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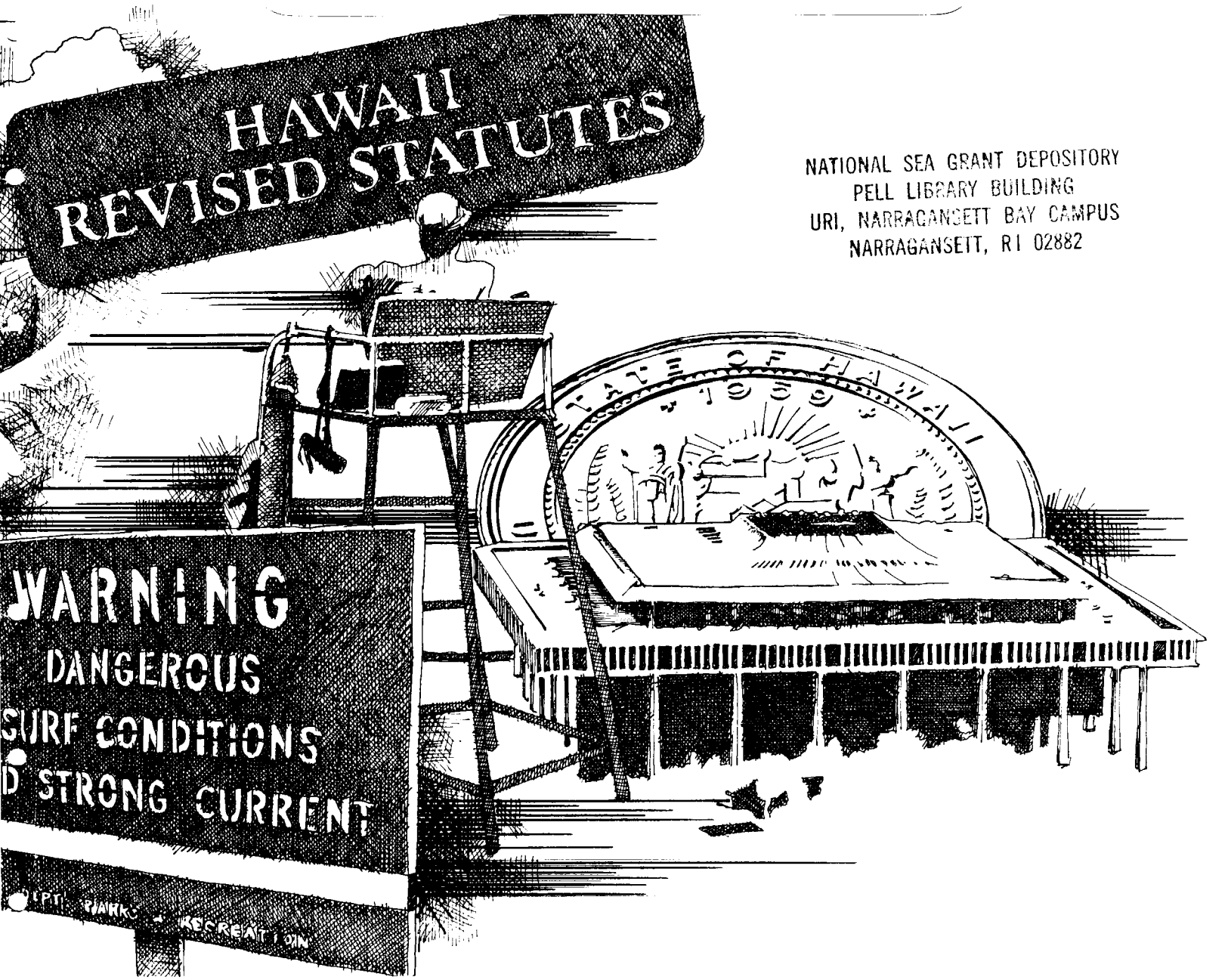

INDIGENOUS OCEAN RIGHTS IN HAWAII

Norman Meller

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ABSTRACT

By a statute of 1839, Hawaiian ocean fishing rights were redistributed between landlord, tenant, and monarch. Subsequent Hawaiian legislation added modifications. Congress, by the Hawaiian Organic Act, sought to terminate all unregistered fisheries, and some recorded fisheries were condemned. Today, the identity of the remaining fisheries is uncertain, and a 1978 Hawaii constitutional amendment raises questions over residual fishing rights of Hawaiians.

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INTRODUCTION

Among the states of the United States, Hawaii is unique in recognizing private property rights to open ocean fisheries. This paper presents the results of an exploratory investigation, conducted in the summer of 1984, into the written materials readily available on "traditional" fishing rights in Hawaii. With minor exceptions, only sources in the English language were consulted, although these included some English translations of publications originally appearing in the Hawaiian language. The purpose for conducting this research was twofold: to determine the viability of such fishing rights, so as to permit considering their use in effecting conservation practices in Hawaii; and to establish a base for understanding analogous types of rights existing in various Pacific islands where statutes and case law have not yet determined their parameters. In these areas of Oceania, too, traditional piscary rights may hold potential for facilitating conservation practices.

Although the author was generally familiar with the literature on the subject,[1] he was not aware of the large amount of recently published[2] and unpublished[3] materials which deal with "traditional" fishing rights in Hawaii. As a consequence, much of what is contained in this report represents ground already traversed. However, it varies particularly in pointing out differences existing in the Hawaiian and English versions of the early laws. Also, it does not necessarily concur with the interpretations and conclusions reached by others.

PRE-1839 PERIOD

Prior to the advent of Europeans in Hawaii, the Western concept of property, and particularly fee simple title to land, was unknown in Hawaii. Consequently, to refer to "ownership" of traditional fishing grounds and fishing rights is to connote a set of relationships derived from Western law which is inapplicable to pre-contact Hawaii. Rather, what existed was the occupation and use of designated lands, and, associated therewith, the ability to enjoy the products of certain other areas, whether they be the firewood, cordage, thatch, etc., of the uplands or the marine produce of the sea. General restrictions, such as tabus placed on an area or species, might from time to time prevent access of all to such products. In addition, particular individuals might be limited by directions of persons having authority so as to control their taking. Given the existence of the institution of master fisherman in the Hawaiian culture, the high technical fishery skill developed over the centuries, and the vast taxonomical knowledge of Hawaiian fishes,[4] it is highly unlikely that there were many marine resources within the waters of the habitated Hawaiian islands which had not been identified and, except as subject to constraint, utilized.

In pre-contact Hawaii, temporal rule of the islands was divided among a number of warring ali'i ("chiefs"), all of whom enjoyed a form of personal suzerainty which, theoretically at least, gave them complete control over the geographical area within their respective jurisdiction, including the use of its resources. Subordinate ali'i, owing fealty, exercised comparable control over portions assigned to them. If this were transliterated into modern idiom, it would be as much akin to the holding of property under trustee relationships as to being fee simple title.

It was the normal rule to divide each island into moku and to subdivide the latter into ahupua'a, which are smaller strips of property running from the mountains to the sea. The rationale supporting this geographical configuration was the affording of access to the resources necessary to sustain the pattern of Hawaiian life. The ahupua'a ". . . usually had attached to them ocean 'fishing rights,' in some instances not only adjacent to their own shores, but spreading out on each side up and down the rocky coast for miles, till they joined another monopoly of the deep-sea fisheries."[5] Some ahupua'a extended farther into the mountains than others, overlapping the latter and having a commensurate greater access to the mountain resources. Similarly, some ahupua'a stretched out into deeper water, overlapping the rights of neighboring ahupua'a which only extended short distances into the ocean.[6] Boundaries did not necessarily project out into the ocean at right angles from the shore, however.[7]

Occasionally, semi-independent ili kupono were carved out of an ahupua'a and specially allotted; in such situations it was not uncommon to attach to them separate supplementary mountain and ocean resource areas called ili lele. Apparently, over time, each of these various fishing grounds -- whether associated with an ahupua'a or an ili kupono -- came to have an identity with name and recognized physical specificity, just as delineations on land require a degree of certainty so as to facilitate the allocation of usufruct rights.

The hoa'aina ("tenants") who dwelled on the ahupua'a and ili kupono, in addition to tilling their kuleana ("land allotment"), enjoyed access to the mountain and ocean resources of their land division.[8] As directed by the konohiki ("agent of the ali'i"), resources both cultivated and gathered might be apportioned so that part would be allocated to the ali'i. The species, types, sizes, and portions of fish so commandeered, and the limitations placed upon the tenants in their access to ocean resources, apparently varied both with konohiki and over time.

Fisheries located outside of the areas associated with the ahupua'a and ili also had come to be well-recognized and included named areas in the open ocean.[9] There is no reason to assume that the maka'ainana ("commoners"), who were subject to direction from their ali'i, were free of constraints just because they were out on the open ocean, limitations akin to those that applied to

fishing within areas attached to ahupua'a and ili. The major difference would be that only hoa'aina could fish within their "own" fisheries; on the high seas all would be free to fish, except as specifically directed by their ali'i, or as restricted by the king,[10] or as prohibited by general religious tabus, or as prevented by physical force which denied access to ocean resources. With respect to the last, it is not improbable that at one time or another open ocean resources were claimed as being within the jurisdiction of some ali'i jousting with others for temporal supremacy.[11]

1839 LEGISLATION

Redistribution of Fishery Rights

In the words of Attorney General R.H. Stanley, in 1839 "Kamehameha III, having the allodium of all the lands, with the concurrence of the chiefs resumed possession of all the fishing grounds in the Kingdom, for the purpose of making a new distribution and regulating the respective rights of all parties interested therein according to written laws."[12] Such an action of the king did not represent a sharp break with the past which was familiar with ruling ali'i reassigning land rights upon assuming power. However, in its contents the statute was as revolutionary as the bill of rights with which it was published, as the constitutional government which was soon to be established, and as the Great Mahele which took place almost a decade later.[13]

As declared in the 1839 statute, "His majesty the King . . . gives one portion of . . . [the fishing grounds] to the common people, another portion to the landlords, and a portion he reserves to himself."[14] The intent of the 1839 statute was to reallocate among king, chiefs, and commoners all fishery rights enjoyed. For the first time the law declared commoners' rights as well as placed limitations on the rights of the konohiki (see discussion below). In addition, it offered protection to the former group against possible abuse from the latter.[15] Starting with the fishery attached to the ahupua'a and ili kupono -- hereafter referred to as the "konohiki fishery" -- part of the tenant's bundle of rights therein was expressly recognized, subject to the obligation to observe the tabu placed on the konohiki's choice of one species of fish, or on agreement to deliver to the konohiki one-third of the entire fish catch from the fishery. To the king, for the support of the government, went a share of specific fishes -- some taken from named places -- seaward of the konohiki fisheries, certain named fishing grounds, and transient shoal fishes.[16] To the people went everything else in the open ocean,[17] as well as the kilohee, luhee, and malolo grounds.[18]

Relying upon the opening declaration of the 1839 statute, the Hawaii Supreme Court, when called upon to adjudicate rights to konohiki fisheries, concluded that rather than modifying and reallocating existing rights, the statute terminated them. In

Haalelea v. Montgomery, the first case reported on the subject, the court held: "This is the point [law of 1839] at which the existing piscatory regulations of the kingdom had their commencement, and since which, ancient custom ceased to govern the subject."[19] The court's denial of the traditional antecedents for the konohiki fishery appears to run contrary to the historical evidence, for, to borrow the words of Margaret Titcomb, "It is evident that the earliest laws were a carry-over of the tabus."[20] The very implementation of the 1839 statute required reference to preexisting custom to identify owners and boundaries:

> Under the statutes defining private fishing rights, the extent of the area subject to a statutory private fishing right depended upon "ancient regulation." Proof of the incidents of ancient regulation, including the boundaries of private sea fisheries, depended upon the facts.[21]

The question may be asked as to whether raising such an objection at this late date is not akin to the blowing up of a tempest in a tea cup. In truth, there may still be need to go back to the customs and traditions prevailing prior to 1839, for the English translation of the 1839 statute does not completely coincide with the Hawaiian version, causing ambiguities still carried over until today. In the discrepancies may be found some explanations for the amendatory and supplementary legislation subsequently adopted. Then, too, after the Hawaiian monarchy adopted a constitution, article 5 of an act passed in 1846 and entitled "Of the Public and Private Rights of Piscary" repeated many of the same provisions.[22] This and subsequent enactments, to the extent they referred to private fishery rights, created vested property rights, even though adding restrictions cutting down what otherwise would be incidents of private property.[23] With Article XI, Section 6, of the Hawaii State Constitution as amended in 1978 recognizing vested konohiki fishery rights, and with Article XII, Section 7, newly protecting traditional and customary Hawaiian rights, landlords and tenants may still have claims to benefits in konohiki fisheries, the potential of which is at present unknown.

