

## INDIGENOUS WATER RIGHTS HAWAIIAN STYLE

In the matter of the water use permit applications, petitions for interim instream flow standard amendments and petitions for water reservations for the Waiahole Ditch Combined Contested Case Hearing

NO. 21309

Appeal from the Commission on Water Resource Management

(CASE NO. CCH-0A95-1)

Supreme Court of Hawai'i, 22 August 2000

### INTRODUCTION

The Hawaiian Supreme Court, a jurisdiction that has embraced and nurtured indigenous rights of Native Hawaiians and declared that in relation to water resources the State of Hawaii, "bears an additional duty under Article XII, section 7 of its constitution to protect traditional and customary Native Hawaiian rights,"<sup>1</sup> handed down an appeal decision against the State of Hawaii's Commission on Water Resources Management (the Commission). The Court, in interpreting the public trust doctrine, by which the State holds all water resources for the benefit of the public, has emphasized that the Hawaii Revised Statutes (HRS) Ch174C pt IV (1993 & Supp 1999) ("Regulation of Water Use") recognise "the policy of comprehensive resource planning intrinsic to the public trust concept."<sup>2</sup>

Importantly, the Court noted the "dual nature" of the state's water resources trust and held that HRS\Ch 174C-2 (c)

Mandates liberal interpretation in favour of maximum beneficial use, but also demands adequate provision for traditional and customary Hawaiian rights, wildlife, maintenance of ecological balance and scenic beauty, and the preservation and enhancement of the waters for various uses in the public

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<sup>1</sup> P 63 of judgment. This note is based on the judgment as filed by the Court, 22 August 1999.

<sup>2</sup> *Id.* 73

interest.<sup>3</sup>

#### **Facts of the Case<sup>4</sup>**

The case came about as a result of the Commission designating four aquifer systems as ground water management areas and requiring permits for "existing uses" be issued within one year of designation, under HRS 174C-50(c) 1993.

The Waiahole Ditch System collects fresh surface water and dike-impounded ground water from the Ko'olau mountain range on the windward side of the island of O'ahu and delivers it to the island's central plain. The system involves adits and tunnels and exits the Ko'olau on the leeward side at Adit 8. At Adit 8 the system develops approximately 27 million gallons a day (mgd) of fresh water.

The ditch system was built in significant part from 1913 to 1916 to irrigate a sugar cane plantation owned and operated by the Oahu Sugar Company Ltd. (OSCo), until the plantation closed in 1995. In addition to the Waiahole ditch water the plantation used significant amounts of ground water pumped from the Pearl Harbour Aquifer. At the time of this appeal various leeward parties retained but were not using well permits to pump approximately 53 mgd of leeward ground water.<sup>5</sup>

The island of O'ahu receives most of its rainfall on the windward side of the Ko'olau Mountain range. The windward streams affected and diverted are Waiahole, Waianu, Waikane and Kahana streams.

After preliminary proceedings involving some six interested parties were completed, the Commission releases a proposed decision to which the parties submitted written and oral exceptions. Whilst the Commission was considering its final decision, the State Governor and Attorney General publicly criticised the proposed decision as inadequately providing for leeward interests.

The final decision, however, differed significantly from the proposed decision by increasing the amount of water allocated to leeward permittees by 3.79 mgd.

#### **Hawaii Supreme Court's reaction to the Commission's decision<sup>6</sup>**

The Hawaii Supreme Court was critical of the final decision. The Court noted that whilst the Commission increased the combined base flow of Waiahole and Waianu Streams to 10 mgd, the Commission made no mention nor provision for the instream flow of Waikane Stream.

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<sup>3</sup> *Id.* Pp 3-5

<sup>4</sup> These are the facts from the "Background" section of the judgment pp 3-5

<sup>5</sup> *Id.* p. 4

<sup>6</sup> *Id.* pp. 9-19

The Commission noted it was yet to designate Kahana Stream as a surface water management area and that the 2.1 mgd of “non-regulated” Kahane surface water drawn is by the ditch to replace operational losses. The Commission proffered that in the future, post designation, it might continue to deduct the operational losses from non-permit ground water.<sup>7</sup>

The Commission preliminarily found that “2,500 gallons per acre per day (gad) is a reasonable level of water” for diversified agriculture. That is 2,500 gallons per acre per day of irrigation water. The figure was left open to future evaluation and adjustment. On this basis the Commission set aside a total of 12.22 mgd for “agricultural purposes” and 1.29 mgd for “other” uses. The 12.22 mgd consisted of 10 mgd for former OSCo sugarcane lands currently used for diversified agriculture and 2.22 mgd for Castle’s agricultural lands.

Other uses included uses by a state prison, a cemetery and two golf courses accounting for 1.29 mgd. A non-permitted “ground water buffer” of 5.39 mgd was intended for initial release in the Windward streams but available for off stream use as a secondary source after the 1.58 mgd proposed reserve.

The Commission also announced its plan to establish technical advisory committees to assess the implementation schemes and to consider conservation and other measures. Parties receiving Waiahole Ditch water would be required to contribute funds on a pro rata basis to the studies to be carried out.

