KONOHIKI FISHING RIGHTS

by

Richard H. Kosaki
Research Assistant

-- Report No. 1, 1954 --

(Request No. 3642)
June, 1954

Norman Meller, Director
Legislative Reference Bureau
University of Hawaii

KONOHIKI FISHING RIGHTS

Konohiki fishing rights--private ownership rights over ocean fisheries--are unique in the eyes of English common law. However anomolous these rights may appear, they are recognized as property rights by the United States Supreme Court, and the Hawaiian Organic Act contains provisions for the registration and subsequent condemnation of these rights by the territorial government.

In attempting to carry out the intent of Congress for the orderly condemnation of konohiki fishing rights, numerous problems have arisen: (1) It is estimated that only 100 of the 300 to 400 konohiki fisheries have been registered in accordance with the provisions of the Organic Act. Requirement for registration on penalty of losing the fishing right was itself challenged as a deprivation of due process but this provision has been held to be constitutional. (2) The uniqueness of and lack of precedents for konohiki condemnation have confronted the courts with difficulties of establishing methods of appraisal and of determining what "contents" are to be included in the valuation. (3) In konohiki fishing, not only owners but certain tenants of their lands also have rights of piscary. The question of just compensation, if any, for tenants remains.

In the past there have been spurts of interest--both in the legislative and executive branches--in konohiki condemnation. The major obstacle to most of these condemnation campaigns seems to have been inadequate financing, often accompanied by doubts on whether such expenditure of public funds will yield benefits commensurate with the cost.

An argument often used against konohiki condemnation runs to the effect that private fisheries serve as much needed conservation areas for a rapidly declining inshore marine food supply. A contra-argument is that konohiki condemnation is only part of the entire problem of the conservation and beneficial utilization of natural resources, and that this may best be met when all ocean fisheries are under public control.

TABLE OF CONTENTS

KONOHIKI FISHING RIGHTS

A. ORIGINS AND MEANING

1. Origins.

Konohiki fishing rights are of ancient origin and constituted part of the land system of old Hawaii.

The products of the sea formed an important item in the diet of the early Hawaiians. Under the then existent feudal system, the king laid claim to not only the lands but the adjacent seas as well. The king's domain was in turn distributed to numerous high chiefs, then to lesser chiefs along the feudal hierarchy upon condition of tribute and military service.

Ancient land practices divided the islands into large districts called moku, and each moku was governed by a high chief. The next general division of land below the moku was the ahupuaa which was the domain of a chief of lesser rank. It is largely with the ahupuaa that fishing rights became associated, for the typical ahupuaa was a "self-sustaining" strip of land running from the mountain to the sea so as to yield the varied food products of the mountains, the cultivated land, and the sea. The word konohiki originally was the designation for the agent who managed the chief's land. In the course of time, however, it came to refer to the things that were the private property of the chief himself. Thus, "konohiki fisheries" means the chief's or privately owned fisheries.

2. Konohiki Fishing Laws.

Official written recognition was first given the ancient practice of private fishery rights by Kamehameha III in 1839 when he promulgated "An Act to Regulate the Taxes." This act, with certain changes, became Chapter III of the Laws of 1840 and contained a section entitled "Of free and prohibited fishing grounds" which read in part:

> His Majesty the King hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself.

These are the fishing grounds which His Majesty the King takes and gives to the people: The fishing grounds without the coral reef, viz: the Kilohee grounds, the Luhee ground, the Malolo ground, together with the ocean beyond.

But the fishing grounds from the coral reef to the sea beach are for the landlords and for the tenants of their several lands, but not for others.[1]

This early document went on to explain the practices of tabued fishes and fishing grounds and of the penalties to be imposed on those who violated these tabus.

These basic fishing laws given formal expression in 1839-40 underwent minor changes and redrafting in 1841 and 1845. In 1851 a major revision was enacted which unequivocally granted all fishing grounds pertaining to any Government land or otherwise belonging to the Government to the people for the free and equal use of all persons.[2]

With the passage of the Civil Code of 1859 by the Hawaii Legislature, the laws pertaining to konohiki fishing rights were codified in sections 387 to 395. A perusal of current (1954) laws pertaining to konohiki fishing rights discloses that these 1859 laws have undergone but little change up to the present time.[3]

3. Konohiki Fishing Practices.

As evolved through the years, the main features of konohiki fishing are as follows:

---

[1]For full text of section (Chapter III, Section 8, of Laws of 1840), see Appendix A.

[2]For details as to these early amendments, see David Starr Jordan and Barton Warren Evermann, "Preliminary Report on the Investigations of the Fishes and Fisheries of the Hawaiian Islands," 57th Congress, 1st session, House of Representatives Document No. 249, January 13, 1902, at pp. 11-15. This report was made pursuant to Section 94 of the Hawaiian Organic Act which reads: "Sec. 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."

[3]See Appendix B.

1. Certain areas of the sea, 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, are the private fisheries of the konohikis.

2. Within these private ocean fisheries, fishing is restricted to the konohikis and the hoaainas or tenants of the lands (ahupuaas) to which the fisheries were originally attached.

3. The konohikis can regulate the fishing within the fisheries by one of the following two methods:

(a) By setting aside or placing a tabu on one specific type of fish for their exclusive use; or

(b) After consultation with tenants, by prohibiting fishing during certain months of the year and, during the fishing season, to exact from each tenant one-third part of all the fishes caught in the fishery.

There are approximately 80 registered and therefore legally recognized konohiki fisheries in existence today. However, it should be noted that many of the owners currently seem to exercise no konohiki rights over their fisheries.

B. THE HAWAIIAN ORGANIC ACT AND KONOHIKI FISHING

1. Pertinent Sections.

When Hawaii became a Territory of the United States in 1900, included in the Organic Act were two sections dealing with the subject of konohiki fishing rights. These sections read as follows:

> Sec. 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 right shall be valid after three years from the taking effect of this Act unless established as hereinafter provided.
>
> Sec. 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.

Contained in the above sections are these salient points:

1. The intent of Congress to destroy all private fishing rights and to open the fishing areas to all citizens.

2. The registration and adjudication of all private fisheries within the two year period following the enactment of the Organic Act.

3. The condemnation of such registered fisheries by the Attorney General, and upon payment of just compensation, the opening up of such areas to public use.

2. Intent of Congress.

The first point was clearly stated by the Supreme Court of Hawaii in deciding one of the first cases involving konohiki fishing rights subsequent to the

passage of the Organic Act. The Court said in part: "The intent of Congress is clear to destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the people." (In re Fukunaga, 16 Haw. 306, 1904) In the case of Bishop v. Mahiko, 35 Haw. 608 (1940) the court stated: "In our opinion the provisions of section 96 of the Hawaiian Organic Act constitute an enabling Act empowering the Territory of Hawaii, in its capacity as agent of the United States, to exercise, in conjunction with local law pertaining thereto, the power of eminent domain possessed by it and pursuant thereto to acquire by condemnation all private fishing rights within the Territory of Hawaii for the declared purpose of making all fisheries in the sea waters of the Territory free to the citizens of the United States."

The intent of the Congress of the United States to eliminate private fishing rights in the sea waters of the Territory is generally admitted. Controversies, however, have arisen over: (1) the interpretation of the saving clause in Section 95: "subject, however, to vested rights;" and (2) the validity, by the test of "due process," of the procedures requiring that these vested fishing rights be duly established.