Translation Discrepancies

The author has no Hawaiian language skills and is still waiting for a definitive retranslation and phrase-by-phrase comparison of the 1839 legislation, so the discussion in this portion of the report is admittedly tentative. What has been confirmed is that the boundaries of konohiki fisheries were erroneously delineated in the 1840 English language version, and this became the basis of the later statutes. In addition, it was ascertained that some of the fishing rights in the open ocean allocated to the king for taxation purposes, and by subsequent legislation surrendered to the people, were similarly incorrectly described in the English version.

Critical to the reapportionment of fishing rights was the designation of the sea boundary of the konohiki fishery. The 1839 Hawaiian statute fixed the boundary at "the breakers"; the 1840 English translation, however, read "the coral reef."[24] Neither was wholly adequate and, hence, necessitated supplementary legislation.

The 1839 statute accommodated fisheries with beaches of sloping gradient without reefs, but those existing in areas where the high seas crashed into headlands appear to have been ignored. Reefs of noncoral composition marking the sea boundary of the konohiki fishery were also covered in the 1839 statute. Left uncertain were those areas with both distant fringing reefs and a second set of inner reefs, more closely skirting the shore.

A revision in Hawaiian in 1840 sought to remove the ambiguity disclosed, when attempting to apply the 1839 law, by adding a paragraph. The English translation is as follows:

> If, however, there is any plantation having fishing grounds belonging to it, but no reef, the sea being deep, it shall still be proper for the landlord to lay a taboo on one species of fish for himself, but one species only.

"In 1845 it was found necessary to define more clearly the rights of the respective parties, and the following was adopted in connection with other legislation: . . . 'Sec. II. The fishing grounds from the reefs, and where there happen to be no reefs[,] from the distance of one geographical mile seaward to the beach at low-water mark, shall in like manner be considered private property of the landlords whose lands by ancient regulation belong to the same; . . .'"[25]

With respect to the rights allocated to the king, in the 1839 Hawaiian statute, mention was made of both shallow places in the ocean and schools of fish. This difference is obfuscated in the English translation which uses the same word -- "shoal" -- for both. For example, with respect to Kauai, there are included ". . . the permanent shoal fish of Niihau, and all the transient shoal fish from Hawaii to Niihau. . . ." The first "shoal" is a reference to fish of the shallow areas of Niihau and the second to schools of fish which transit the ocean area between Kauai and Niihau. The incorrect designation of Hawaii instead of Kauai in the English version has been noted.

Errors of translation into English also occurred in the designation of the king's fish. It was the parrotfish of Kaohai and the bonita of Kaunolu, both of Lanai, which by statute were allocated to the king, and not all of these two fishes wherever found in Lanai waters, as the English version reads.

So much for examples of errors and inaccuracy in translating the Hawaiian language version into English. In the early period

of the monarchy, the Hawaiian version of a statute took precedence over the English version.[26] This suggests that tracing the present law on konohiki fisheries back to the first statutory declarations in Hawaiian, and a careful restudy of them, may provide a better understanding of konohiki fishery rights today, particularly if they are subjected to scrutiny under the Hawaii Constitution as amended in 1978.

Restatement of Tenants' Rights

As previously related, according to preexisting custom the tenants of land adjoining a fishery had recognized ocean usufruct rights. The continuation of such rights was implied in the 1839 statute and made explicit in the revision in 1840. The original 1839 language (in parentheses) was expanded as shown in the following English translation:

> (But the fishing grounds from the coral reef to the sea beach are the landlords) and for the tenants of their several lands, but not for others.

In 1845 this was restated:

> The landlords shall be considered to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their landlords, subject to the restrictions . . . imposed [by law].[27]

Because reference was made only to fishing, the 1845 statute remained deficient. Ultimately, in 1892, this was cured by the Hawaii Civil Code being amended so as to declare that ". . . all fish, seaweed, shellfish, and other edible products . . ." could be taken by tenants from the konohiki fishery.[28] Since the enjoyment of seaweed and the other named ocean resources had been an established practice long before the first statute was enacted in 1839, it is highly improbable that observance ceased during this interim of half a century. Instead of giving tenants new rights as against the konohiki, it would appear that, with the amendment of 1892, the statutory law of Hawaii pertaining to fisheries was now formulated so as to encompass the traditional range of rights of tenants in konohiki fisheries.

After the Great Mahele, and the change of Hawaii's land system, persons who became owners of land within an ahupua'a were treated as tenants entitled to rights in the fishery of the ahupua'a. The same rights were enjoyed by their lessees and renters. All of this was accommodated under the premise that the word "tenant" had been broadened, becoming almost synonymous with the word "occupant," and including any bona fide resident of the land.[29] The same applied to the ili kupono,[30] but since the ili was carved out of an ahupua'a and existed separately, dwellers in

an ili gained no piscary rights in the ahupua'a fishery.[31] All of these fishing rights existed only "as an incident to the tenancy" so that, upon moving away, "the next tenant receives his rights through the statute, just as his immediate predecessor did."[32] The enactment of the Organic Act in 1900 materially affected the continuation of tenant rights in konohiki fisheries, as will be discussed below.

Rights Of King and People Outside the Konohiki Fishery

The fish resources seaward of the konohiki boundary initially were divided between the king and the people by the 1839 statute. The intent of this portion of the early legislation was twofold: to derive revenue for the government -- the sharing of the fisheries was contained in "An Act to Regulate the Taxes" -- and to encourage the Hawaiian people to exploit the ocean's resources. Neither objective was to prove successful. Over time, the monarchy surrendered its share to the "people,"[33] so that all that the government eventually retained was the right to impose a protective tabu.[34]

Difficulties in collecting the tax could be anticipated on the adoption of the original legislation in 1839. If there were only one canoe load of the king's fish, it could be kept by the fisherman, but thereafter the fish catch was to be split. Woe betide the fisherman who borrowed a larger canoe so that all of the fish caught could be transhipped into a larger bottom: the tax would then be levied on all of the fish. By 1841 the one-canoe exemption was apparently eliminated,[35] presumably because of enforcement problems. In this year, also, the form of the penalties was changed. The 1846 "Act to Organize the Executive Departments of the Hawaiian Islands" gave the minister of the interior supervisory control over fisheries. Fishing agents, to whom the minister issued instructions through the island governors, enforced the king's tabu and received the royal portion from the fishermen's catch. Sometimes a konohiki would attempt to place a tabu on a fish which had already been reserved for the king. In such cases the Interior Department would have to step in and assert the government's superior claim.

By 1851 ". . . the fish belonging to the government . . . [were] productive of little revenue, and . . . the piscary rights of the government, as managed by the fishing agents . . . [were] a source of trouble and oppression to the people."[36] It was decided to transfer "all fish belonging to or especially set apart for the government [so that they] shall belong to and be the common property of all the people, equally . . . ," subject to the king's power to tabu certain fish for conservation purposes at designated seasons of the year. A few months earlier, fish leaving the konohiki fishery and going into the grounds given to the people were declared free of the konohiki tabu.[37] Seaward of the konohiki fisheries, the ocean was now open to everyone with respect to all fish.

Also during the 1851 session, the legislature limited the possibility of expanding the number of private fisheries recognized by law. This was accomplished by granting forever "to the people for free and equal use of all persons" the fishing grounds appurtenant to lands still held by the government.[38] Earlier, a companion measure sought to foreclose implied transfers of fishery rights by denying to a past or future purchaser of government land, and to one obtaining land by lease or other title from any party, any superior right ". . . over any fishing ground, not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the taboos of the minister of the interior."[39]

The cumulative effect of all of these changes was to expand the rights and privileges of the common people in the seas outside the boundaries of the recognized konohiki fisheries. In addition, their rights of piscary were extended to waters adjacent to government lands where konohiki fisheries would have existed if the lands were in private hands and a fishery expressly included in the title conveyed. Conversely, the rights of the monarchy were curtailed -- reduced mainly to effecting conservation measures.

Rights of Konohiki

Decades of adjustment, defining with more specificity and in effect curtailing the landlord's fishery rights, followed the enactment of the original statute in 1839. One of the curtailments was that a landlord owning several adjoining fisheries, could only tabu a single fish for all of them. Such tabued fish once kept their protected status if they left the private fishery and ventured into public fishing grounds, but later the tabu was recognized only inside the private fishery. The statutory declaration of the fishery's seaward boundary also denied to the konohiki[40] of an ahupua'a or ili any claim to lease sea fisheries farther out in the ocean.[41] Furthermore, it was not within the konohiki's power to alienate any right in a konohiki fishery conferred by law on the tenant.[42]

During the division of lands at the time of the Great Mahele, title to konohiki fisheries normally was not part of awards made by the Land Commission. "The Land Commission did not decide on the question of . . . fisheries, except as incidentally to its other duties."[43] In practice, the Commission treated the fisheries as not within its jurisdiction.[44] In addition, crown lands under the Great Mahele may have had fisheries attached to an ahupua'a or ili, but Kamehameha III obtained no award from the Commission as to these lands, for he already had perfect title. Government lands, too, included both those surrendered by Kamehameha and others returned by the chiefs as commutation for lands retained by them in the Great Mahele. Such areas could have unadjudged fisheries attached. Thus, the failure of the

Land Commission to establish rights to a konohiki fishery was held by the United States Supreme Court not to be a prejudicing factor in any claim to konohiki fisheries.[45]

Ownership of both lands and fisheries continued to be concentrated in the hands of a small elite class, which was, for the most part, not Hawaiian. The role of the landlord "changed from a position whose social responsibility it was to maintain a balance in natural resource use for the welfare of the ahupua'a community to a position of private privileges in the harvests of the fisheries without necessarily the responsibility for conservation."[46]

The konohiki fishery system had evolved as an integral part of a subsistence, integrated culture, but, with Hawaii's shift to a market, individualistic economy, it became anachronistic. Tenants were not limited to the taking of fish for their own use and, excluding the tabued fish, were free to sell all that they caught.[47] The konohiki could and did lease out fishing privileges, further encouraging depletion of the fishery's stocks. Decreasing revenues from fish catches and the inability to enforce payment of rentals made it unprofitable to stop non-tenants from invading the protected waters and to ensure that tenants were observing the tabu. Private enforcement efforts slackened, and with the annexation of Hawaii, criminal trespass action could no longer be bought to punish offenders for appropriating fish from the konohiki fisheries that were still recognized.[48]

A question has long surrounded the nature of the rights of the konohiki: did they enjoy full ownership, subject only to the rights of the tenants, or did the declaration of the 1839 statute and succeeding legislation consist of an exclusive enumeration of the konohiki rights, reducing them solely to tabuing one fish or, in lieu thereof, to receiving one-third of the tenants' total catch?[49] Strange as it may seem, this issue was not definitively resolved until just before statehood, by which time the fisheries had almost disappeared and the value of those still recognized had materially shrunk. As decided by the Hawaii Supreme Court in 1956, the konohiki enjoys full ownership rights, except as statutorily limited.[50]

Number of Konohiki Fisheries

The number of konohiki fisheries that once existed in Hawaii will probably never be known. Not only does memory of many no longer exist, but the practice of sometimes referring to several under a single name, while at other times designating them individually, makes all numerical counts suspect:

> It does not appear how many private fisheries existed by ancient regulations or what was their number in 1839. . . . Of the private fisheries that existed at

the time of annexation, the number that could be identified from official records does not appear.[51]

Since it was estimated that there "are" approximately 1,203 ahupua'a and ili fronting on the sea, they and the unknown number of ili kupono located inland with fishery rights affixed suggest an overall maximum base figure of around 1,500 private fisheries.[52] Of the 1,203 figure, however, approximately 840 were at one time crown and government land, so that presumably the fishery rights of many of them were surrendered to the people. At the time of annexation, then, if reliance is placed on these data, the number of private konohiki fisheries in existence ranged from 363[53] (1,203 minus 840) to probably as many as double that number.

