

Hawaii Navigability Report

Summary

With very few navigable waterways, Hawaii has relatively little state law regarding public rights to waterways and recreation in non-navigable rivers. The only river navigable by boats larger than kayaks is the Wailua River on Kauai. Smaller navigable waterways include the Waimea, Hanape'pe, Lumahai, and Hanalei Rivers.

State Test of Navigability

Hawaiian courts apply one of three different tests of navigability, depending on the contextual relevance to a case: (1) the navigable-in-fact test: if a body of water is navigable-in-fact, *i.e.*, actually navigable, then it is navigable-in-law; (2) the reasonable improvement test: a waterway is navigable-in-law if reasonable improvement will render it navigable-in-fact; and (3) the ebb and flow test: “estuarine tidal areas which are regularly inundated by the mean higher, high tide are subject to the navigational servitude.”¹ As one exception, however, courts do not apply navigability tests to fishponds because of their unique legal status in Hawaii as protected private property.²

Extent of Public Rights in Navigable and Non-Navigable Rivers

Hawaii’s Constitution mandates that state bodies of water, including navigable rivers and streams, be protected in a public trust for its citizens.³ Hawaii's Supreme Court affirmed the public trust doctrine in a 2000 decision on the diversion of water for private use, finding that the state had the right “to maintain the purity and flow of [its] waters for future generations”⁴ and holding that “[t]he public trust doctrine applies to all water resources without exception or distinction.”⁵ However, the law in Hawaii is silent on streambed ownership.

Hawaiian law places some limits on the public trust provisions of the Hawaiian Constitution that otherwise allow broad access to state waterways. Among them, state law provides that “no person shall anchor, moor, or otherwise place any vessel, houseboat, or other contrivance on or within the ocean waters or navigable streams of the state without a permit from the [Department

¹ United States v. Kaiser Aetna, 408 F. Supp. 42, 49–50 (D. Haw. 1976), *aff'd in part & rev'd in part*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 444 U.S. 164, 100 (1979).

² *Id.*

³ Haw. Const. art. XI, § 1 (“For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water..., air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.”).

⁴ *In re Water Use Permit Applications*, 94 Haw. 97, 129 (2000).

⁵ *Id.* at 133.

of Land and Natural Resources].”⁶ However, this statute provides an exception for “pleasure craft or fishing vessels temporarily anchored for a period of less than seventy-two hours.”⁷

Miscellaneous

Several government agencies oversee Hawaii’s navigable waterways. Hawaii has created a commission for the protection of in-stream flows for purposes such as recreation.⁸ The Department of Land and Natural Resources (“DLNR”) is responsible for overseeing and regulating activities on Hawaii's navigable waterways.⁹ The DLNR and the Division of Boating and Ocean Recreation are responsible for, among other things, removing non-natural obstructions and public safety hazards, adopting safety measures, and licensing commercial activities on navigable waterways.¹⁰ For more information, visit the DLNR and the Division of Boating and Ocean Recreation websites at www.hawaii.gov/dlnr and <http://dlnr.hawaii.gov/dobor/>, respectively.

⁶ Haw. Rev. Stat. § 200-6(b) (1991).

⁷ *Id.* § 200-6(b)(3).

⁸ *See Id.* § 171 (2008).

⁹ *See Id.* §§ 200-4, 200-6 (2012).

¹⁰ *See Id.* § 200-3 (2012).