C. REGISTRATION OF FISHERIES

1. Meaning of "Vested Rights."

The problem of the interpretation of "vested rights" under Section 95 arose very shortly after enactment of the Organic Act. In the cases of Carter v. Hawaii and Damon v. Hawaii, 14 Haw. 465 (1902), the Hawaii Supreme Court posed this problem for itself: "The question of greatest difficulty presented by these cases is to determine whether or not the rights of the plaintiffs /konohikis/ in the respective fisheries were properly 'vested rights' within the saving clause of Section 95, of the Organic Act." These cases involved land grants of ancient origin in which appurtenant fishing rights were presumably, by the general wording of the land patent or at least by custom, attached though perhaps not specifically granted eo nomine. Minimizing the uniqueness of konohiki fishing rights, the court said: "Under the common law the right of fishing in the open sea like that of navigation was a public right. The grant of an exclusive right to a sea fishery cannot be presumed. Every presumption is against the grant and in favor of the public. Every ambiguity or doubt in the instrument by which the right is claimed to be granted will be construed most strongly against the grantee." The court recited the explicit fishing laws that had been in existence since 1839 and concluded: "It is clear from a review of these statutes that the following are necessary inferences, to-wit, that the plaintiffs cannot base any claim 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 in the fisheries of whatever nature that had been enjoyed by any subject prior to that date was revoked and annulled by said Act and that all claims must now date from the Act of 1839 or from some subsequent date." The court recognized only two other grounds "on which the plaintiffs might sustain their claim, to-wit: (1) that it is based on grant or (2) was an appurtenance to the land." Neither basis was held as valid,

so in the absence of an expressed conveyance of fishery rights and on the common law principle that such a grant against the public right should be construed against the grantee, the court held that the plaintiffs did not possess the fishery rights involved.

The case went to the United States Supreme Court on appeal and this decision was reversed. (Damon v. Hawaii, 194 US 154, 1904) The U.S. Supreme Court did not seek to find "technically accurate words" expressly granting fishing rights, but said: ". . . it does not follow that any particular words are necessary to convey [a fishing right] when the intent is clear. When the description of the land granted says that there is incident to it a definite right of fishery, it does not matter whether the statement is technically accurate or not; it is enough that the grant is its own dictionary and explains that it means by 'land' in the habendum, land and fishery as well." Of greater interest, however, is the attitude taken by the Supreme Court towards konohiki fishing rights. Justice Oliver Wendell Holmes in delivering the opinion of the court, expressed it thus: "A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right."

Carter et al v. Hawaii, 200 US 255 (1906) was also taken to the U.S. Supreme Court on appeal and here again the court decided in favor of the plaintiffs and upheld their konohiki rights. The Carter case differed from the Damon case in

that claim was based by Carter not on a Royal Patent as in the case of Damon but on ancient prescription and statutes. Justice Holmes, again delivering the opinion of the court, reaffirmed the position taken in the Damon case to the effect that the statutes involved "created vested rights."

2. Constitutionality of Registration Procedures.

The validity and effect of the registration procedures for konohiki fishing rights as outlined by Section 96 of the Organic Act were treated in the case of Bishop v. Mahiko, 35 Haw. 608 (1940). One of the questions faced by the court was whether the registration procedure in Sec. 96 and the invalidation of fishing rights if not registered two years after taking effect of the Organic Act in Sec. 95 "are violative of the provisions of article V of the amendments of the Constitution of the United States, inhibiting the deprivation of property without due process of law and the taking of private property for public use without just compensation." Asserting that: "'Due process' as applied to legal proceedings does not require that the proceedings should be by a particular mode but only that there be a regular course of proceedings in which are present the accepted constitutional safeguards of life, liberty and property. . .", the court, in upholding the constitutionality of Sections 95 and 96 of the Organic Act, said:

> The inherent incidents of private fishing rights, the manner and circumstances of their creation, their exclusion from the application of all laws of the Kingdom of Hawaii and its successors, the Provisional Government and Republic of Hawaii, conferring original title to lands, the absence of official records by which their boundaries might be identified, the source of the information of the facts and the declared purpose to make all of the sea waters of the Territory free to the citizens of the United States, are ample justification for the procedure prescribed, both for the segregation and final condemnation of private fishing rights. Upon this branch of the case we conclude that, even though statutory rights to private fisheries in the sea waters of the Territory of Hawaii at the time of annexation of the Hawaiian Islands to the United States were vested rights and the titles of the owners thereof were entire, complete and inchoate, in the absence of official records of the boundaries of such private fisheries, it was within the power of the Congress of the United States, in accomplishment of its declared purpose to make all sea fisheries in the sea waters of the Territory not included in any fish pond

> or artificial enclosure free to the citizens of the United States, to provide reasonable means for the segregation and final acquisition of such fishing rights, and the provisions of section 96 of the Hawaiian Organic Act requiring claimants to vested fishing rights, preliminary to the institution of condemnation proceedings, to establish their rights in the manner therein provided upon penalty under the provisions of section 95 of the Organic Act, of such rights becoming invalid in case of default, are reasonable and constitute due process.

On the effect of the failure to file petition for claim to konohiki fishing rights within the time stipulated in the Organic Act, the court said: "Holding as we do that the establishment of a private fishery is but the preliminary step provided in the proceedings in condemnation authorized by section 96 of the Hawaiian Organic Act, the failure to establish a private fishing right constitutes, in legal effect, a waiver to compensation." Again in conclusion, it stated: "Considering the establishment of vested fishing rights in private fisheries solely as a provision for the segregation and separation of private fishing rights from public fishing rights, the failure to establish a private fishing right operated as an abandonment and waiver of all claims to and compensation for such fishing right, in the event of which the provision of the fifth amendment of the Constitution, in respect to the taking of property for public use without just compensation, does not apply."

3. Fisheries Registered and Unregistered.

In the above cited case of Bishop v. Mahiko, reference is made to the fact that at the time of the annexation of Hawaii to the United States, it could not be determined with any degree of accuracy how many private fisheries existed in the Territory. Various estimates range from 300 to 400. Of this number, approximately 100 have been registered. Upon the request of Attorney General J. V. Hodgson, the following data concerning registered and unregistered konohiki fisheries were submitted by Commissioner of Public Lands and Surveyor L. M. Whitehouse on March 14, 1939:

PRIVATE FISHERIES IN THE TERRITORY OF HAWAII (1939)

I. 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

II. 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, . . ." That these appraisal figures are low may be indicated by comparing them with the appraisals made of 21 Oahu fisheries in 1933 (see p. 17) and with the compensation paid by the U.S. Navy for the Pearl Harbor fisheries (see p. 22).

The registered fisheries, according to the above data, number 101. The

locations on the various islands of these established ocean fisheries are indicated on the maps prepared by the office of the Territorial Surveyor which are attached to this report. (See Appendix C.)

In re unregistered fisheries, it is interesting to note the public interpretation placed upon the court opinion in the Bishop v. Mahiko case as indicated by an article appearing in the Honolulu Star Bulletin of September 7, 1940. The article reads in part: "Public right to the use of 262 sea fisheries in various parts of the Territory was established in an opinion by the supreme court . . .", and further: "It was held that the law requiring registration of the lands was not unconstitutional and that owners who failed to register within the required time forfeited the fisheries to the public."

Although its legal effect and validity are not ascertained and it seems to have received no recognition subsequently, it is interesting to note the manner in which the Territorial Legislature attempted to settle the question of unregistered konohiki fishing rights in 1923, seventeen years before the Bishop v. Mahiko case was finally decided. In 1923, the House of Representatives then passed House Resolution No. 6 which read as follows:

> Whereas, Section 95 of the Organic Act specifically states that no vested rights in any sea fisheries shall be valid after three years from the taking effect of this Act unless established as hereinafter provided; and
>
> Whereas, the majority of the sea fishery (konohiki) owners have failed to establish their claims; and
>
> Whereas, the majority of the people of the Territory of Hawaii have not proper information of such failure of said sea fishery owners to establish such claims; and
>
> Whereas, the people should be notified of such fact; therefore, be it
>
> RESOLVED, that the Commissioner of Public Lands be and he is hereby authorized, empowered, ordered and commanded to ascertain which sea fisheries are open to the citizens on account of the failure of the owners of such sea fisheries to establish their claims within the time specified in Section 95 of the Organic Act and furnish this House the result of his findings within ten days from the date of the delivery of a certified copy of this Resolution to him.
>
> (Introduced by John C. Anderson, Representative, Fifth Dist.)