Section 96 of the Organic Act mandated that all vested fishing rights be claimed by court action within 2 years, under threat of the right becoming invalid if not so established by 1903.[54] How many were so registered is also not without controversy.[55] Probably 144 claims were made within the period specified by the Organic Act: Oahu - 58, Maui - 41, Kauai - 28, Hawaii - 11, Molokai - 4, and Lanai - 2. "The largest recorded area covered by a 'right' was one of the two around the island of Lanai, 4,152 acres. It is possible, however, that several whose areas have not been computed would exceed this one in extent. The fishery with the smallest recorded area was that of Haua, on the island of Molokai, which has an area of one-half acre."[56]

The explanation for the greater number of filings on Oahu probably lies in these konohiki fisheries being more lucrative,[57] due to the larger population on Oahu and to Honolulu's constituting the seat of government. At the time, on the island of Hawaii practically no effort was being made to collect rent for any of the fisheries; merely nominal rents were being received for Molokai fisheries; and attempts to collect rent on Lanai "were almost uniformly unsuccessful."[58] On Maui the principal area covered by a fishing right was located at Kahului, and the rest there were "practically free of any charge."[59]

Given the disagreement over the number of private fishery rights that were "vested" under the Organic Act, it is not surprising that a comparable lack of concurrence exists with regard to the private fisheries that were not claimed and thus would become invalid under the strictures of the Organic Act. Kosaki, relying on Commissioner Whitehouse's 1939 submission, used the figure of approximately 248;[60] Khil fixed it at 311+, including both "public and private" fisheries.[61] Much earlier, in 1923, Commissioner of Public Lands Bailey submitted a list of 327+ fisheries which had "not been adjudicated"; however, this total admittedly failed to include an "undetermined number" from designated districts on the island of Hawaii.[62] The exact number of unadjudicated fisheries will probably never be known, but most likely it ranged from two to five times as many as those for which formal claims were registered.

When adopting the Organic Act, "the intent of Congress . . . [was] clear to destroy, so far as it is in its power to do so, all private rights of fishery and throw open the fisheries to the people."[63] It was contemplated that the territorial attorney general would proceed to condemn all rights judicially recognized. However, neither the territorial government nor the later state government aggressively carried out the intent of the Congress, and the federal government intervened to condemn some vested fishery rights where it desired to deny public access to the areas.[64] In all, the Hawaiian governments have acquired, by condemnation or deed, at least 60 registered fisheries.[65]

The interest of Hawaii in eliminating all vested konohiki fishery rights has waxed and waned over time. Kosaki provides a record of the rhetoric associated with this history up to 1954.[66] The Hawaii State Constitution also reflects the ambivalence. It echoes the Organic Act in declaring that, subject to vested rights, the seawaters are to be free to the public.[67] However, while the first two versions of the Constitution made condemnation mandatory, the constituent document as amended in 1978 merely recognizes that such power lies with the state government, without requiring the state to take action.[68]

As for konohiki fisheries which their owners failed to register with the courts, for four decades the question of whether the guillotine sanction provided in the Organic Act operated to terminate them remained unanswered. The legal issue was publicly debated,[69] but not brought before the courts.[70] Finally, in a case submitted upon an agreed set of facts -- and which has all the appearances of having been deliberately designed to settle the issue -- the Hawaii Supreme Court in 1940 sustained the validity of the Organic Act's sanction against the challenge of unconstitutional deprivation of property without due process.[71] Apparently, no appeal to the federal courts on the mainland was ever lodged.[72] Thus, based upon a decision made while Hawaii was still a territory, and reconfirmed after statehood,[73] all unregistered konohiki fisheries were forfeited as of 1903 and private rights could no longer be claimed in them.

Prior to the decision by the Hawaii court upholding the Organic Act's termination of unregistered konohiki fisheries, both the Federal District Court in Hawaii and the Hawaii Supreme Court had occasion to consider the fishery rights of persons who had become tenants after the effective date of the Organic Act. Consonant with the logic of cases both preceding[74] and yet to come,[75] the Hawaii court had little difficulty in holding that tenant rights were enjoyed solely by virtue of the fishery laws enacted during the monarchy and continued during the republic. Section 95 of the Organic Act repealed these statutes, so any person becoming a tenant after its enactment had no basis for claiming rights in a fishery. The Hawaiian statutory provisions "amounted to nothing more than an offer to give . . . [to those persons who became tenants] certain fishing rights when they

should become tenants, -- an offer which was withdrawn before they were in a position to accept it."[76]

The Federal District Court in Hawaii reached a contrary conclusion in the Pearl Harbor cases, at least as to persons who had become tenants after 1900 in areas with registered konohiki fisheries.[77] There the matter has rested.

One of the anachronistic results of the Hawaii courts' denial of fishery rights to post-1900 tenants has been a corresponding expansion of the rights of the konohiki fishery owner. The intent of the Organic Act was to open up the konohiki fisheries to everyone; instead, as the pre-1900 tenants die or leave the land, the konohiki fishery owners come to enjoy an ever-expanding portion of their vested fisheries' resources, until ultimately there will be no tenant with whom they must be shared.[78] So incensed was Territorial Delegate Victor K. Houston by this strange turn of events which appeared to nullify the whole intent of the Organic Act that he protested the decision and requested an investigation by the territorial attorney general. The latter reported to the territorial governor there was no impropriety of the chief justice participating in the decision even though he owned a one-sixth interest in a konohiki fishery, "netting to him the sum of $4.25 a month."[79]

VESTED RIGHTS

As of 1970, according to Khil "there were at least 42 adjudicated private fisheries still remaining in the State of Hawaii . . . ." Three-fifths of those he listed were owned by estates and trusts.[80] Admittedly there were difficulties in identifying the fisheries outstanding. This figure was adopted by Shon in 1978, who added:

> At present, all of the major konohiki rights have been condemned and acquired by the state. The remaining [vested] fisheries are assumed to be abandoned, since owners have not attempted to bar the public from fishing in their areas.[81]

The value of the private fisheries which can still be identified is uncertain. For the larger number existing in 1913, ". . . the Legislature requested data on the konohiki fisheries and the Attorney General reported that the estimates he had received from owners concerning the value of their konohiki fisheries aggregated $201,236."[82] In 1939, 101 registered konohiki fisheries, including 16+ acquired by the United States and the Territory of Hawaii, were together appraised at $31,550.[83] However, these appraisal figures were very conservative, for, in 1933, just 21 Oahu fisheries situated from Kahaluu around Koko Head to Pearl Harbor were alone appraised at $56,170.[84] Also, during the same period, the Federal District Court in Hawaii awarded $90,000 as the fair market value of the fisheries owned

by the John Ii Estate and $38,000 for those of the Bishop Estate, both part of the Pearl Harbor fisheries.[85]

The reasons for the difficulty of evaluation lie in the uniqueness of konohiki fisheries. Sale price is unavailable as a basis, for as the Federal District Court said in 1934, "since the formation of our Territorial government over thirty years ago and for a half century prior thereto, there has apparently been only one direct sale of a fishery [meaning thereby a sale of a konohiki fishery without a transfer of appurtenant land] of record."[86] Apparently "income capitalization" has been invoked in determining appraisal values, but appraisals vary widely and are dependent upon the "income" used as a base.[87] Insofar as could be determined, the federal courts have never been called upon to set a value for konohiki fisheries which were not registered under the Organic Act; and the Hawaii courts, as previously related, consider them surrendered to the public.

Whereas valuation of the owner rights in a private fishery raises difficult problems, they are multiplied when a similar endeavor is made to evaluate the rights of tenants in konohiki fisheries. Since no tenant ever registered under section 95 of the Organic Act,[88] foremost is the legal question of whether any of their rights remain for which they would be entitled to compensation. The Federal District Court in Hawaii has ruled affirmatively on this in regard to registered konohiki fisheries, finding a trustee relationship in the statutory direction that "the konohiki shall be considered in law to hold the private fisheries for the equal use of themselves and of the tenants on their respective lands."[89] The vesting of the owner's rights to the konohiki fishery under the Organic Act served to save the tenants' rights, as well.[90] The same issue has never been directly faced by the Hawaii courts, although the Hawaii Supreme Court has opined, "Assuming, without deciding, that konohikis were by the statute created trustees for the tenants, and that Mr. Damon's [1905] decree [under Secs. 95, 96 of the Organic Act] protected the rights of the tenants . . . , it would only operate at most so as to protect the vested rights of such tenants . . . ."[91] However, while the Hawaii courts may be willing to acknowledge and accord value to the rights of pre-Organic Act tenants in registered fisheries, they part company with the Federal District Court in refusing to recognize piscary rights of persons who became tenants after the enactment of the Organic Act.

The Federal District Court, when called upon in the 1930s to consider the value of tenant rights, in one of the Pearl Harbor cases found it ". . . not humanly possible to compute the value of the hoa'aina right under the evidence. . . . There is, in short, no showing in this case (and doubtless no showing could be made) upon which may be predicated any award, in any definite amount, as 'just compensation'. . . ."[92] If the konohiki and tenant could agree on the division of the condemnation award, the court would approve it. In others in this series of eminent

domain cases, nominal damages of $1.00 were paid to the tenant in the absence of evidence on the value of hoa'aina rights.[93] In short, the burden rests on the tenants to prove the value of their piscary rights. In each case the amount determined is deducted from the total award to the konohiki upon condemnation of the fishery.

It has long been anticipated that the value of private fisheries would continue to decrease due to the depletion of fish stocks in them. In retrospect, it may have been a wise policy to have deferred bringing up condemnation suits -- unless necessary for a specific purpose -- on the grounds that eventually all fisheries will become economically valueless. If so, at some future point in time only a nominal sum would be required to extinguish all claims of right. Such a policy, however, disregards the matter of social worth of the traditional fisheries and whether a monetary price can be attached to it. This is an issue inherent in the 1978 Constitutional amendment which protects the rights of Hawaiians in private fisheries.

CONCLUSION

For approximately a century and a half the statutes of Hawaii have recognized konohiki fishing rights. Over this period, changes in styles of island living have resulted in the gradual disappearance of the observance of these rights. Today, "private fishery owners 'are not relying on their fisheries as a major source of food or income . . . [and] little if any private enforcement efforts are being made on behalf of these konohiki fisheries.'"[94] Few tenants, if any, are enjoying rights in fisheries which are not also being availed of by the general public.

The enactment of the Organic Act was intended to set in motion a chain of events that would remove all vestiges of private fishery rights, due to the Congress having found "the concept of such exclusive fisheries repugnant to public trust principles."[95] The congressional act did not fully succeed in its objective, however, and meanwhile left a number of unresolved problems. Basic among them is the fact that the Organic Act's direction that all konohiki fisheries be registered, on penalty of forfeiture, has yet to be tested for constitutionality through the federal court system. The Hawaii Supreme Court has upheld sections 95 and 96 of the Organic Act against challenge of unconstitutionality,[96] but this is a court which has had its decision reversed previously by the United States Supreme Court because of the narrowness of its view on this portion of the act.[97] However, even if it were to be granted that the highest court of the United States accepted the premise of the constitutionality of the forfeiture feature, there would still remain the allied question raised by the Hawaii court ruling denying all private fishery rights to tenants who assumed that status after the enactment of the Organic Act.[98] Here a lower Federal District Court has already disagreed, referring to the Hawaii position as "clearly

erroneous."[99] Thus, developments in Hawaiian law, with the state courts seemingly more willing to re-examine matters going back to the early Hawaiian period (rather than foreclosing them as res adjudicata), suggest that tenant rights in fisheries may receive renewed consideration.

