion occurring after May 20, 2003, can be public land without affecting any privately owned vested rights.

It does not appear to have been the intent of the Legislature to affect existing ownership rights. This measure tailors the law so that it only affects land that accreted after Act 73, SLH 2003, became effective (May 20, 2003).

Impact on the public: This bill would provide that privately owned property rights are not affected and the public is not required to pay for taking any such rights.

Impact on the department and other agencies: This bill would relieve the State from the



obligation to pay compensation resulting  
from a constitutional taking.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: LNR 101, LNR 906.

OTHER AFFECTED  
AGENCIES: Department of the Attorney General.

EFFECTIVE DATE: Upon approval.

# HB2591

Submit Testimony

Measure Title: RELATING TO ACCRETED LANDS.  
Report Title: Accreted Lands  
Description: Clarifies that land accreted after May 20, 2003, shall be public land except as otherwise provided by law.  
Companion: SB2853  
Package: Gov  
Current Referral: WLO, JUD  
Introducer(s): SAY (BR)

<b>Sort by Date</b>		<b>Status Text</b>
1/23/2012	H	Pending introduction.
1/25/2012	H	Introduced and Pass First Reading.
1/25/2012	H	Referred to WLO, JUD, referral sheet 7
2/1/2012	H	Bill scheduled to be heard by WLO on Friday, 02-03-12 9:00AM in House conference room 325.



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

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

**BEFORE THE:**  
HOUSE COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES

**DATE:** Friday, February 3, 2012                      **TIME:** 9:00 a.m.  
**LOCATION:** State Capitol, Room 325  
**TESTIFIER(S):** David M. Louie, Attorney General or  
William J. Wynhoff, Deputy Attorney General

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Chair Chang and Members of the Committee:

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).<sup>1</sup>

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<sup>1</sup> 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.