Complying with the above request, the Commissioner of Public Lands submitted a list of unadjudicated fisheries. The House then adopted a second resolution on the subject (H.R. No. 34 of 1923) empowering and directing the Clerk of the House to have the list published once a week for four weeks in specified local newspapers. Such publication appeared in the form of a legal notice which read in part: "Pursuant to House Resolution No. 34, notice is hereby given that C. T. Bailey, Commissioner of Public Lands of the Territory of Hawaii, has submitted to the House of Representatives, Regular Session of 1923, the following as the sea fishing rights in the Hawaiian Islands which not having been adjudicated are now free and open to the citizens of the United States in accordance with the Organic Act." Thence followed a long listing of konohiki fisheries by islands. The publication of the above notice, said an article in The Honolulu Advertiser of March 18, 1923, has focused on a question of much debate, viz., "whether any legislative body or instrument of government can compel an individual or corporation in peaceful possession of property or vested rights to take positive action to confirm title and, in default of such action, confiscate his property." The question, it appears, was squarely met in 1940 when Bishop v. Mahiko was adjudicated.

D. CONDEMNATION OF FISHERIES

1. Fisheries Condemned.

The general intent of Sections 95 and 96 of the Hawaiian Organic Act is to eliminate konohiki fishing rights. Those that have been legally established are to be condemned and, by payment of just compensation, acquired by the Territory for the general use of the citizens. The second paragraph of Section 96 reads:

> 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.

Under the provisions of Section 96 and also as a result of the development of Pearl Harbor as a U.S. Naval base, the following 37 konohiki fisheries[4] out of the 101 that are registered have been acquired since 1900.

KONOHIKI FISHERIES ACQUIRED, 1900-1953*

Fishery	Acquired by:	Title	Date	Acquired from:
Honouliuli, Oahu (one-half portion)	U.S.	Deeds	4/4/45	(Campbell Estate (Oahu Railway & Land Co. (Dowsett Co., Ltd.
Waiawa, Oahu Kaluaoopu, Oahu Waiau, Oahu Kaonohi, Oahu Kalauao, Oahu Halawa, Oahu Kunana, Oahu Pipiloa, Oahu	U.S.	Deeds	(4/28/45 (4/19/45	(McCandless Estate (Bishop Estate
Hanapouli, Oahu Waipio, Oahu Homaikaia, Oahu Miki, Oahu	U.S.	Civil 291 (Fed. Dist. Court, Honolulu)	1934	Ii Estate
Apokaa, Oahu Hoaeae, Oahu	U.S.	Civil 292 (Fed. Dist. Court, Honolulu)	1934	Robinson, et al
Moanalua, Oahu Kaliawa, Oahu	T.H.	Law 16653		Damon Estate

*Information secured from Public Lands Office: "Miscellaneous Folder on Fisheries," and Deputy Attorney General Clinton R. Ashford.

(Continued next page)

[4]In counting konohiki fisheries, it should be remembered that they greatly vary in size and in value, that a contiguous series is often referred to under one name, and that some are known by more than one name. These factors in large part account for the difficulty involved in securing an accurate count of konohiki fisheries.

(Cont'd) KONOHIKI FISHERIES ACQUIRED, 1900-1953*

Fishery	Acquired by:	Title	Date	Acquired from:
Kaehu a ka moi, Maui Paukukalo, Maui Malehaakoa, Maui Kaihuwaa, Maui Makawela, Maui Kahului, Maui Puuiki, Maui Kaipuula, Maui Kanaha, Maui Palaeke, Maui Kalua, Maui Kaa, Maui Hopukoa nui, Maui Hopukoa iki, Maui Papaula, Maui Kapahu, Maui Palaha, Maui Kawaau, Maui Kanepaina, Maui Kahue, Maui	(Collectively known as Wailuku Fishery)	T.H.	Law 1538	1949	(Haw'n Com'l & Sugar Co. (Wailuku Sugar Co.

In addition, condemnation proceedings have been initiated by the Attorney General against the following listed fisheries.

KONOHIKI FISHERIES, ACQUISITION PENDING, 1954*

Mokauea, Oahu**	Law 16696	(1st Circuit)
Heeia, Oahu**	Law 18141	(1st Circuit)
Kahaluu, Oahu**	Law 18142	(1st Circuit)
Nawiliwili, Kauai***	Law 1852	(5th Circuit)
Niumalu, Kauai***	" "	" "
Kalihikai, Kauai	Law 1854	" "
Kalihiwai, Kauai	" "	" "
Hanamaulu, Kauai	" "	" "
Anukoli, Maui	Law 1650	(2nd Circuit)

*Information secured from Public Lands Office: "Miscellaneous Folder on Fisheries," and Deputy Attorney General Clinton R. Ashford.

**Proceedings near completion.

***Proceedings to commence on May 24, 1954.

2. Attempts at Condemnation.

The second paragraph of Section 96 of the Organic Act provides for the condemnation of registered konohiki fisheries:

> 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.

This provision authorizes the Attorney General to condemn the registered fisheries; the necessity of spending public money in sizeable amounts by way of "just compensation," plus its general power of oversight of administration, have resulted

in the Territorial Legislature taking an active interest in condemnation proceedings. As a result, steps directed toward commencing of condemnation proceedings against the owners of konohiki fisheries have repeatedly been initiated by both the legislative and executive branches of the territorial government.

In 1913, the Legislature requested data on the konohiki fisheries and the Attorney General reported that the estimates that he had received from owners concerning the value of their konohiki fisheries aggregated $201,236.00. As already mentioned previously (see p. 11), the 1923 Legislature in an attempt to ameliorate the general problem had publicized a list of unadjudicated sea fisheries as "free and open to the citizens of the United States."

a. 1931.

In 1931 a concerted effort was made by the territorial government to condemn and acquire existent konohiki fisheries. In part this drive was sparked by the knowledge that an unappropriated balance of $600,000 was expected in the territorial treasury at the end of the fiscal year ending June 30, 1933. Bearing this in mind, Governor Lawrence M. Judd suggested that this unappropriated balance be applied toward the purchase of konohiki fisheries through administrative authority and action. He informed the members of the Legislature of this possible move by letter dated July 22, 1931, which read in part:

> Although appropriation bills have from time to time been fruitlessly introduced in the legislature for the purpose of such condemnation--two, in fact, in the last session--it is my firm belief that Congress (in section 96 of the Organic Act), has already authorized the treasurer to pay, from any moneys not otherwise appropriated, the damages awarded in any condemnation proceedings brought in pursuance of such section, and has in effect made a blanket appropriation available at any and all times to the extent of the then unappropriated balances.
>
> In my opinion no greater service to the public could be performed by this administration than the opening of many, and ultimately all, of these private fisheries to the people, and unless some sufficient reason to the contrary exists I would respectfully suggest that steps be immediately taken toward this end.

Following up this letter from the Governor to the legislators, Attorney General Hewitt sent letters to the konohiki fishery owners which led the press to label this move as "formal negotiations between the Territory and the 30 owners of some 100 konohikis." (The Honolulu Advertiser, July 28, 1931) In his letter, dated July 27, 1931, the Attorney General wrote:

> I have discussed fishery matters with various owners; and from many of them have found that this pseudo-feudal system prevailing in respect to private ownership of fisheries is resulting in a source more of annoyance and unpleasantness than profit; that, due to the difficulty of adequately protecting private rights, it has been impossible in many instances to maintain lessees in these fisheries or to secure adequate rentals therefor. To my mind the entire system is un-American and one toward the correction of which we should all cooperate. As a matter of fact several owners have indicated their desire to turn these fisheries over to the public at extremely reasonable figures.

There are indications that some did not share the view of the Governor and the Attorney General in regard to expeditious elimination of konohiki fishing rights. The Honolulu Star-Bulletin of July 30, 1931, editorialized:

> It may be that thorough consideration of all the facts will lead all concerned to the conclusion that having waited for 30 years, the condemnation of the konohiki rights now will hardly yield benefits commensurate to the cost.