Article XII, Section 7, of the Hawaii Constitution as amended in 1978 declares:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians. . . .[100]

The Constitutional Convention Committee on Hawaiian Affairs, which proposed the addition of this new provision, argued that tenant rights are personal in nature: "Rather than being attached to the land, these rights are inherently held by Hawaiians and do not run with the land."[101] According to this view, current residency by a tenant of Hawaiian ancestry on land to which a konohiki fishery was once attached would provide the basis for claiming protection of hoa'aina fishing rights.[102] Residency predating the Organic Act would be immaterial.[103] Although the vesting of konohiki rights in fisheries is referred to in the committee report, in the logic of protecting present Hawaiians in the enjoyment of rights formerly exercised in the ahupua'a, vesting becomes immaterial.[104] All of this provides fertile ground for reopening the entire subject of traditional fishing rights in Hawaii. Echoing the words of a recent report:

> Thus konohiki and especially hoa'aina rights may present a "real question concerning the extent of public and private rights in fisheries."[105]

NOTES

1. The published literature was surveyed and the subject summarized by Richard H. Kosaki in Konohiki Fishing Rights (Report No. 1 of 1954, Legislative Reference Bureau), which remains the definitive study.

2. Robert G. Schmitt, Linda K.C. Luke, Edwina Yee, Robert E. Strand, and Carter Kerns, The Hawaiian Archipelago, Working Paper No. 16 (Honolulu: University of Hawaii Sea Grant College Program, 1975), pp. 67-68; James Shon, Hawaii Constitutional Convention Studies, 1978, Article X, Article XI (Honolulu: Legislative Reference Bureau, 1978), pp. 114-118; Hawaii State Constitutional Convention Committee on Hawaiian Affairs, "Standing Committee Report No. 57," Hawaii Constitutional Convention of 1978, pp. 4-8; Hawaii, Department of Planning and Economic Development, Ocean Leasing for Hawaii (Honolulu, 1981), pp. V-126 to V-148.

3. In 1975, reports prepared by Jane Silverman, Robert Hommon, and Pauline King Jerger compiled the historical evidence on the use and control of Hawaiian ocean waters pre-dating the discovery of the islands, in support of the state's claim to jurisdiction over the waters between the islands. Copies of these manuscripts could not be located upon inquiry to the authors or to the state government. Specific acknowledgment is made of the use of the draft report and other contents of the "Silverman file" held in the State Archives. Also helpful was the manuscript of John Khil, "Evolution of Sea Fishery Rights and Regulations in Hawaii and Their Implications for Conservation," 1978, 56 pp.

4. See Margaret Titcomb, Native Use of Fish in Hawaii (Honolulu: The University Press of Hawaii, 1972).

5. John N. Cobb, "Hawaiian 'Fishery Rights,'" American Fisheries Society Transactions (1908):160.

6. C.J. Lyons, "Land Matters in Hawaii," No. 2, The Islander, July 9, 1875, p. 111 (Some sources limit this reference to the overlapping of fishery rights to the island of Hawaii, but this could not be confirmed).

7. Bishop v. Mahiko, 35 Haw. 608 (1940), pp. 652, 653.

8. Cobb states that the kuleana carried only the right to fish from where a person could wade out to about 5 feet (Supra, p. 161). However, it would appear he confused this with the limitation on ahupua'a rights: "Smaller ahupua'a had to content themselves with the immediate shore fishery extending out not farther than a man could touch bottom with his toes, the larger ones swept around outside of them, taking to themselves the main fisheries" (Lyons, supra). See also

W.D. Alexander, "A Brief History of Land Titles in the Hawaiian Kingdom," Thrumm's Hawaiian Annual (1891), p. 106.

9. "Every rocky protruberance from the bottom of the sea for miles out, in the waters surrounding the islands, was well known to the ancient fishermen. . . ." (E.M. Beckley, Hawaiian Fisheries and Methods of Fishing, Honolulu, 1883, p. 10). Even when out of sight of shore, reference was made to sightings on the high mountains of Hawaii to establish the location of fishing grounds (Ibid.). Kahaulelio, a master fisherman, named a 100 deepsea fishing grounds fished by him since childhood: one was 5 miles distant from land, but only 15 to 20 fathoms deep; another was some 1,200 feet deep (A.D. Kahaulelio, "Fishing Lore," translated by Mary Kawena Pukui from Ka Nupepa Kuokoa, February 28 - July 4, 1902 [on file in library of Hawaii Institute of Marine Biology], pp. 22, 24).

10. Kamehameha I placed restrictions on the sea grounds where fish ran in schools (Samuel Kamakau, Ruling Chiefs of Hawaii, Honolulu: Kamehameha Schools Press, 1961, p. 177).

11. This is only a surmise; further inquiry is warranted, which probably would have to be undertaken by reference to Hawaiian language sources. However, see 1839 Hawaiian legislation, discussed in text, wherein Kamehameha III claimed and distributed to himself designated high seas fisheries.

12. Opinion of Stanley to President of the Legislative Assembly (1874), (in Hawaiiana Collection, Hamilton Library, University of Hawaii) p.3; see also, Kapiolani Estate v. Territory, 18 Haw. 452 (1907), p. 463.

13. See Jon J. Chinen, The Great Mahele (Honolulu: The University Press of Hawaii, 1958). The parallelisms and differences with the 1839 fisheries act will not be pursued in this paper. However, "the principles of the Mahele . . . were foreshadowed concretely in the distribution of fishing grounds. . . ." Theodore Morgan, Hawaii: A Century of Economic Change (Cambridge: Harvard University Press, 1948), p. 130.

14. Law of Kamehameha III, June 7, 1839. Unless indicated to the contrary, references are to the 1840 English version of the 1840 Hawaiian revision. The Hawaiian language version used "konohiki" but the English one continued with "landlord" until about 1851 when the Hawaiian term was used. "The term konohiki originally referred to a land agent appointed by a chief. However, in time, konohiki was extended to include the chief himself." Chinen, supra, p. 24, note 19.

15. "If a landlord having fishing grounds lay[s] any duty on the fish taken by the people on their own fishing grounds, the

penalty shall be as follows: for one full year his own fish shall be taboo'd for the tenants of his own particular land, and notice shall be given of the same, so that the landlord who lays a duty on the fish of the people may be known." The same punishment was applied to a landlord who seized the tenants' catch from the landlord's fishing grounds. See note 14, supra.

16. In the Act of April 1, 1841, seven transient fish were named, which were to "be divided equally whenever they arrive at these islands, or whenever they drift along." See Jordan and Everman, supra, pp. 362, 363.

17. For divisions of the ocean, see David Malo, Hawaiian Antiquities, 2nd Edition (Honolulu: Bishop Museum Press, 1951), pp. 25, 26.

18. "The meaning of these terms is: [the] kilohe'e grounds - the area shallow enough for wading, or examining the bottom from a canoe, perhaps with the aid of the oiliness of pounded kukui nut to smooth the surface of the water; the luhe'e grounds - the area where the water was too deep for the bottom to be in sight and the he'e (octopus) had to be caught by line and cowrie shell lure; the malolo grounds were rough and choppy areas crossed by currents, where the malolo (flying fish) habitually ran. These were deep places, but were not considered the open ocean." Titcomb, supra, p. 15.

19. Haalelea v. Montgomery, 2 Haw. 62 (1858), p. 65. See also, Hawaii v. Carter, 14 Haw. 465 (1902), p. 473, where the court said, ". . . the plaintiffs cannot base any claims to the fisheries on ancient custom or prescription; that no right that they may have possessed can antedate the Act of 1839; that all right . . . that had been enjoyed . . . was revoked and annulled by said Act. . . ." The decision was subsequently reversed, but not necessarily on this point.

20. Titcomb, supra.

21. Bishop v. Mahiko, 35 Haw. 608 (1940), p. 651. Since this case rules the necessity of going back to "ancient regulation" justified the Congress's imposing the requirement in the Organic Act that all konohiki fisheries be registered, it appears somewhat contradictory so to uphold the constitutionality of the congressional act because of this traditional character of fishing rights and simultaneously treat the 1839 statute as terminating all such traditional rights.

22. See Damon v. Hawaii 194 U.S. 154 (1904), pp. 158-60.

23. Ibid.

24. It should be noted that in 1858 the Hawaii Supreme Court in Haalelea v. Montgomery, 2 Haw. 62, p. 66, finessed this distinction: "Under the statute, as we understand it, the entire fishing ground, lying between low water mark and the outer edge of the coral reef (or kuanalu, as it is called in the Hawaiian version). . . ." Nevertheless, it later translated "aole nae e hookomo ana i ka papa koa nawaho," which specifically refers to coral reef, as "not including, however, the coral reef outside" (p. 67). In the much later case of Bishop v. Mahiko, 35 Haw. 608 (1940), p. 631, note 30, the court recognized that there was, indeed, more than one English version of this portion of the 1839 act.

25. D.S. Jordan and B.W. Everman, Preliminary report on an investigation of the fishes and fisheries of the Hawaiian islands. U.S. Fish Commission Report, 1900-1901, p. 363.

26. Haalelea v. Montgomery, 2 Haw. 62 (1858), p. 68. However, see Territory v. Bishop Trust, 41 Haw. 358 (1956), pp. 366ff.

27. Chap. VI, Art. V, Sec. III of 1845 Act. See Jordan and Everman, Preliminary, supra, p. 363.

28. Section 388, Civil Code, as amended in 1892. Jordan and Everman attribute the amendment to the design "to clear up disputed points which had arisen. . . ." Supra, p. 369.

29. Haalelea v. Montgomery, 2 Haw. 62 (1858); Hatton v. Piopio, 6 Haw. 334 (1882); Smith v. Laamea, 29 Haw. 750 (1927).

30. Smith v. Laamea, supra.

31. Shipman v. Nawahi, 5 Haw. 571 (1886).

32. Damon v. Tsutsui, 31 Haw. 678 (1930), p. 689.

33. Although the language of the original 1839 statute distinguished the rights of the tenant ("maka'ainana") and landlord ("konohiki"), with respect to the private konohiki fishery, from the rights of the "maka'ainana" to resources beyond the seaward boundary of the konohiki fishery, it appears not to have been questioned but that the use of "people" (in the English version) for the latter included all, alii and commoner, citizen and resident, alike. Thus, in Matsuno v. The Concord (1907) 3 Dist. Crt. Haw. Rep. 227, section 95 of the Organic Act, declaring sea fisheries free, was not interpreted restrictively as being applicable only to citizens of the United States, despite the statute's so declaring. In keeping with its Hawaiian statutory antecedents, alien residents could enjoy them also.

34. Dating from the law of April 1, 1841, it was declared that the governmental tabu could also apply to the konohiki fishery.

35. The nobles meeting at Luaehu, in Lahaina, directed that this clause be "erased." Jordan and Everman, supra, p. 362. However, the Hawaiian Laws of 1842, p. 22, still carried the exemption clause.

36. Quotation is from first "whereas" clause of Act of July 11, 1851.

37. Section 2, Act of May 25, 1851.

38. Section 2, Act of July 11, 1851.

39. Section 1, Act of May 25, 1851. This statute can be interpreted as impliedly recognizing that a fishing ground appurtenant to government land could still be transferred, just so long as it was expressly included in the title to the land. If so, it would appear superseded by the later July act, and the latter reappears as section 1449, 1897 Penal Code.