In all, of the 27 mgd flow of the ditch, as measured at Adit 8, the Commission assigned 14.03 mgd to permitted leeward agricultural and non-agricultural uses. The Commission released 12.97 mgd in the windward streams. However 6.97 mgd remained available for offstream leeward purposes.

## THE APPEAL

### Facts reviewable

This review focuses on native water rights issues only, leaving out for example, interesting administrative legal and constitutional issues. The Hawaii Supreme Court considered the standard for review in light of Hawai’i precedent. In Hawai’i the Supreme Court is empowered to protect the rights of the citizenry and is empowered to review findings of fact in light of the whole record.<sup>8</sup>

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<sup>7</sup> P. 19

<sup>8</sup> Compare this high level of judicial responsibility with the refusal to review findings of fact by the Australian Federal Court in Native Title Registration matters: *Powder Family v Registrar, NNTT*, (1999) 4 AILR pp. 33-40

## The Public Trust Doctrine

The Court discussed at length this important doctrine of United States common law and its application to the State water code. It is this discussion that allows the Court to canvas the notion of the public trust in comparative terms with other United States jurisdictions and to define its substance in Hawaii.

In relation to Hawaii, the Court noted the rights of native Hawaiians to water rights from the time of the Kingdom and their later expansion to the general public. The Court states:

In acknowledging the general public's need for water, however, we do not lose sight of the trust's "original intent." As noted above, review of the early law of the kingdom reveals the specific objective of preserving the rights of native tenants during the transition to a western system of private property.....In line with this history and our prior precedent,..... we continue to uphold the exercise of native Hawaiian and traditional and customary rights as a public trust purpose.<sup>9</sup>

The Court went to some lengths to address the powers and duties of the State under the Trust. Citing the state constitution's definition of conservation, which is "the protection, improvement and use of natural resources according to principles that will assure their highest economic or social benefits;<sup>10</sup>" (Court's emphasis) the Court noted: "the object is not maximum consumptive use, but rather the most equitable, reasonable and beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use'.<sup>11</sup>"

This led the Court to an in depth discussion of the California case of *National Audubon Society v Superior Court of Alpine County*<sup>12</sup> the leading United States case on water allocation. The Court noted that the *National Audubon* case "sought to assert the public trust against a water rights system equating nonconsumptive use with 'waste'.<sup>13</sup>" At this juncture the Court noted: "Unlike California, this state bears an additional duty under Article XII, section 7 of its constitution to protect traditional and customary Native Hawaiian rights.<sup>14</sup>"

This analysis prefaced a long holding by the Court confirming the fundamental principles embodied in the Public Trust doctrine as regards

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<sup>9</sup> *Id.* at 56-57

<sup>10</sup> *Id.* at 61

<sup>11</sup> *Id.* at 61-62

<sup>12</sup> *Id.* at 62 – 658 P.2d 709 (Cal), cert denied, 464 US 977 (1983) otherwise known as the *Mono Lake* case

<sup>13</sup> *Id.* at 63

<sup>14</sup> *Id.*

water in Hawaii.<sup>15</sup> An aspect of this holding is that:

...Insofar as the public trust, by nature and definition, establishes use consistent with trust purposes as the norm or “default” condition, we affirm the Commission’s conclusion that it effectively prescribes a “higher level of scrutiny” for private commercial uses such as those proposed in this case. In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust.<sup>16</sup>

### Interpreting the Water Codes

A party (DOA/DNLR) asserted in the hearings that “maximum beneficial use” expressed a preference for “consumptive uses such as agriculture” over instream uses. The Court found to the contrary.<sup>17</sup> “this provision does not dictate maximum consumptive use, but instead requires maximum beneficial use for the range of purposes described, with the condition that, ‘adequate provision shall be made’ for various protective purposes,” said the Court.

### Instream flow standards

The protection of instream flow standards was a major part of another party’s case. To restore water to native Hawaiian uses and, it was asserted, assist in regeneration of the offshore environment in the Kane’ohe Bay region. The Court found that the instream flow standards were the primary mechanism by which the Commission was to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flow. Yet the Commission had no firm standards upon which to operate.

The Court found the Commission had misconstrued its analysis in considering applications for increased instream flow levels as “competing applications”. The protection of instream use was covered by a statute operating independently of the procedure for water regulation under HRS 174C part IV (1993 & Supp. 1999).<sup>18</sup>

The Court firmly directed that as the closure of OSCo had provided a window of opportunity for reassessment of water needs in Central O’ahu,

The Commission should thus take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.<sup>19</sup>

Further, (DOA/DLNR) objected to the Commission amending the interim flow standards of the windward streams upwards. The Court found for the

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<sup>15</sup> *Id* at 64 - 69

<sup>16</sup> *Id* at 67

<sup>17</sup> *Id* at 73

<sup>18</sup> *Id* at 77

<sup>19</sup> *Id* at 80

Commission, holding:

(This party) objects to the amendment of interim standards based on less than conclusive evidence, but insists on keeping the 1992 standards, which lack any evidentiary basis. This proposition strains the overall purpose of the Code as well as the limits of reason. We thus affirm the Commission's determination that the Code allows the amendment of interim flow standards.<sup>20</sup>

### Over allocation

The Court viewed with distaste the Commission's reliance on the precautionary principle to allocate "close to the least amount of instream use protection practicable under the circumstances"<sup>22</sup> the Court exposed the "faulty logic" of the Commission that had resulted in such low instream flow standards and noted that, "the Code also obligates the Commission ensure that it does not "abridge or deny" traditional and customary rights of Native Hawaiians."<sup>24</sup>

After a thorough scolding of the Commission the Court stated: "Nothing in the Code authorises such a measure;" as the Commission's designation of the 5.39 mgd as an available "nonpermitted ground water buffer" The Court stated: "We have rejected the idea of public streams serving as convenient reservoirs for offstream private use" declaring: "Nonetheless, the buffer achieves that very result, insofar as it reverses the constitutional and statutory burden of proof and establishes a working presumption against public instream uses."<sup>25</sup>

The Court here took a principled stand that the Commission only had the ability to designate necessary flows not to "guestimate" possibilities and promote "buffers" that are not presently required. This principle underlies the reminder of the Court's findings and vacations of the Commissions decisions. The Court is firm in interpreting the Code to permit the Commission to supply current requirements only.

The Court remanded the Commission decision on Waikane stream noting that, "Nothing in the decision indicates that the Commission considered the practicability of restoring flows to the Waikane Stream.

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<sup>20</sup> *Id* at 84

<sup>22</sup> *Id* at 93

<sup>24</sup> *Id* at 89 – the Court noted that this included preserving appurtenant rights, citing precedent.

<sup>25</sup> *Id* at 93

The lack of firm evidence as a basis for the Commission's decisions greatly disturbed the Court which is left with the task of exhorting the Commission to undertake firm scientific research:

We are troubled, therefore, by the Commission's permissive view towards stream diversions, particularly while the instream flow standards remain in limbo. Such an approach contradicts not only the Commission's own findings and conclusions, but also the law and logic of water resource management in this state.<sup>26</sup>

The Court seized the opportunity to revisit the old common law "absolute dominion" doctrine in relation to a land owner's right to underground water on his land which two parties to the proceedings argued. The Court overruled a series of old cases that had upheld the "absolute dominion rule" for certain ground water categories<sup>27</sup> and declared that correlative rights extend only to uses on lands overlying the water source. The Court further qualified this finding to note that correlative rights only grant overlying landowners "such water as necessary for reasonable use."<sup>28</sup> In the event both parties were declared to have no existing correlative uses and hence no superior rights as they had claimed.<sup>29</sup>

## CONCLUSION

The Court noted in its conclusion that the Commission considered that, "by the year 2020, water demand for projected growth in O'ahu will exceed the remaining ground-water resources of the island."<sup>30</sup> The Court urged the Commission and the parties to consider this fact and to engage in planning with a view to the future. The Court stated that it has rendered this decision with utmost care and that apart from those decisions it had specifically vacated or remanded, the Commission's decisions were confirmed.

### Trans-pacific ramifications

The relevance of this case to water management planning around the Pacific is not to be ignored. In a dry continent such as Australia is behoves State and Federal government water management authorities to consider the regulatory regimes in place now in Hawaii in light of native title considerations in this country. Many of the regulatory hurdles are being bridged in Hawai'i before they have arisen in Australia and despite constitutional differences, the similarities of indigenous rights are a unifying reality.

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<sup>26</sup> *Id* at 102

<sup>27</sup> *Id* at 139

<sup>28</sup> *Id* at 140

<sup>29</sup> *Id* at 143

<sup>30</sup> *Id* at 161

### **Relevance of the case to Queensland**

Water management, including artesian and sub-artesian ground water supplies, is particularly important in the dry west of Queensland, where the native title rights of Aboriginal peoples are threatened by over allocation of ground water resources. The diminution of ground water resources in the Great Artesian Basin and other artesian sources effects, for example, the longevity of springs and soaks after the wet season.

As the discharge rate of the artesian water sources far exceeds the recharge rate (due to agricultural and mining use of millions of litres everyday), the ground water dries up more rapidly after the wet, and soaks and springs likewise disappear due to this imbalance in the discharge/recharge rate. Without this surface ground water it is difficult to exercise native title rights on country; that is without access to traditional water sources. Aboriginal peoples should have direct input into all water license/use arrangements in their domains and should be compensated for all water uses that diminish their ability to exercise their native title rights. This is the position in Papua New Guinea where legislation provides compensation for loss of traditional water rights resulting from non-traditional users.<sup>32</sup>

Australia is so close to Hawaii and yet so lamentably far behind its neighbour in the jurisprudence of indigenous affairs.

Peter Poynton  
Barrister-at-Law  
Star Chambers  
Cairns

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<sup>32</sup> See *Water Resources Act* (PNG) c205, s16