Opposition to the expenditure of unappropriated funds for the acquisition of konohiki rights by administrative authority may have led the Governor to call a meeting with the legislators to discuss this subject on August 3, 1931. At any rate, such a meeting was held and, as a consequence, the Governor modified his original position and so informed the Attorney General by letter on that day:

> There were present a large number of Senators and Representatives, who were unanimous in the feeling that no monies should be expended unless specifically appropriated by the territorial Legislature, regardless of the authority contained in Section 96 of the Hawaiian Organic Act, and that the better procedure would be for your Department to institute condemnation proceedings, preferably with the prior agreement of the owners to waive any claims for damages in case of failure to pay the judgments, and then to present

those judgments to the next session of the Legislature for approval, either in whole or part, and the necessary appropriation as far as it deems advisable.

Under this plan the Territory, although having obtained condemnation of the konohikis, would not take possession of them until the Legislature had appropriated funds to pay the amounts of the court judgments, plus 7 per cent interest for the intervening period.

Originally the territorial administration had planned to proceed under the condemnation authority granted it over konohikis by Section 96 of the Organic Act, paying the judgments with a part of the estimated unappropriated balance (of approximately $600,000) that will be remaining as of June 30, 1933.

Several legislators present objected to this plan, however, declaring that the matter is of sufficient importance to await appropriation by the 1933 session.

The Governor had agreed not to expend portions of the unappropriated balance for the acquisition of konohiki fisheries but steps toward their elimination were to proceed. Attorney General Hewitt, in a letter to Commissioner of Public Lands C. T. Bailey dated Sept. 8, 1931, outlined the first major step as the acquisition of the private fisheries in and around the populous areas on the island of Oahu:

> Following many conferences with various territorial officials, legislators and konohikis, I have come to the conclusion that the first step in the acquisition of private fisheries throughout the Territory should be to clean out completely all private interests beginning at Kahaluu on the windward side of this Island and extending around Makapuu to Pearl Harbor. A study of the situation convinces me that with this area opened up completely to the public all present necessities would be cared for and all sources of conflict between private owners and public would be eliminated.

Now that the fisheries to be condemned had been specified, appraisals were in order. For this purpose, the government established an appraisal team of Samuel Wilder King, Oscar P. Cox, and Paul Beyer. This team of appraisers submitted a report to the Public Lands Commissioner to the effect that the condemnation awards for the 21 Oahu fisheries situated from Kahaluu around Koko Head to Pearl Harbor would total $56,170.00.

It is believed that this 1932 konohiki appraisal by King, Cox and Beyer was submitted to the Legislature but no action concerning konohikis was taken

by the Legislature in the 1933 session. A later Attorney General was to remark: "These appraisals were not used, as I understand it, due to lack of funds."[5] Indeed, special sessions were convened in 1932 and 1933 to effect economies in government and "for consideration of legislation that will provide adequate revenues for the maintenance of the Territorial government."[6]

b. 1939.

In the 1939 Legislature, attempts were again made to condemn konohiki fishing rights. A bill was introduced in the House (H.B. 32 by Representative T. Ouye of the Fifth District) appropriating $50,000 for use by the Attorney General "for the purpose of acquiring fishery rights in the county of Kauai." This bill was filed without comment by the Finance Committee. A concurrent resolution was introduced in the House (H.C.R. 10 by Representative E. M. Muller of the Third District) "directing the attorney general to condemn all privately owned sea fisheries in the territory." The resolution read in part:

> BE IT RESOLVED . . . that the Attorney General of the Territory be, and he hereby is, directed to institute and carry to judgment condemnation proceedings for the condemnation of all fishing rights established by private owners pursuant to section 96 of the Hawaiian Organic Act.

This resolution was referred to the Judiciary Committee where it was given serious consideration. The Attorney General and the Commissioner of Public Lands were asked to submit pertinent information. After due deliberation, the committee reported: "It is our well-considered judgment that it would be unwise at this time to pass this Concurrent Resolution." The main objec-

---

[5]Letter of Attorney General Hodgson to Honorable R. E. Woolley, chairman, Judiciary Committee of the House of Representatives dated March 18, 1939.

[6]Quoted from Governor Judd's proclamation of October 25, 1933, convening a special session.

tion stated was financial as it was estimated that the amount involved "would run into hundreds of thousands of dollars." The committee said further:

> Your committee would like to see the fisheries acquired by the Territory for the use of all the people, but the financial condition of the Territorial government at this time is such that the passage of this Resolution now would be an insupportable burden.
>
> Experts have told us that, within the next eight or ten years, the value of these fisheries will be reduced to a comparatively low figure as, at the present rate, most of the fish which are still found in large numbers in these fisheries, will have disappeared by reason of depletion.

Upon recommendation of the committee, House Concurrent Resolution No. 10 was tabled.

c. Post World War II.

Shortly after World War II, efforts to condemn konohiki fisheries were revived under Attorney General Nils Tavares. A new appraisal team of Campbell Crozier, chairman, and members Samuel W. King and John Child, Jr., was appointed. The current drive has thus far seen the condemnation of the Heeia and Kahaluu fisheries at Kaneohe, Oahu, and of twenty adjoining fisheries on Maui commonly referred to as the Wailuku fishery. The condemnation proceedings pending before the courts are also the result of this latest concerted attempt to carry out the provisions of Section 96 of the Organic Act.

3. "Emergency" Measures Proposed.

Aside from formal legislative or administrative attempts to condemn konohiki fisheries, it is interesting to note other attempts, usually in times of emergency, to open the private fisheries for public use.

During the depression, Chairman Ralph G. Cole of the Garden Committee of the Committee on Unemployment Relief sent the following letter dated February 16, 1934, to Governor Lawrence M. Judd:

> In view of the depression and the serious distress which affects many of our citizens, to the extent that they are unable to provide sufficient food for their families, and in view of the fact that the original institution of the private fisheries was to take care of the food requirements of the inhabitants, it would seem that for the period of the depression some effort should be made to enlist the cooperation of the konohikis, so that the sea fisheries might partially be used without violation of the law.

During World War II, when an adequate food supply again became a problem, it seems that konohiki restrictions were temporarily suspended, at least on the island of Kauai. An article appearing in the Honolulu Star-Bulletin of July 23, 1942, states: "In order to give Kauai residents (sic.) to bring in more fresh fish, Lt. Col. Eugene Fitzgerald, commanding officer, Kauai district, has suspended the Konohiki fishing rights until further notice."

4. 1953 Legislative Session.

During the 1953 legislative session, two measures dealing with konohiki fishing rights were passed. Joint Resolution No. 42 authorizes the county of Kauai "to acquire by agreement or to lease the konohiki fishing rights in the county of Kauai, including the rights-of-way to fishing grounds."

The House adopted Resolution No. 71 requesting the attorney general to report on the status of and future plans concerning konohiki fishing rights. The office of the attorney general responded:

> This office intends to initiate proceedings to acquire all private fisheries according to the mandate of the Organic Act. . . .
>
> No appropriation for the acquisition proper is required, for the reason that the mandate of Section 96 of the Organic Act carries with it the right to pay compensation out of the general funds of the Territory.
>
> However, it may be necessary to expend funds to bring the 1947 appraisals down to date prior to instituting individual proceedings. It is estimated that the cost of such reappraisal will be approximately $5,000.00, and an appropriation in such amount is requested.

The 1953 legislature did not grant this request, although subsequently $5,000 was transferred to the attorney general's office from the Governor's contingent fund to pay for such additional expenses as may be accrued in seeking the acquisition of konohiki fishing rights.

E. PROBLEMS OF CONDEMNATION

1. Financing.

One of the major obstacles involved in the program of condemning konohiki fisheries is financing. Section 96 of the Organic Act reads that just compensation "when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated."