40. Consonant with the use of "konohiki" instead of "landlord" in the English language version, it will be used in the text. See note 14, supra.

41. See Interior Department, Book 4, p. 73, December 31, 1851.

42. Oni v. Meek, 2 Haw. 87 (1858).

43. Jones v. Meek, 2 Haw. 9 (1857); Judd v. Kuanalewa, 6 Haw. 329 (1882); Bishop v. Mahiko, 35 Haw. 608 (1940); Chinen, supra, p. 13, note 10.

44. Akeni v. Wong Ka Mau, 5 Haw. 91 (1883). This does not mean that fisheries were not sometimes included in claims presented to the Land Commission. See No. 8354, Kapela. Native Register, v. 5, p. 544, which included, passim, "A shallow fishery and a deep fishery are also claimed in connection with Kolokohau."

45. Carter v. Hawaii, 200 U.S. 255 (1905).

46. Hawaii, Department of Planning and Economic Development, supra, pp. V-127, 128 (citing Khil, supra, p. 12, note 7).

47. Hatton v. Piopio, 6 Haw. 334 (1882). By statute a tenant was restricted from selling firewood, house timber, and other things taken from the land, but this did not apply to fish.

48. In re Fukunaga, 16 Haw. 306 (1904). However, see H.R.S. Sections 188-13 and 188-14, enacted subsequently.

49. See opinion of Attorney General Harry R. Hewitt, published in Honolulu Advertiser, July 22, 1931, pp. 1, 7. Also see Kosaki, supra, p. 24, note 8.

50. Territory v. Bishop Trust, 41 Haw. 358 (1956), 597.

51. Bishop v. Mahiko, 35 Haw. 608 (1940), p. 661. Data in following sentences of text extracted from agreed upon statement used in the case at pp. 650-661, 673.

52. The total figure is the author's guestimate.

53. See Appendix B, which gives an estimated total of 349.

54. The legal effect of failure to file was ". . . simply to relinquish the fishery, subject thereto to the free use and enjoyment of all citizens of the United States . . . ." Bishop v. Mahiko, supra, p. 679. According to Khil, the last fishery was adjudicated in 1914 (Supra, Table 2, p. 24).

55. Kosaki, supra, pp. 9, 10, lists only 101 registered fisheries (see Appendix B), relying upon data submitted by the Commissioner of Public Lands and Surveyor L.M. Whitehouse on March 14, 1939, to Attorney General J.V. Hodgson. In each case but Lanai (for which the figures are identical), the number for an island shown by Whitehouse is less than that listed by Cobb, the source cited in the text. Khil uses the figure of 107 for "adjudicated" private fisheries, apparently relying upon 1931 and 1960 data and correspondence with several offices of the territorial government. Supra. However, in another table he utilizes the 101 figure for "registered" fisheries. See his Table 5, p. 29. A 1923 newspaper article states 58 adjudicatory suits were brought to court, but as one on Maui included no less than 25 separate rights, this implied that claims to 82 private rights were adjudicated. Honolulu Advertiser, March 18, 1923, p. 9.

56. Data in text and quotation from Cobb, supra, p. 161. Since he took part in the survey conducted by Jordan and Everman for the U.S. Fish Commissioner -- as directed by Section 94 of the Organic Act and published in the year 1908 -- the 144 claim figure appears the most credible of all. (It is possible that some claims registered were not allowed, and thus do not comprise part of Kosaki's "registered" or Khil's "adjudicated" konohiki fisheries.)

57. Close to Honolulu, at this time, two fisheries belonging to one person were bringing in a yearly rental of $1,375. D.S. Jordan and B.W. Everman, The Aquatic Resources of the

Hawaiian Islands, Bulletin of the U.S. Fish Commission, 23 (1903):759-760, Part II. The Bishop Estate registered all of its konohiki fishery rights on Oahu, but was not as thorough for the other islands. See Bishop v. Mahiko, supra.

58. Cobb, supra, p. 162.

59. Jordan and Everman, The Aquatic Resources, supra, pp. 759, 760.

60. Kosaki, supra, p. 10.

61. Khil, supra, Table 1, p. 23, although on p. 22 he indicated that ". . . as many as 342 such fisheries . . ." might not have survived.

62. The list was published by the Clerk of the House of Representatives in the Honolulu Advertiser on March 6, 13, 20, and 27, 1923, and the fishery rights were declared forfeited. An article in the March 18, 1923 issue of the Honolulu Advertiser, p. 9, asserted that the list included some konohiki fisheries that had been claimed under the Organic Act and adjudicated.

63. In re Fukunaga, 16 Haw. 306 (1904), p. 308.

64. See U.S. Congress, House of Representatives, Committee on the Territories, "Rights of Fishery, Pearl Harbor, Hawaii," Report No. 508; 66th Cong., 2nd Sess., 1919.

65. See Khil, supra, Table 3, p. 25. Kosaki lists 37 konohiki fisheries which had been acquired up until 1954 and another 7 with respect to which condemnation proceedings were underway or pending. Supra, pp. 13, 14.

66. Kosaki, supra, pp. 15-20; Khil, supra, provides details on more current history.

67. Hawaii Constitution, 1950, Art. X, Sec. 3; Hawaii Constitution, 1968, Art. X, Sec. 3; Hawaii Constitution, 1978, Art. XI, Sec. 6.

68. Hawaii Constitution, 1950, Art. XVI, Sec. 9; Hawaii Constitution, 1968, Art. XVI, Sec. 13; Hawaii Constitution, 1978, Art. XI, Sec. 6.

69. Honolulu Advertiser, March 18, 1923, p. 9.

70. "The possibility of section 95 of the Organic Act being unconstitutional has been from time to time suggested by members of the bar of this court. None of the attorneys in the case advanced this contention that it is unconstitutional. The court mentioned the subject from the bench at the formal hearing, but counsel did not see fit to present

any argument or to take any position on the subject." Damon v. Tsutsui, 31 Haw. 678 (1930), pp. 695, 696.

71. Bishop v. Mahiko, 35 Haw. 608 (1940).

72. At first "it was understood" that the attorneys for the Bishop Estate proposed to appeal the decision all the way to the United States Supreme Court, if need be. See Honolulu Advertiser, September 7, 1940, pp. 1, 7. By the following day it was undecided whether the case would be appealed. Honolulu Star-Bulletin, September 7, 1940, p. 7.

73. State v. Hawaiian Dredging Co., 48 Haw. 152 (1964); 397 Pac. 2d. 593.

74. Carter v. Hawaii, 14 Haw. 465 (1902), reversed by U.S. Supreme Court; In re Fukunaga, 16 Haw. 306 (1904).

75. Bishop v. Mahiko, supra.

76. Damon v. Tsutsui, supra.

77. U.S. v. Shingle, Civil No. 290. Kosaki develops this difference. Supra, pp. 27-29; see also Hawaii, DPED, supra, pp. V-130, 131.

78. See Damon v. Tsutsui, supra, pp. 690, 691; Territory v. Bishop Trust, 41 Haw. 358, 597 (1956); Khil, supra, p. 32.

79. Honolulu Advertiser, July 22, 1931, pp. 1, 7.

80. See Appendix C for a list of konohiki fisheries still outstanding, including the names of their original and current owners; see Appendix D for locations of established fisheries by island.

81. Shon, supra, p. 117.

82. Kosaki, supra, p. 15.

83. See Appendix B for lists of registered and unregistered private fisheries, and their appraised values.

84. Kosaki, supra, p. 17.

85. Ibid, p. 22. Several decades later, $30,000 was awarded for the Nawiliwili fishery on Kauai. Ibid, p. 23, note 7. Damages for one year in a trespass on a konohiki fishery, which resulted in reduced fish catch, was assessed at $3,371. Coney v. Lihue Plantation, 39 Haw. 129 (1951).

86. Quoted in Kosaki, supra, p. 22.

87. Ibid, p. 23, note 7.

88. Damon v. Tsutsui, supra, p. 693.

89. H.R.S. Section 188-5.

90. U.S. v. Robinson, Civil No. 292 (1934) (cited in Kosaki, supra, p. 27).

91. Damon v. Tsutsui, supra, p. 695; see also p. 696. In State v. Hawaiian Dredging (1964) the court expressly pointed out that hoa'aina rights were not involved. 48 Haw. 152, p. 183, note 24.

92. U.S. v. Robinson, Civil No. 292 (1934) (quotation from Kosaki, supra, p. 28).

93. Ibid, pp. 28, 29.

94. Hawaii, DPED, supra, p. V-128, citing Khil, supra, and interview with one konohiki owner.

95. Ibid.

96. Bishop v. Mahiko, supra.

97. Damon v. Hawaii, 194 U.S. 154 (1904); Carter v. Hawaii, 200 U.S. 255 (1906).

98. Damon v. Tsutsui, supra.

99. U.S. v. Shingle, Civil No. 290 (1934), p. 9 (quoted in DPED, supra, p. V-130).

100. With respect to fisheries, this section would have to be construed so as to include the rights of an ili tenant in the fishery of an ili kupono.

101. The Hawaii Constitutional Convention Committee on Hawaiian Affairs, Standing Committee Report No. 57 (August 25, 1978), p. 6.

102. It is not clear whether this section of the Constitution is self-executing or will require implementation by statute.

103. See comments of former Chief Justice William Richardson on native Hawaiian tenant rights in konohiki fisheries under this section of the Constitution. Sunday Star-Bulletin and Advertiser, March 18, 1984, p. A-6.

104. The committee was apparently not referring to "vesting" by court registration under Sections 95 and 96 of the Organic Act when it said: "Since practically all ancient Hawaiians practiced and possessed such vested rights which automatically passed to their descendants and which have never been condemned or compensated for, they are, therefore, still

held by Hawaiians today, with the exception of fishing rights that were condemned and compensated for." Supra.

105. Hawaii, DPED, supra, p. V-132, quoting Daniel Finn, "Hawaii Caselaw Relating to Coastal Zone Management," in Legal Aspects of Hawaii's Coastal Zone Management Programs, ed. Daniel Mendelker (1976), p. H-16.

APPENDICES

Appendix A. Pertinent Statutes

Hawaiian Organic Act, 1900

§94. **Investigation of fisheries.** That the Commissioner of Fish and Fisheries of the United States is empowered and required to examine into the entire subject of fisheries and the laws relating to the fishing rights in the Territory of Hawaii, and report to the President touching the same, and to recommend such changes in said laws as he shall see fit.

§95. **Repeal of laws conferring exclusive fishing rights.** That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided.

§96. **Proceedings for opening fisheries to citizens.** That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

That if such fishing right be established the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated.

Hawaii Revised Statutes

§188-4 **Konohiki rights.** The fishing grounds from the reefs and where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low watermark, shall, in law, be considered the private property of the konohiki, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the konohiki shall not be molested, except to the extent of the reservations and prohibitions hereafter in this chapter set forth. [CC 1859, §387; RL 1925, §750; RL 1935, §354; RL 1945, §1204; RL 1955, §21-23]

§188-5 **Tenants' rights.** The konohiki shall be considered in law to hold the private fisheries for the equal use of themselves and of the tenants on their respective lands, and the tenants shall be at liberty to take from the fisheries, either for their own use, or for sale or exportation, but subject to the restrictions imposed by law, all fish, seaweed, shellfish, and other edible products of the fisheries. [CC 1859, §388; am L 1892, c 18, §1; RL 1925, §751; RL 1935, §355; RL 1945, §1205; RL 1955, §21-24]

§188-6 **Konohiki's notice of tabu fish.** A konohiki may each year set apart for himself one given species or variety of fish natural to his fishery, giving public notice, by at least three written or printed notices posted in conspicuous places on the land or the fishery, to his tenants and others residing on his land, signifying, by name, the kind of fish which he has chosen to be set apart for himself. Notice shall be substantially in the following form:

NOTICE

Fishing for (name of fish) in this private fishery is hereby tabu for the year.

_____

Owner or Lessee.

