



# University of Hawaii at Manoa

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## SB 1786 RELATING TO (MAKAI) BOUNDARIES

Statement for  
Senate Committee on  
Ecology, Environment and Recreation  
Public Hearing, 28 February 1979

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SB 1786 proposes two statutory definitions of the makai boundaries of ocean front land. This statement on the bill does not reflect an institutional position of the University.

Which of the two proposed definitions of the makai boundaries would apply to any particular parcel of land would depend on whether or not the parcel has been registered in the Land Court. If the land has been registered in the Land Court, the boundary would be that established by the decree of registration; if not, the boundary would be the mean high water mark. The preparers of the bill do not seem fully unaware of the ambiguities of some Land Court boundary descriptions, the possible ambiguity of the term high water mark, the effects of accretion and erosion on makai boundary locations, and the long and complex history of Hawaiian makai boundary cases in the courts.

The adoption of a boundary as established by the Land Court is in accord with the recent decision by the Federal District Court in Sotomura (1978) that the acceptance of a boundary description by the Land Court is *res judicata*. This does not mean that the position of the boundary may not change. In *Halstead v. Gay* (1889) the State Supreme Court has ruled that a makai boundary changes in position with accretion and in Sotomura (1973) that it changes with erosion. Although the Federal Court overruled the State Supreme Court in Sotomura, the overruling did not affect the applicability of the doctrine of erosion. The Sotomura case is indicative also of the necessity to determine which of two or more definitions of the boundary accepted by the Land Court is the proper one, and to interpret exactly what a particular verbal boundary description properly means.

Makai boundaries of lands not registered in the Land Court have been defined in original patents, awards, grants, and deeds both by metes and bounds surveys and by various Hawaiian and English terms, and have been redefined by the courts with similar diversity. The term high water mark has been used in many descriptions. The term has

been considered by some courts to mean the line of mean high tide, and when qualified as the mean high water mark this interpretation seems quite reasonable. However, high water mark, or the Hawaiian terms that have been translated as high water mark, might be taken to refer to a visible mark rather than an invisible tide line. This is especially the case with the Hawaiian term "kahakai" whose etymological meaning is "mark of the sea." The Supreme Court in Ashford (1968) held that the term "ma ke kai" (along the sea) means along the upper reaches of the wash of waves as evidenced by the visible vegetation or debris line, not the line of mean high tide. A bill was introduced into the Legislature last year or the year before to try to establish all boundaries uniformly at the wave wash line indicated by these visible marks.

Regardless of the meaning of mean high water mark, there are some boundary descriptions in original patents, awards, grants, and deeds, and in subsequent court decisions, that are clearly inconsistent with that term, for instance low water mark. The decision in Sotomura (1978) indicates clearly that the federal court would consider that implementation of a statute holding that a boundary, described as at the low water mark, was actually at the high water mark would constitute a taking that would be unconstitutional unless compensated.

To whatever extent uniformity of description of makai boundaries is legally possible, the line of mean high tide would have the advantage of amenability to precise location. However, this advantage would be nullified on beach coasts by the instability of all tide lines. The vegetation and uppermost debris lines, though locatable less precisely, are far more stable. At the moment, I cannot advise to what extent makai boundaries can be made uniform, but I am engaged in a review of the history of boundary cases in Hawaii from which some guidance may emerge.