For those who have interpreted Section 96 of the Organic Act as a mandate by Congress for the speedy condemnation of all konohiki fishing rights, progress so far in this direction has been disappointing. In 1945, a series of articles under the by-line "More Fish for Food--Let's Get It" appeared in The Honolulu Advertiser (July 22-24) attacking the slowness with which konohiki fisheries were being condemned and being put to public use. The articles noted that the loophole which condoned and indeed sustained non-performance was the clause pertaining to compensation to be awarded the konohiki owners which reads: ". . . which compensation, . . ., shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated." Money "not otherwise appropriated" is seldom to be found in any public treasury, and if the lack of adequate monies was preventing the acquisition of konohiki fisheries for public use, the articles blamed the Legislature for failure to make adequate appropriations to accomplish this end.

In the absence of any explicit and specific appropriation by the Legislature for this purpose, no great sums of money have been available for the purchase of konohiki fisheries. When an attempt was made by executive action to expend a sizeable unappropriated balance for the condemnation of private fisheries in 1931-32 (see p. 15), the legislators protested, stating that the matter was of sufficient importance to merit legislative appropriation. Past organized attempts at condemnation have not proceeded beyond the appraisal stage, presumably because the amounts indicated by the appraisals have been too high.

2. Appraisal.

The problem of appraisal is in itself a difficult one. The reasons for this are not far to seek. The lack of precedents and the uniqueness of konohiki fishing rights complicate the task of appraisal. The federal district court in Honolulu, in attempting to establish "just compensation" for the fourteen konohiki fisheries condemned by the U.S. Navy in the Pearl Harbor area in 1934, remarked: "These fisheries may be said to belong to that species of property which has no definite 'market value'." (U.S. v. J. Lawrence P. Robinson, Civil No. 292) The court also found that: "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 fishery without a transfer of appurtenant land) of record."

In most instances, the court in the cases involving the Pearl Harbor fisheries relied on expert testimony and set the condemnation price in terms of the marketable fish normally found in the fishery. In the Pearl Harbor fisheries, just compensation was awarded in terms of the market value of mullet, pua and nehu. For example, in one judgment the court said that the fair market value of the sea fisheries owned by the John Ii Estate (U.S. v. John Ii Estate, Ltd., Civil 291) was $90,000--this being an aggregate of $10,000 as nehu value, $20,000 as pua value, and $60,000 as commercial mullet value. In another judgment, the court awarded to the Bishop Estate the sum of $30,800 (U.S. v. E. Faxon Bishop, Civil 296), calculated in terms of $10,400 for nehu and iao, $10,000 for pua, and $10,400 for commercial mullet.

Little is known of the Territory's method of appraising konohikis.[7] The difficulties inherent in konohiki appraisal contribute to the holding of court proceedings to determine "just compensation"; often, the method of appraisal itself becomes the major point of litigation. The difficulties of konohiki appraisal on the part of the Territory was high lighted in a Honolulu Star-Bulletin article of July 14, 1947, at the time the territorial appraisal team of Crozier, King, and Child was in action:

> A few facts and a lot of educated guesses go into the work of appraising the value of a private fishing right.
>
> First, there is nothing comparable to them in the U.S. According to one of the appraisers, Campbell Crozier, there never has been. In short, there are no precedents or comparative values as there are in other type of property condemnation.
>
> Next, there are no well defined boundaries in the ocean areas. Policing them is difficult. If a fisherman is thrown out of a private area, he often can move next door to a public one that reduces the value of a private area.
>
> In addition, few people have kept records of the annual catches in their fisheries. Even fewer have recorded the market value of them.

---

[7]It is believed that appraisers generally apply the "income capitalization" approach in determining konohiki appraisal values. However, the widest differences in appraisal figures will occur largely dependent upon the "income" that is to be used as a base. Some feel that the "income" to be capitalized is the annual rental fee; others are of the opinion that the gross income to be derived from fishing operations within the konohiki fishery is properly the "income" to be capitalized; still others have different interpretations as to what constitutes the "income" that should serve as a basis for appraisal. Thus, in the case of Territory of Hawaii v. Bishop Trust Co. recently adjudicated in the 5th circuit court, the territorial appraisers valued the Nawiliwili fishery at $13,500 and $17,696; the defendant's appraisers presented valuations of $50,000, $60,000, and $64,000. The jury awarded the sum of $30,000.

3. Portion of Fishery to be Appraised.

Aside from the problem of the method to be employed in the appraisal of konohiki fisheries, two additional questions can be raised: (1) Are the owners of the konohikis entitled to the full value of the fishery or are they to be compensated for only the tabu fish or for one-third of the normal fish catches; and (2) Are the hoaainas or tenants of the land to which the fishery was originally appurtenant entitled to any compensation upon condemnation of the fisheries to which they also have certain rights of piscary?

In one of the Pearl Harbor cases (U.S. v. Shingle, Civil 290) involving the condemnation of fisheries by the U.S. Navy, the federal district court faced the question of deciding what portion or proportion or exactly what property of the konohikis was involved in the valuation. The government contended that the konohikis should be awarded compensation only in terms of their rights under konohiki fishing rules and practices, i.e., that the award should be determined, as konohiki fishing is practiced, either in terms of the value of the tabu fish or of one-third of the catch. To this the court replied that the konohiki owners were entitled to the full value of the fishery, subject only to such deduction as is shown to represent the value of the hoaaina or tenant interests.[8]

---

[8]This question of the portion of the konohiki that is to be included in condemnation proceedings was raised by the Territory in its condemnation suit recently adjudicated in the 5th circuit court against the owner of the Naviliwili and Niumalu fisheries on Kauai. The Territory contended that the konohikis have exclusive rights to only one type of fish or to only one-third of the annual fish catches. The court, however, handed down a ruling that is in line with the ruling made by the federal district court in the Pearl Harbor cases, viz., that the konohikis have the exclusive rights to all fish within the fishery, subject only to hoaaina (tenants') rights. The Territory has noted exception to this ruling and the case may be appealed to the territorial supreme court.

4. Tenants' or Hoaaina Rights.

Hoaaina rights and interests have been the subject of much litigation. It is to be remembered that the original grant of private fishing rights promulgated by Kamehameha III included the tenants: ". . . the fishing grounds from the coral reefs to the sea beach are for the landlords, and for the tenants of their several lands, but not for others." The present Revised Laws of Hawaii 1945 contains a section on tenants' rights:

> Sec. 1205. Tenants' rights. The konohikis 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 such 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 such fisheries.

In an early landmark case, the Hawaii Supreme Court set forth a definition of "tenant" applicable in konohiki cases:

> We understand the word tenant, as used in this connection, to have lost its ancient restricted meaning, and to be almost synonymous, at the present time, with the word occupant, or occupier, and that every person occupying lawfully, any part of "Honouliuli" [an ahupuaa], is a tenant within the meaning of the law. Those persons who formerly lived as tenants under the Konohikis but who have acquired fee simple title to their kuleanas, under the operation of the Land Commission, continue to enjoy the same rights of piscary that they had as hoaainas under the old system. (Haalelea v. Montgomery, 2 Haw. 62 (1858))

Furthermore, the court held that right of piscary would pass as an appurtenance to the land when a kuleana was sold:

> If any person who has acquired a kuleana on the Ahupuaa of "Honouliuli", should sell and convey his land, or even a part of it, to another, a common right of piscary would pass to the grantee, as an appurtenance to the land. In that case it would not be necessary, we apprehend, to mention the right of piscary in the conveyance--it would pass as an incident.

The court saw the distinction between the rights of the konohiki and those of the tenant as: "the /Konohiki/ holds the fishery as his private property, the /tenant/ has only a right of piscary therein, as an incident to his tenancy. This marked distinction in their respective rights, must create a corresponding difference in regard to the transfer of those rights."

In Hatton v. Piopio, 6 Haw. 334 (1882), the court further upheld this right of a tenant of an ahupuaa to fish in the appurtenant fishery:

> Every resident on the land, whether he be an old hoaaina, a holder of a Kuleana title, or a resident by leasehold or any other lawful tenure, has a right to fish in the sea appurtenant to the land as an incident of his tenancy.

The court further maintained that this right was not dependent upon the permission of the konohiki, who, said the court, "has no greater (fishing) rights than any other tenant" of the ahupuaa.