[CC 1859, §389; RL 1925, §752; am L 1933, c 94, §1; RL 1935, §356; RL 1945, §1206; RL 1955, §21-25]

§188-7 **Konohiki's tabu fish.** The specific fish so set apart shall be exclusively for the use of the konohiki, if caught within the bounds of his fishery, and neither his tenants nor others shall be at liberty to appropriate the reserved fish to their private use, but when caught, the reserved fish shall be the property of the konohiki, for which he shall be at liberty to sue and recover the value from any person appropriating the same. [CC 1859, §390; RL 1925, §753; RL 1935, §357; RL 1945, §1207; RL 1955, §21-26]

§188-8 **Restriction on konohiki rights.** The konohiki shall not have power to lay any tax, or to impose any other restriction upon their tenants, regarding the private fisheries, than is prescribed in this chapter, neither shall any further restriction be valid. [CC 1859, §391; RL 1925, §754; RL 1935, §358; RL 1945, §1208; RL 1955, §21-27]

§188-9 **Konohiki right to prohibit fishing.** The konohiki, on consultation with the tenants of their lands, in lieu of setting apart some particular fish to their exclusive use, as allowed in this chapter, may prohibit during certain months in the year, all fishing upon their fisheries; and, during the fishing season, exact of each fisherman among the tenants, one-third part of all

the fish taken upon their private fishing grounds. In every such case the konohiki shall give the notice prescribed in section 188-6. [CC 1859, §392; RL 1925, §755; RL 1935, §359; RL 1945, §1209; RL 1955, §21-28]

§188-10 Tabu fish free, where. If that species of fish which has been tabu by any konohiki goes on to the grounds which have been, or may be, given to the people, the fish shall not be tabu thereon. It shall be tabu only when caught within the bounds of the konohiki's private fishery. Nor shall it be lawful for a konohiki to tabu more than one kind of fish upon any fishing grounds which lie adjacent to each other. [CC 1859, §394; RL 1925, §756; RL 1935, §360; RL 1945, §1210; RL 1955, §21-29]

§188-11 Vested fishing rights, defined. The words "vested fishing right" as used in sections 188-12 and 188-13 mean any fishing right which has been established by proceedings brought in conformity with section 96 of the Organic Act, and for which judgment has been entered in any circuit court. [L 1905, c 86, §1; RL 1925, §757; RL 1935, §361; RL 1945, §1211; RL 1955, §21-30]

§188-2 Notice of tabu; penalty. The department of land and natural resources shall give public notice of any tabu imposed; and no tabu shall be in force until the notice has been given. Every person who violates the tabu shall be fined not more than $15, and the value of the fish taken. [PC 1869, c 84, §2; RL 1925, §747; RL 1935, §351; RL 1945, §1202; RL 1955, §21-21; am L Sp 1959 2d, c 1, §22; am L 1961, c 132, §2]

§188-3 Using adjoining lands. No person who has bought any government land, or obtains land by lease or other title, has or shall have any greater right than any other person, resident in the State, over any fishing ground not included in his title, although adjacent to the land. [CC 1859, §393; RL 1925, §749; RL 1935, §353; RL 1945, §1203; RL 1955, §21-22]

§188-12 Condemnation proceedings, effect of. A vested fishing right when so established shall continue, for the purpose of sections 188-11 to 188-13, notwithstanding the pendency of any condemnation proceedings, until judgment is entered upon the condemnation proceedings and the compensation named therein has been paid or tendered to the owner of the vested fishing right or others interested therein, or until an order of possession has been obtained as provided in sections 101-28 to 101-32. [L 1905, c 86, §2; RL 1925, §758; RL 1935, §362; RL 1945, §1212; am L 1947, c 200, §2; RL 1955, §21-31]

§188-13 Violation of rights; penalty. Any person who catches and appropriates to himself any fish which the owner or lessee of a vested fishing right has set apart for himself under and by virtue of the vested fishing right or to which the owner or lessee is otherwise entitled by law; or who aids or abets the catching and appropriating by others, shall be fined not more

than $100 for each offense. [L 1905, c 86, §3; RL 1925, §759; RL 1935, §363; RL 1945, §1213; RL 1955, §21-32]

§188-14 Other violation of rights; penalty. Any person, who, without lawful authority, fishes in or upon any private fishery, shall be fined not more than $100 for each offense. [L 1933, c 94, §2; RL 1935, §364; RL 1945, §1214; RL 1955, §21-33]

Appendix B. Private Fisheries in the Territory of Hawaii (1939)

Registered under authority of Sec. 96 of Organic Act

Island	1 Number	2A Acquired by U.S.	2B Acquired by T.H.	3 Number of Owners	4* Approximate Value
Hawaii	8	--	--	3	$ 800.00
Maui	27	--	--	3	2,000.00
Molokai	3	--	--	2	600.00
Lanai	2	--	--	1	200.00
Oahu	53	13 plus part of 1	3	20	19,650.00
Kauai	8	--	--	6	8,300.00
TOTAL	101	13 plus	3	35	31,550.00

Unregistered fisheries

Island	Number	Number of Owners	Approximate Value
Hawaii	140	62	$14,000.00
Maui	54	21	5,350.00
Molokai	25	15	2,500.00
Lanai	2	1	200.00
Oahu	11	9	1,100.00
Kauai	16	11	1,600.00
TOTAL	248	119	$24,750.00

*Whitehouse in letter of transmittal states: "Under column 4, the approximate values were secured from Mr. C.C. Crozier, Deputy Tax Commissioner, and are very conservative, . . ."

Source: Kosaki, supra, p. 10

Appendix C. Konohiki Fisheries Outstanding

Fishery	Original Owner	Last Identified Owner
ISLAND OF OAHU		
Hamohamo, Waikiki	Liliuokalani	Liliuokalani Trust
Hanakea, Koolaupoko	L.L. McCandless	L.L. McCandless Trust
Kahuku, Koolauloa	Jas. Campbell Est.	Jas. Campbell Est.
Kailua, Koolaupoko	Nannie R. Rice	Harold K.L. Castle
Kaneohe, Koolaupoko	Nannie R. Rice	Harold K.L. Castle
Kalokohanahou, Koolaupoko	H.H. Parker	Kaneohe Land Co.
Kaluanui, Koolauloa	B.P. Bishop Est.	B.P. Bishop Est.
Kaunala, Koolauloa	Jas. Campbell Est.	Jas. Campbell Est.
Kawailoa, Waialua	B.P. Bishop Est.	B.P. Bishop Est.
Paalaa, Waialua	B.P. Bishop Est.	B.P. Bishop Est.
Kawela, Koolauloa	Jas. Campbell Est.	Jas. Campbell Est.
Keana (1/2), Koolauloa	Jas. Campbell Est.	Jas. Campbell Est.
Keana, Koolauloa	William G. Irwin	Harold K.L. Castle
Keauau, Waikiki	Solomon Kauai	Robert K. Lewis
Makaha, Waianae	R.W. Holt Est.	R.W. Holt Est.
Makaua, Koolauloaauloa	John Ii Est., Ltd.	John Ii Est.
Malaekahana, Koolauloa	Jas. Campbell Est.	Jas. Campbell Est.
Mikiloa, Koolaupoko	Kapiolani Est., Ltd.	Mikiloa Land Trust
Ohikilolo, Waianae	L.L. McCandless	L.L. McCandless Trust
Pahipahialua, Koolauloa	Jas. Campbell Est.	Jas. Campbell Est.
Panahana, Koolaupoko	William G. Irwin	Harold K.L. Castle
Papaakoko, Koolauloa	Grace Kahoalii	Grace Kahoalii
Punaluu, Koolauloa	B.P. Bishop Est.	B.P. Bishop Est.
Waialae-iki, Kona	B.P. Bishop Est.	B.P. Bishop Est.
Waialae-nui, Kona	B.P. Bishop Est.	B.P. Bishop Est.
Wailupe, Kona	Anna Perry, et al.	Anna Perry Est., et al.
ISLAND OF KAUAI		
Omao, Koloa	McBryde Sugar Co. Ltd.	McBryde Sugar Co.
Wahiawa, Koloa	McBryde Est., Ltd.	McBryde Est., Ltd.
ISLAND OF MAUI		
none		
ISLAND OF HAWAII		
Honohonohui, Hilo	B.P. Bishop Est.	B.P. Bishop Est.
Kahuwai, Puna	B.P. Bishop Est.	B.P. Bishop Est.
Kapoho, Puna	R.A. Lyman	Kapoho Land Dev.

Fishery	Original Owner	Last Identified Owner
Kula, Puna	R.A. Lyman	Kapoho Land
Dev.Halekamahina, Puna	R.A. Lyman	Kapoho Land Dev.
Kauaea, Puna	B.P. Bishop Est.	B.P. Bishop Est.
Keahialaka, Puna	Puna Sugar Co., Ltd.	Olaa Sugar
Pualaa, Puna	B.P. Bishop Est.	B.P. Bishop Est.
Waipio, Hamakua	B.P. Bishop Est.	B.P. Bishop Museum
ISLAND OF MOLOKAI		
Halawa, Koolau	B.P. Bishop Est.	George W. Murphy
Haua	Emma M. Nakuina	Beckley Est.
Honomuni	Emma M. Nakuina	Henry Duvauchelle, et al.
ISLAND OF LANAI		
Kaa	W.G. Irwin and A.B. Spreckels	Hawn. Pineapple Co.
Kaohai	W.G. Irwin and A.B. Spreckels	Hawn. Pineapple Co.

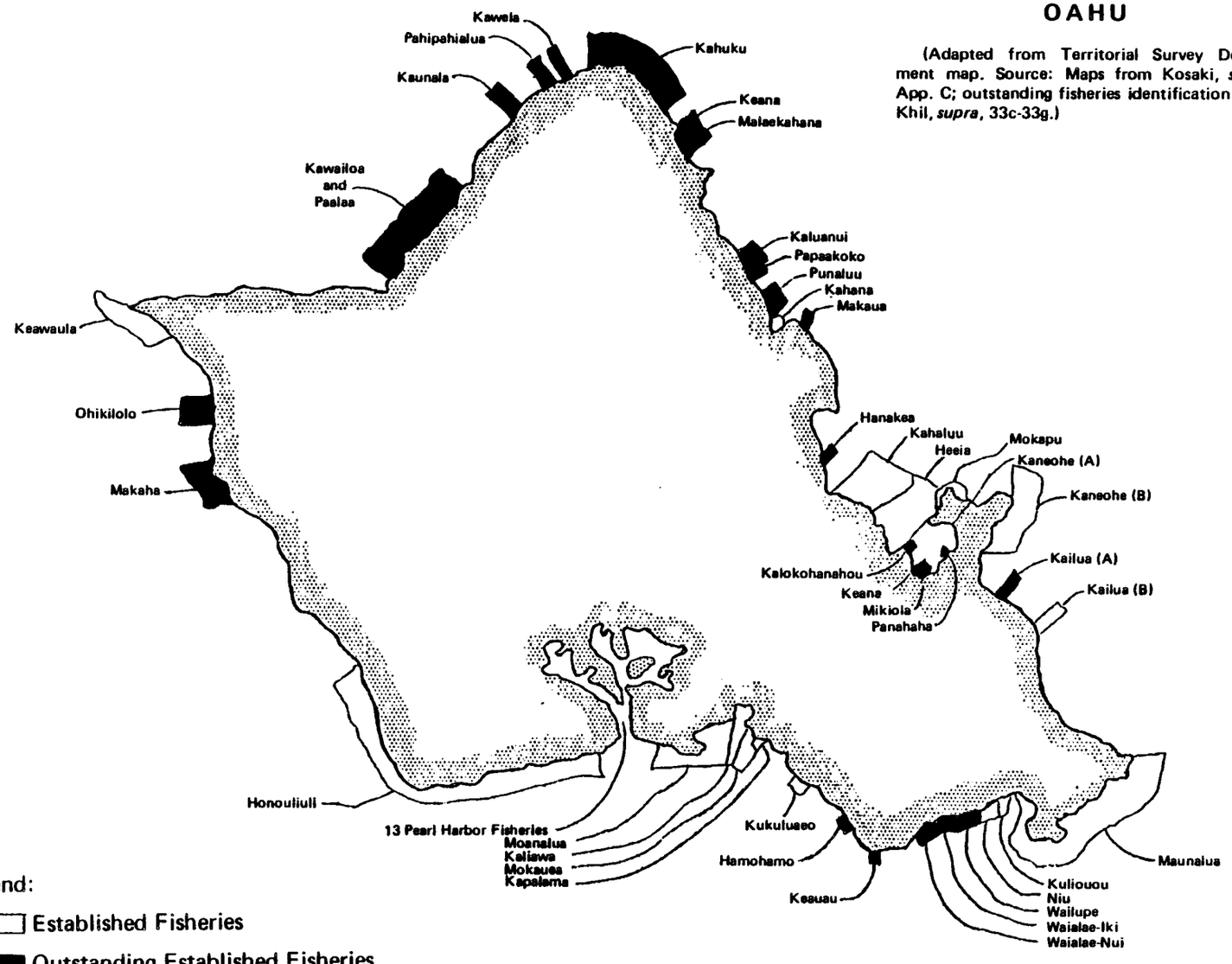
Note: List based on data compiled by Mr. James M. Dunn, State of Hawaii Survey Division, dated March 29, 1960, and data from and correspondence with the State of Hawaii's Attorney General Office, Division of Land Management, and the Survey Division.