However, later cases consider restrictions to hoaaina rights. In the case of Shipman v. Nawahi 5 Haw. 571 (1886), it is recorded that the lessee of an ili kupono, which is located within but has complete independent title of the ahupuaa had no rights to the konohiki fishery of the ahupuaa. (As it was later discovered that the lessee also had a kuleana within the ahupuaa, the whole complexion of the case took a new turn.) As late as 1927, in Smith v. Laamea 29 Haw. 750 (1927), the Hawaiian Supreme Court reaffirmed the Haalelea v. Montgomery ruling holding "one who by adverse possession acquires title to a portion of an ahupuaa is an occupant or tenant and entitled to the common right of piscary . . ." Subsequently, a major qualification to this broad interpretation of the tenant's rights of piscary was made in the case of Damon v. Tsutsui, 31 Haw. 678 (1930). In this case

the court held that the language of Section 95 of the Hawaiian Organic Act was entirely unambiguous in seeking the repeal of all laws which conferred exclusive fishing rights, including those of tenants, "subject, however, to vested rights." And the court held that although "it may be assumed" that tenants prior to 1900 had "vested" rights, provided they were judicially established as required, tenants after 1900 could not claim such rights. "In our opinion," said the court, "those persons who became tenants after April 30, 1900, as did Tsutsui in 1929, did not have any 'vested' rights within the meaning of the Organic Act and therefore the repealing clause was operative as against them. As to them, the statutory provisions of 1846 amounted to nothing more than an offer to give them certain fishing rights when they should become tenants,--an offer which was withdrawn before they were in a position to accept it." In one of the Pearl Harbor cases (U.S. v. Robinson, Civil 292), the federal court saw a possible conflict in the ruling of the Smith v. Laamea case as against the ruling in the Damon v. Tsutsui case. The court favored the opinion in the former case which it interpreted as saying: "that if a fee-simple title to a portion of the ahupuaa originated even as late as approximately 1924 (certainly long years after the repeal of the fishing laws of 1900) the owner of such parcel of land would become entitled, upon acquiring title, to an appurtenant right of fishery."

In the Pearl Harbor cases, especially U.S. v. Robinson, there is considerable discussion of hoaaina rights. The court frequently cites the broad ruling in favor of tenants established in the Haalelea case and, cognizant also of later modifications, says at one point:

> Even if it be assumed, . . . (which assumption I am not here adopting) that tenants at will or tenants by sufferance who, as residents of an ahupuaa possessed a right of piscary in an adjacent fishery, had no real "vested rights" (and derived their rights solely through the operation of the statutes now repealed) and thus lost, irreclaimably, all rights the moment the Hawaiian fishing laws were repealed, the tenant of the ahupuaa who owned, in fee simple, a kuleana therein must nevertheless

be held to own, by virtue of his fee simple ownership of the kuleana, a "vested right" of piscary as an appurtenance to his kuleana.

And the federal court further maintained, citing the Laamea case, that a fee simple title acquired after 1900 to a portion of an ahupuaa entitled the owner to an appurtenant right of fishery.

To the line of argument that held that hoaaina rights, though "vested," were invalidated by a failure to establish them according to the procedures set forth in Section 96 of the Organic Act, the court said that the judgment establishing the private fisheries in the name of the konohikis would, in legal contemplation, establish the vested right of tenants who are kuleana owners. The court further added: "A practical consideration bearing on this matter is the question whether Congress intended the many hundreds (or thousands) of tenants to validate each of their rights by proceedings in courts. I am loath to believe that Congress had any such drastic requirement in mind." The court also mentions that seen in this historical context, fishing rights since their inception belonged jointly to landlords and tenants.

After establishing legal recognition of hoaaina rights, the court approached the main problem in the Pearl Harbor cases, namely, what is the "just compensation" to be awarded for the condemnation of hoaaina rights? To this the court answered:

> To find that Dowsett Co., Ltd. owns the vested hoaaina rights of piscary in the Hoaeae Fishery is one thing; to determine the value of said right of piscary is another. It is not humanly possible to compute the value of this hoaaina right under the evidence adduced at the hearing of this proceeding. . . 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" for the taking of the hoaaina right of piscary of Dowsett Co., Ltd. . . The result must be that out of the aggregate sum of $5,833.33 which the Government must pay as compensation for the property actually taken (the Hoaeae and Apokaa fisheries) it should be adjudged that Dowsett Co., Ltd. is entitled to share in the sum thus awarded and should receive such portion of said sum as represents (a) the value of its Hoaaina right of piscary in (b) the Hoaeae fishery only.
>
> If an amicable adjustment can be made between the parties hereto the Court will approve such distribution of the said fund as may be agreed to; and this is all the Court at this time can do.

The same court, in the other instances of hoaaina awards, specified that only nominal damages of $1.00 were to be paid. Extracts from the other cases illustrate the court's reasoning: In U.S. v. John Ii Estate (Civil 291)--"But this respondent /owner of hoaaina rights/ has utterly failed to submit any evidence (nor has any showing otherwise been made) of the value, if any, of these hoaaina rights; and accordingly must be and hereby is awarded nominal damages only, in the sum of $1.00." In U.S. v. Bishop (Civil 296)--". . . all the last named respondents claiming hoaaina rights . . . in these various fisheries, recovery of nominal damages only may be awarded them because of an utter failure of proof as to the monetary value (if any) of their several hoaaina piscatorial rights in these various fisheries. No evidence--not the barest scintilla--of the value of these hoaaina rights was adduced at the hearing of this proceeding, and none offered by or on behalf of any of said respondents. It is therefore incumbent on the court to award nominal damages only."

5. Arguments Against Condemnation.

a. Financial.

The cost of financing has been cited as the major obstacle in the condemnation of konohiki fisheries. Appraisals run into the thousands of dollars. In addition to the appraised valuations, the Attorney General in 1939 pointed out that to the cost of any large scale systematic condemnation program, there must be added the preparation of surveys and abstracts to determine the extent and present owners of each fishery, the services of appraisers, and the full-time services of a member of the Attorney General's staff for two or three years. The high cost of any systematic condemnation program has led some to believe that the benefits to be derived will not be commensurate with the cost.

b. Conservation.

Another argument against the condemnation of konohiki fisheries rests on the ground that these private fisheries are our chief if not the only conservation measure against the depletion of fish and other marine sources of food in Hawaii's in-shore areas. A recent editorial appearing in The Honolulu Advertiser (April 13, 1954), in commenting on pending court action to condemn the Nawiliwili fishery, took cognizance of the problem of conservation as it may be related to konohiki fishing:

> The courts can determine only the value of the fishing rights, they have no power to say whether it is wise to open to public exploitation the fishing grounds that heretofore have been safeguarded by konohikis. Removal of this safeguard may have a vital bearing on Hawaii's future fish-food supply.
>
> Owners of fishing rights who are far-sighted--and many of them are--do not allow their fishermen to keep inshore fish that have not reached the spawning stage. . .
>
> Nearly everyone who has lived in the Islands for three or more decades has noticed the rapid decline of the inshore fish food supply.

Against the argument that konohiki fisheries make an important contribution to the conservation of Hawaii's inshore fishing resources, opponents claim that this is but an unorganized and very limited conservation program. They also recognize the need for better conservation measures and claim that the only effective conservation program is one that will be organized and administered by the government on a large, uniform scale.

Unlike the problem of the high cost of condemnation, the question of fish conservation appears to be one that may be resolved by factual investigation. It should be possible to determine if present konohiki fishery practices are more conducive to preserving the Territory's fisheries than those practiced by the public in exploiting public fishing grounds under territorial law and administrative regulation. Whether or not the high cost counterindicates the condemnation of private fishing rights is in good part a subjective matter which can be decided only by the weighing of other competing requests for territorial funds.

APPENDIX A

LAWS OF 1840, CHAPTER III, SECTION 8.
OF FREE AND PROHIBITED FISHING GROUNDS.
1.--OF FREE FISHING GROUNDS.*

His majesty the King hereby takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself.

These are the fishing grounds which his Majesty the King takes and gives to the people; the fishing grounds without the coral reef, viz: the Kilohee grounds, the Luhee ground, the Malolo ground, together with the ocean beyond.

But the fishing ground from the coral reef to the seabeach are for the landlords, and for the tenants of their several lands, but not for others. But if that species of fish which the landlord selects as his own personal portion, should go on to the grounds which are given to the common people, then that species of fish and that only is taboo. If the squid, then the squid only; or if some other species of fish, that only and not the squid. And thus it shall be in all places all over the islands; if the squid, that only; and if in some other place it be another fish, then that only and not the squid.

If any of the people take the fish which the landlord taboos for himself, this is the penalty, for two years he shall not fish at all on any fishing ground. And the several landlords shall give immediate notice respecting said fisherman, that the landlords may protect their fishing grounds, lest he go and take fish on other grounds.

If there be a variety of fish on the ground where the landlord taboos his particular fish, then the tenants of his own land may take them, but not the tenants of other lands, lest they take also the fish tabooed by the landlord. The people shall give to the landlord one-third of the fish thus taken. Furthermore, there shall no duty whatever be laid on the fish taken by the people on grounds given to them, nor shall any canoe be taxed or taboo'd.

If a landlord having fishing grounds lay 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.

If any of the landlords lay a protective taboo on their fish, when the proper fishing season arrives all the people may take fish, and when the fish are collected, they shall be divided--one-third to the fishermen, and two thirds to the landlord. If there is a canoe full, one-third part shall belong to the fishermen and two-thirds to the landlord. If the landlord seize all the fish and leave none for the fishermen, the punishment is the same as that of the landlords who lay a duty on the fish of the people.

---

*Copied from Hawaii's Blue Laws: Constitution and Laws of 1840, Holomua, 1894, pp. 26-28.

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. If the parrot fish, then the parrot fish only; but if some other fish, then that only and not the parrot fish. These are the enactments respecting the free fishing grounds, and respecting the taking of fish.

APPENDIX B

CIVIL CODE OF 1859 AND REVISED LAWS OF 1945
IN RE KONOHIKI FISHING RIGHTS

For the purpose of comparison, the currently effective sections pertaining to konohiki fishing as found in the Revised Laws of Hawaii, 1945 are set forth in the right column alongside the original sections of the Civil Code of 1859.

Civil Code of 1859	Revised Laws of Hawaii, 1945
Section 387. 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 law, be considered the private property of the konohikis, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the said konohikis shall not be molested, except to the extent of the reservations and prohibitions hereinafter set forth.	Sec. 1204. 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 water mark, shall, in law, be considered the private property of the konohikis, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the konohikis shall not be molested, except to the extent of the reservations and prohibitions hereafter in this chapter set forth.
Section 388. The konohikis shall be considered in law 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 konohikis, subject to the restrictions imposed by law.	Sec. 1205. Tenants' rights. The konohikis shall be considered in law to hold the private fisheries for the equal use of themselves and of the tenants on their repsective lands, and the tenants shall be at liberty to take from such 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 such fisheries.
Section 389. The konohikis shall have power each year, to set apart for themselves one given species or variety of fish natural to their respective fisheries, giving public notice, by viva voce proclamation, and by at least three written or printed notices posted in conspicuous places on the land, to their tenants and others residing on their lands, signifying the kind and description of fish which they have chosen to be set apart for themselves.	Sec. 1206. Konohiki's notice of tabu fish. A konohiki shall have the power each year to 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 tabued for the year . . . . Owner or Lessee.

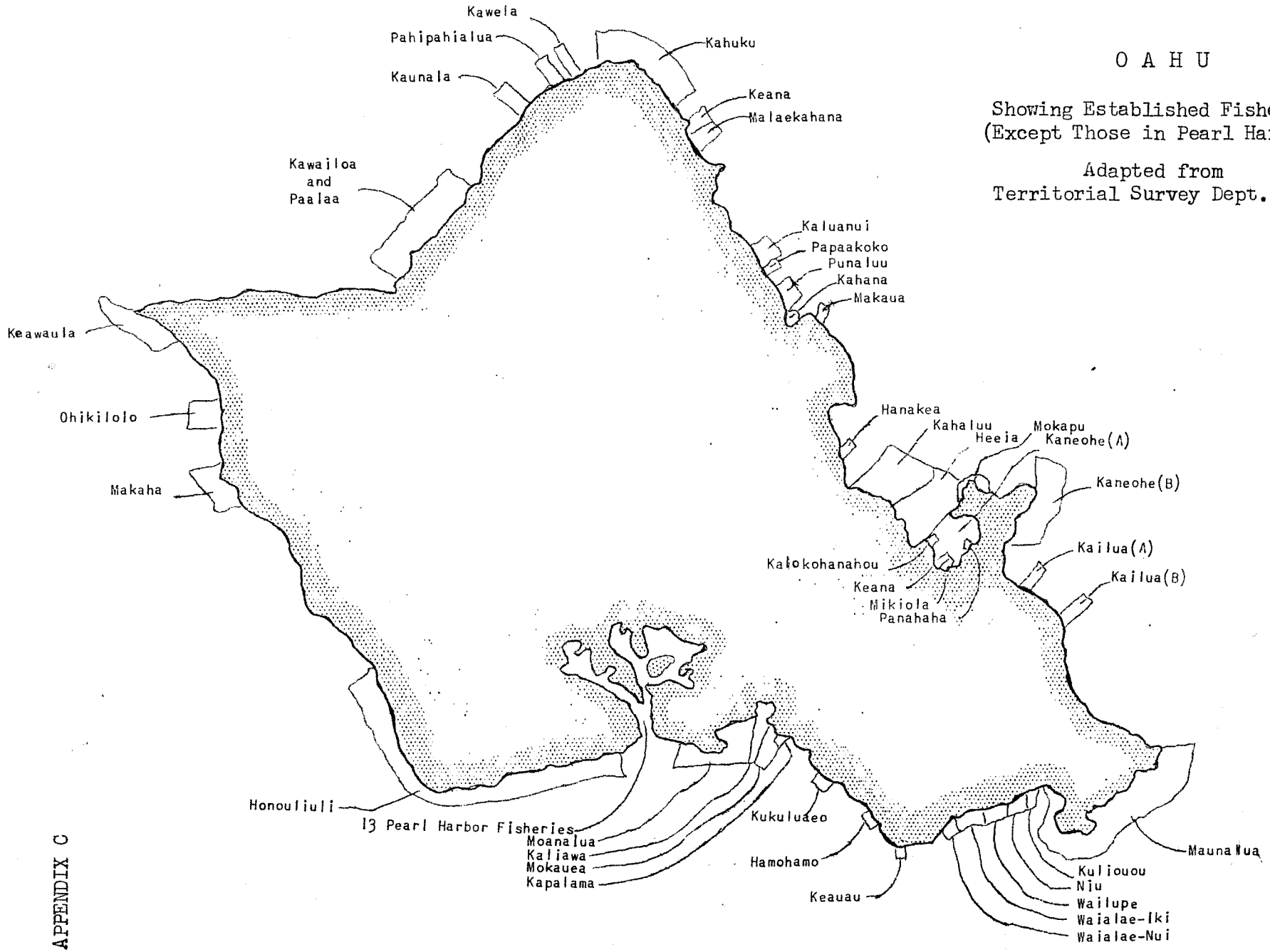
APPENDIX B (Cont.)