Source: Khil, supra, pp. 33a, 33b

Appendix D. Maps Showing Established Fisheries

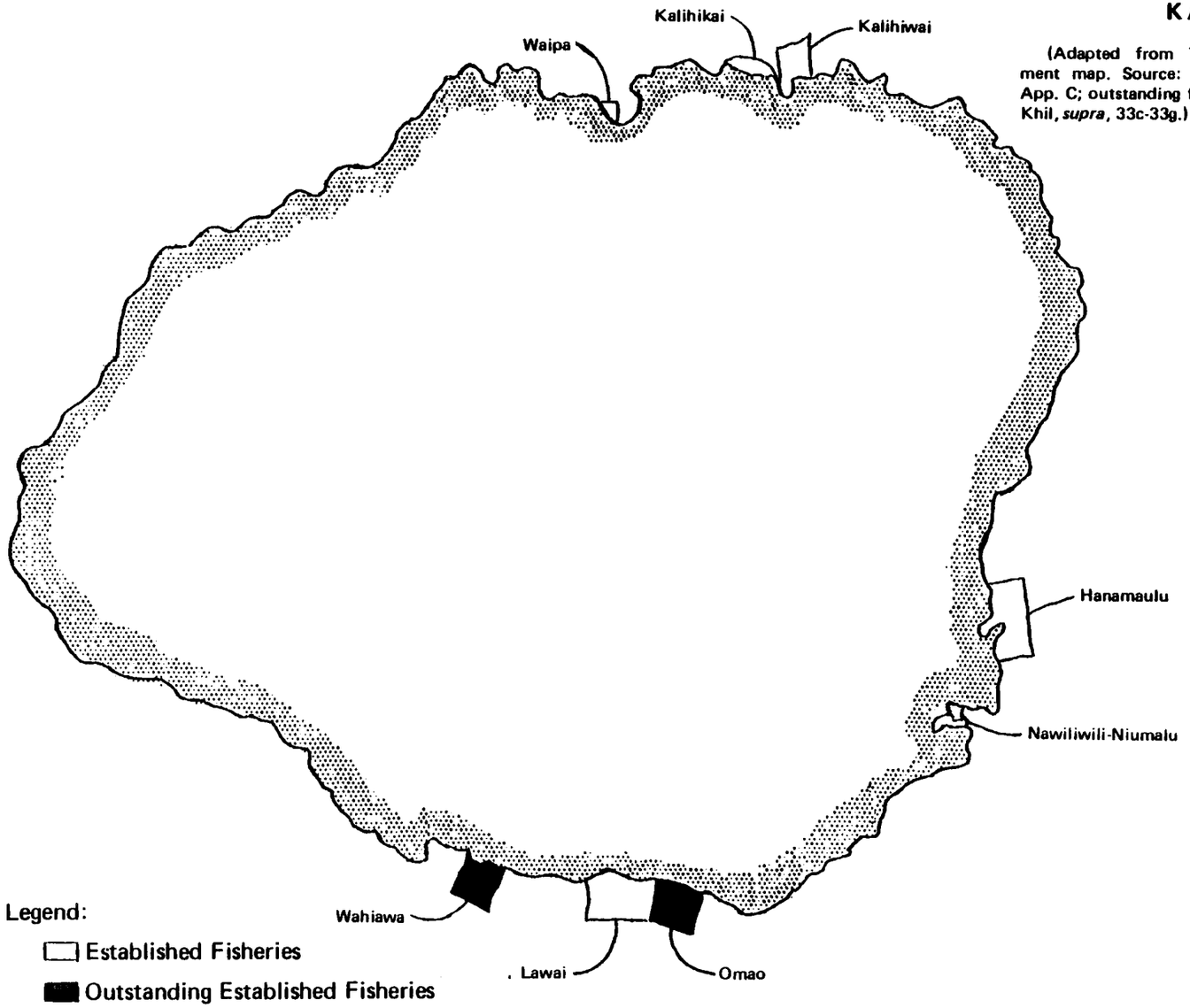
OAHU

(Adapted from Territorial Survey Department map. Source: Maps from Kosaki, *supra*, App. C; outstanding fisheries identification from Khil, *supra*, 33c-33g.)



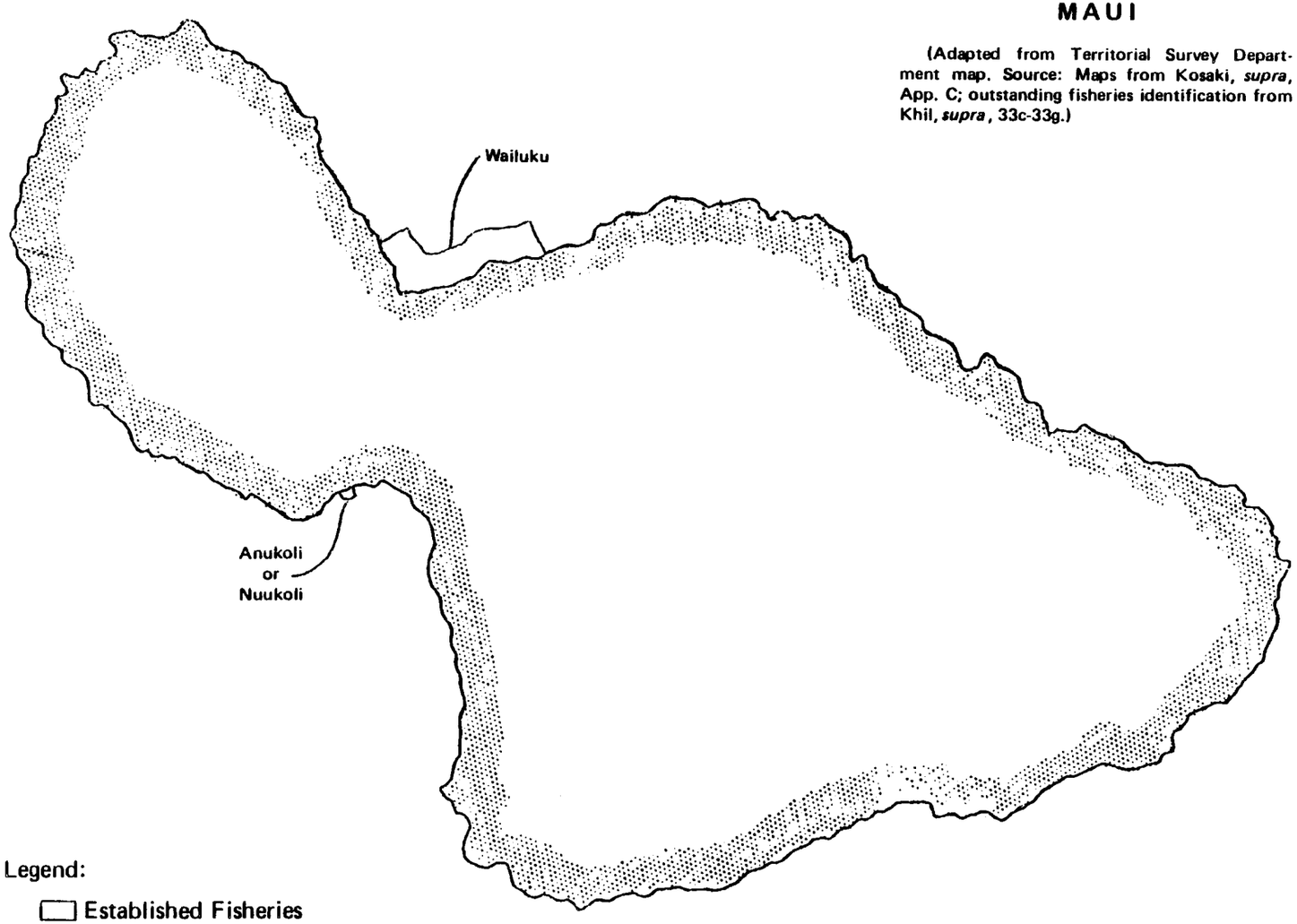
KAUAI

(Adapted from Territorial Survey Department map. Source: Maps from Kosaki, *supra*, App. C; outstanding fisheries identification from Khil, *supra*, 33c-33g.)



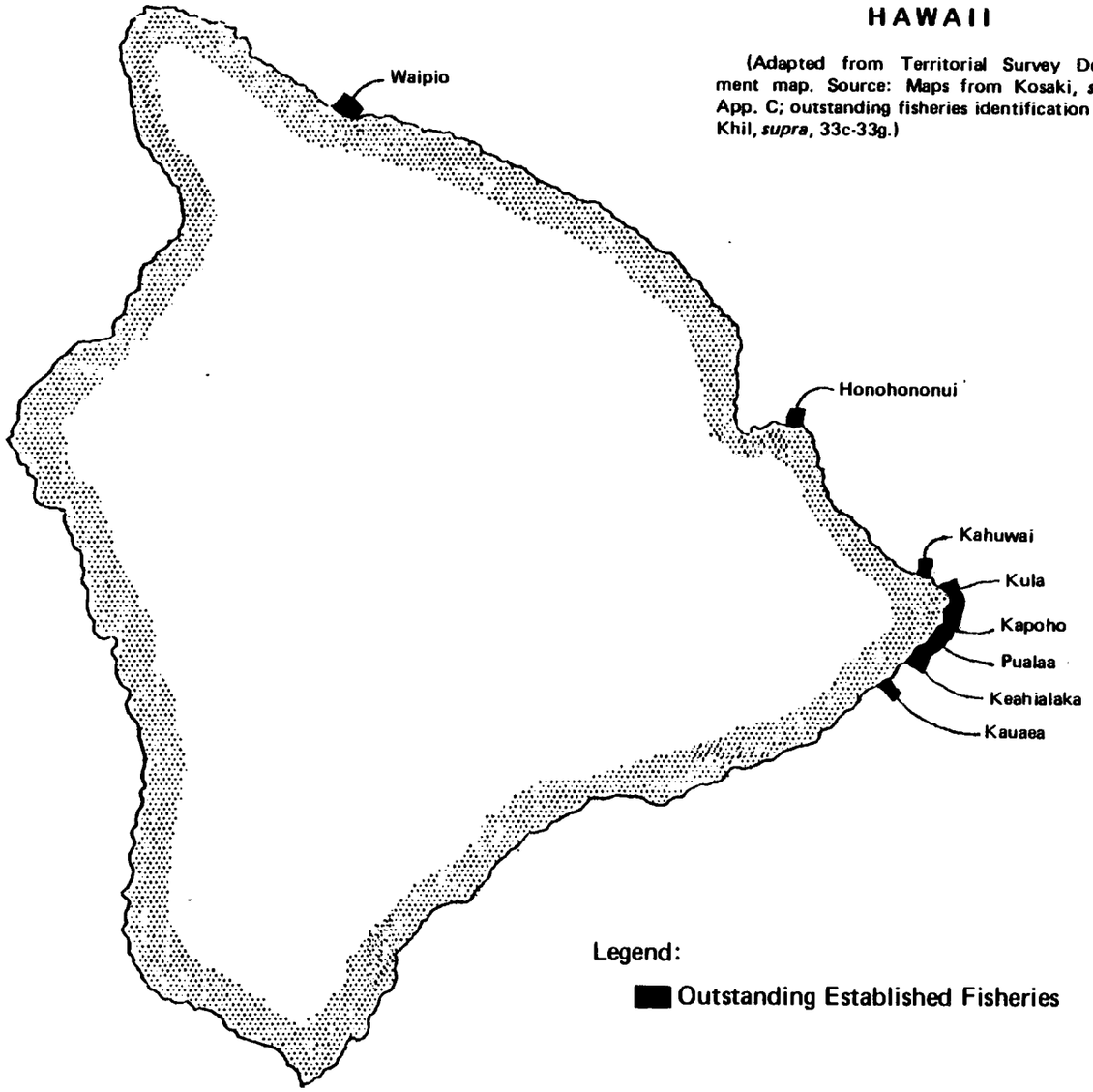
MAUI

(Adapted from Territorial Survey Department map. Source: Maps from Kosaki, *supra*, App. C; outstanding fisheries identification from Khil, *supra*, 33c-33g.)