Civil Code of 1859	Revised Laws of Hawaii, 1945
Section 390. 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 such reserved fish to their private use, but when caught, such 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.	Sec. 1207. Konohikis' 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 such reserved fish to their private use, but when caught, such 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.
Section 391. The konohikis shall not have power to lay any tax, or to impose any other restriction, upon their tenants, regarding the private fisheries, than is hereinbefore prescribed, neither shall any such further restriction be valid.	Sec. 1208. Restriction on konohikis' rights. The konohikis shall not have power to lay any tax, or to impose any other restriction, upon their tenants, regarding the private fisheries, than is in this chapter before prescribed, neither shall any such further restriction be valid.
Section 392. It shall be competent to the konohikis, on consultation with the tenants of their lands, in lieu of setting apart some particular fish to their exclusive use, as hereinbefore allowed, to prohibit during certain months in the year, all fishing upon their fisheries; and, during the fishing season, to exact of each fisherman among the tenants, one-third part of all the fish taken upon their private fishing grounds. In every such case it shall be incumbent on the konohikis to give the notice prescribed in section 389.	Sec. 1209. Konohikis' right to prohibit fishing. It shall be competent to the konohikis, on consultation with the tenants of their lands, in lieu of setting apart some particular fish to their exclusive use, as in this chapter before allowed, to prohibit during certain months in the year, all fishing upon their fisheries; and, during the fishing season, to exact of each fisherman among the tenants, one-third part of all the fish taken upon their private fishing grounds. In every such case it shall be incumbent on the konohikis to give the notice prescribed in section 1206.
Section 393. No person who has bought, or who may hereafter buy, any Government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person, resident in this Kingdom, over any fishing ground not included in his title, although adjacent to said land.	Sec. 1203. 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 Territory, over any fishing ground not included in his title, although adjacent to such land.

APPENDIX B (Cont.)

Civil Code of 1859	Revised Laws of Hawaii, 1945
Section 394. If that species of fish which has been tabooed by any konohiki, shall go on to the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall be tabooed only when caught within the bounds of the konohiki's private fishery. Nor shall it be lawful for a konohiki to taboo more than one kind of fish upon any fishing grounds which lie adjacent to each other.	Sec. 1210. Tabu fish free, where. If that species of fish which has been tabued by any konohiki shall go on to the grounds which have been, or may be, given to the people, such fish shall not be tabued thereon. It shall be tabued 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 fishing grounds which lie adjacent to each other.
Section 395. Every konohiki or other person who shall wilfully deprive another of any of his legal rights to fish on any fishing ground, which now is, or may become, free to the use of the people, or who shall wilfully exact from another any portion of the fish caught on any public fishing ground, or who shall wilfully exact of another, for the use of any private fishery, a greater amount of fish than by law he is entitled to receive as his share, and any tenant or other person who shall wilfully deprive any konohiki of his fishing rights, by appropriating to himself the tabooed fish of said konohiki, or otherwise, shall be punished by a fine not exceeding one hundred dollars for every such offense, in the discretion of the Court, and in default of the payment of such fine, be imprisoned at hard labor not exceeding three months.	(Sec. 1213.) Violation of rights; penalty. Any person who shall catch and appropriate 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 shall aid or abet such catching and appropriating by others, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding one hundred dollars for each offense.

APPENDIX C


O A H U
Showing Established Fisheries
(Except Those in Pearl Harbor)
Adapted from
Territorial Survey Dept. Map
Kawela
Pahipahialua
Kaunala
Kahuku
Keana
Malaekahana
Kawailoa
and
Paalaa
Kaluanui
Papaakoko
Punaluu
Kahana
Makaua
Keawaula
Ohikilolo
Makaha
Hanakea
Kahaluu
Heeia
Mokapu
Kaneohe(A)
Kaneohe(B)
Kailua(A)
Kailua(B)
Kalokohanahou
Keana
Mikiola
Panahaha
Honouliuli
13 Pearl Harbor Fisheries
Moanalua
Kaliawa
Mokauea
Kapalama
Kukuluaeo
Hamohamo
Keauau
Mauna Lua
Kuliouou
Niu
Wailupe
Waialae-Iki
Waialae-Nui

APPENDIX C (Cont.)

K A U A I

Showing Established Fisheries

Adapted from
Territorial Survey Dept. Map

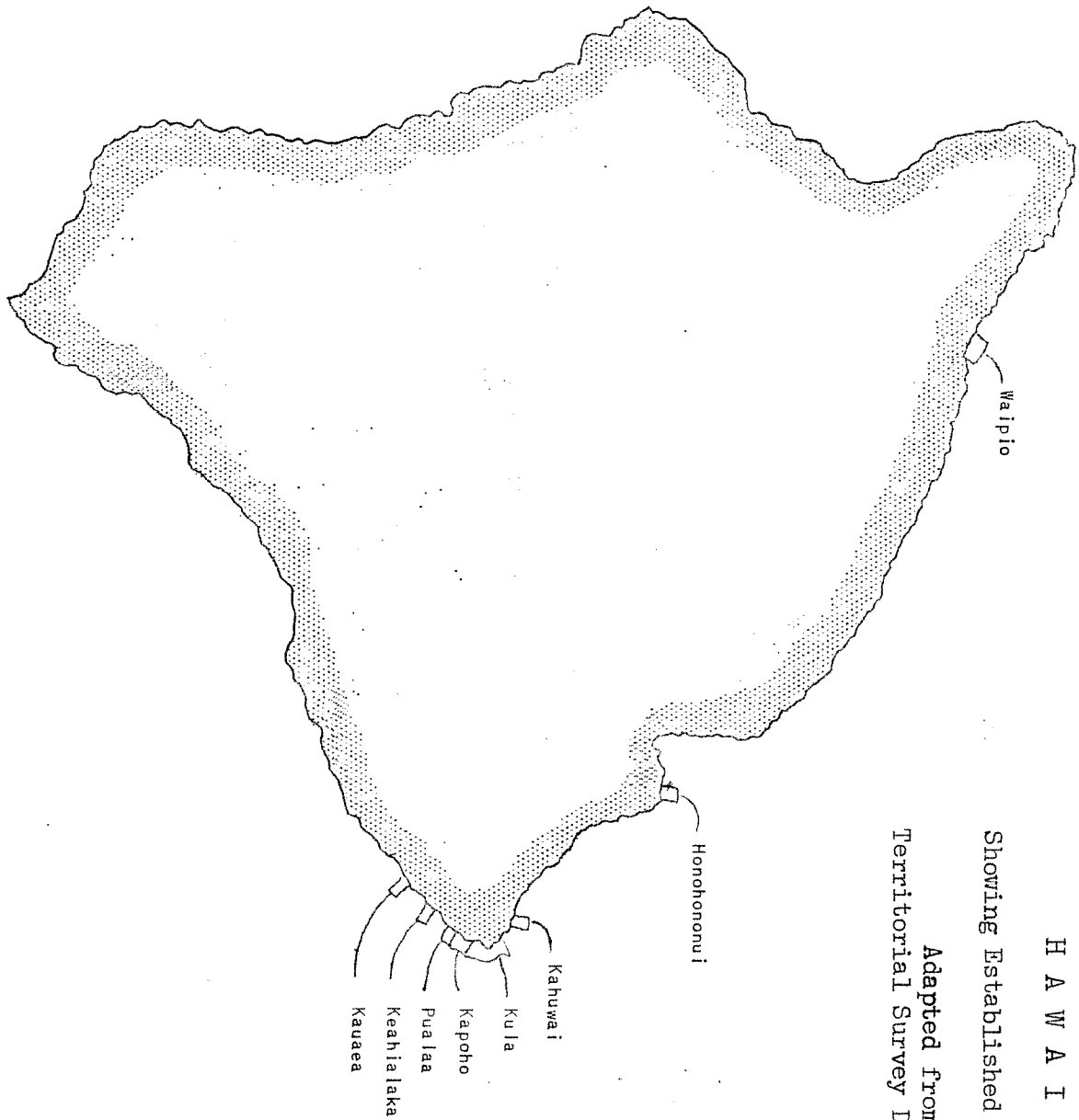
APPENDIX C (Cont.)

M A U I

Showing Established Fisheries

Adapted from
Territorial Survey Dept. Map

Appendix C (Cont.)



H A W A I I

Showing Established Fisheries

Adapted from
Territorial Survey Dept. Map

Appendix C (Cont.)

M O L O K A I

Showing Established Fisheries

Adapted from
Territorial Survey Dept. Map

APPENDIX C (Cont.)

L A N A I

Showing Established Fisheries

Adapted from
Territorial Survey Dept. Map