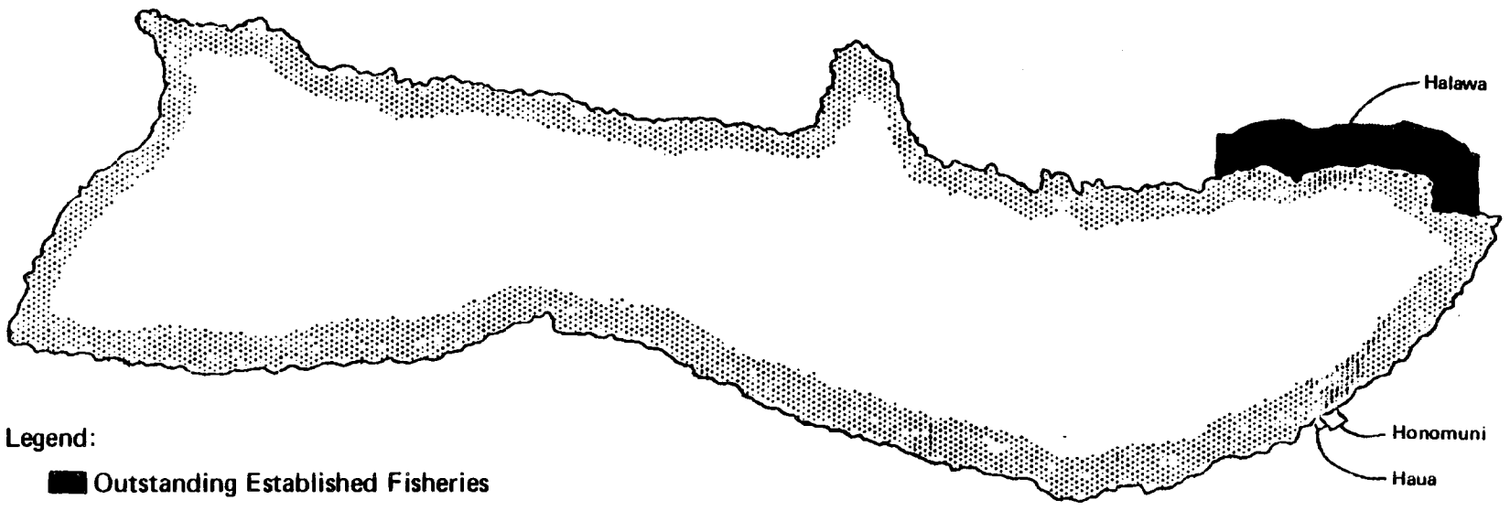
HAWAII

(Adapted from Territorial Survey Department map. Source: Maps from Kosaki, *supra*, App. C; outstanding fisheries identification from Khil, *supra*, 33c-33g.)



MOLOKAI

(Adapted from Territorial Survey Department map. Source: Maps from Kosaki, *supra*, App. C; outstanding fisheries identification from Khil, *supra*, 33c-33g.)

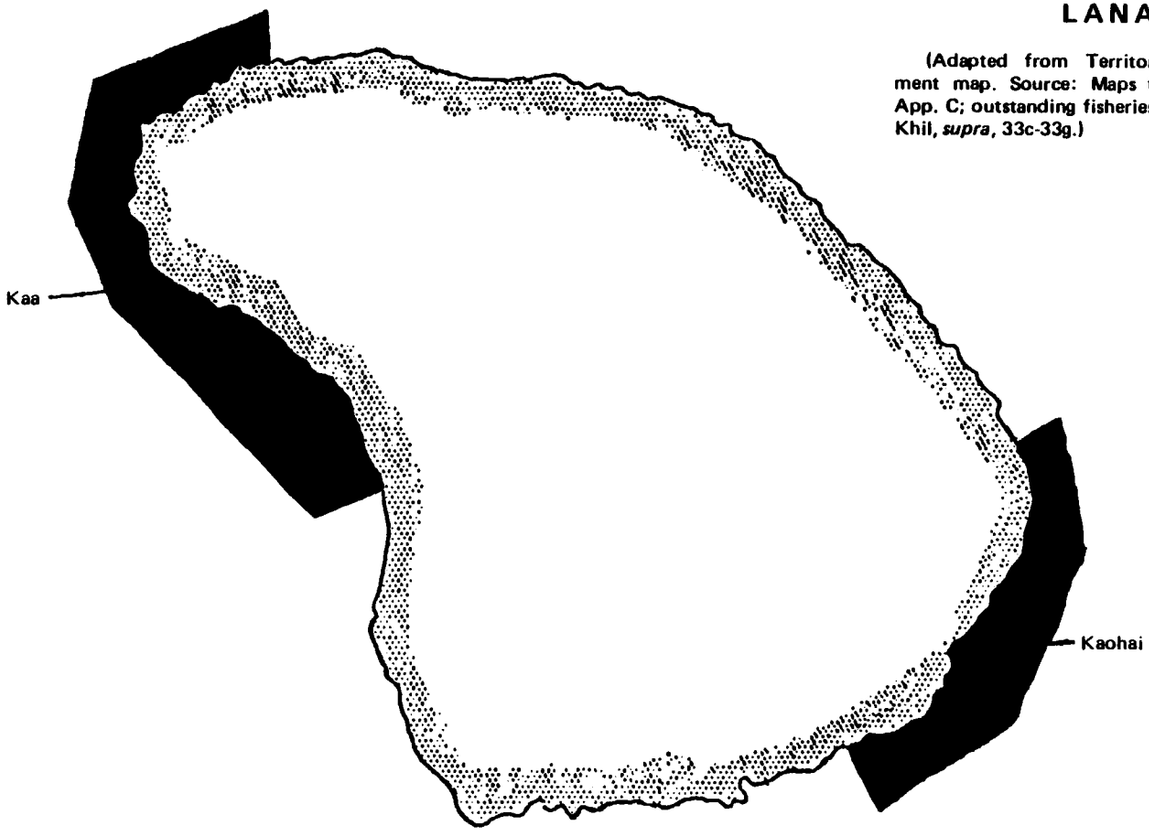


Legend:

■ Outstanding Established Fisheries

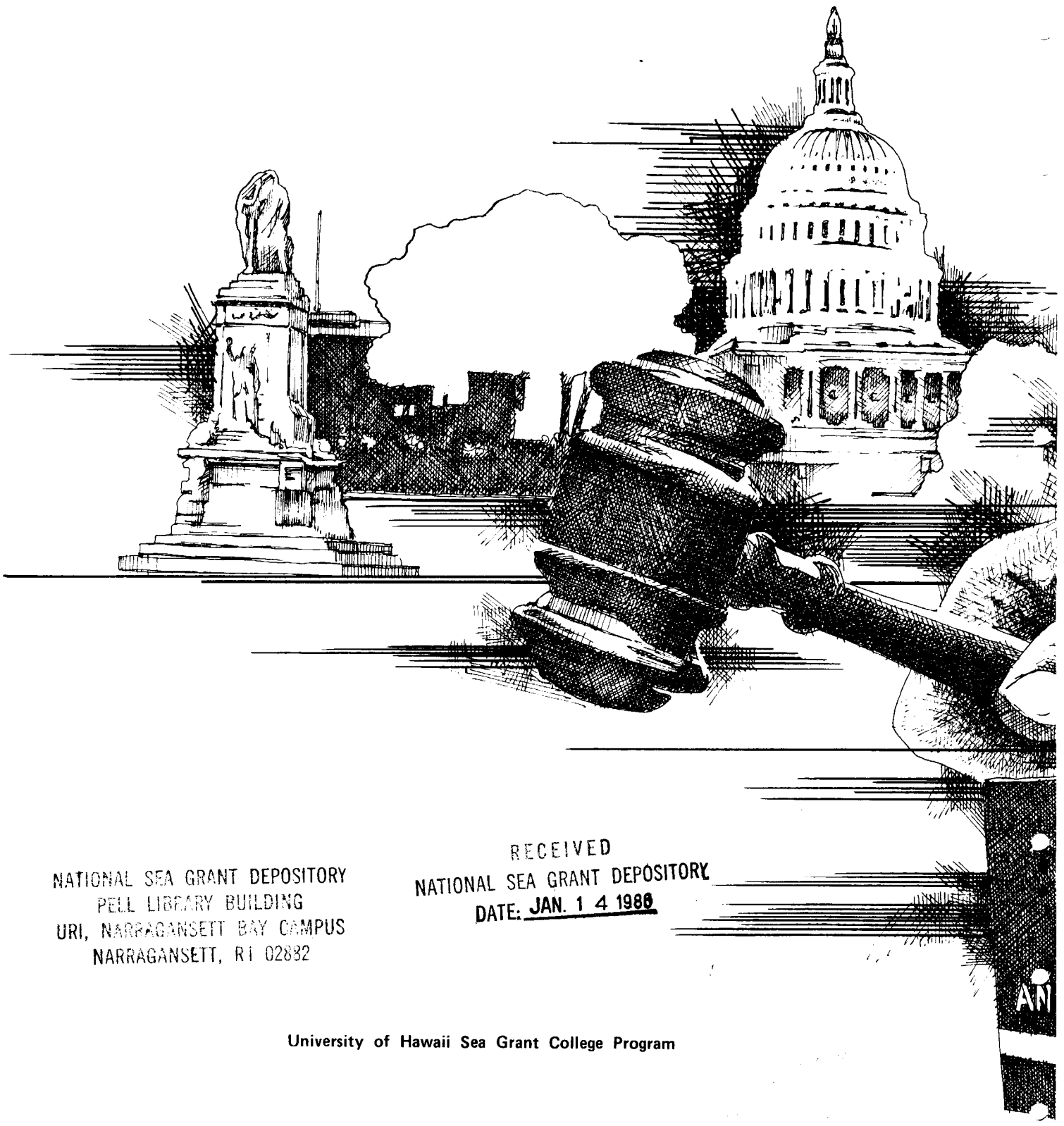
LANAI

(Adapted from Territorial Survey Department map. Source: Maps from Kosaki, *supra*, App. C; outstanding fisheries identification from Khil, *supra*, 33c-33g.)



Legend:

■ Outstanding Established Fisheries



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