

No. SCAP-30603

IN THE SUPREME COURT OF THE STATE OF HAWAII

Electronically Filed
Supreme Court

ʻĪao Ground Water Management Area
High Level Source Water Use
Permit Applications and
Petition to Amend Interim Instream
Flow Standards of Waiheʻe, Waiehu,
ʻĪao, & Waikapū Streams
Contested Case Hearing

CWRM Case No. CCH-MA06-01
APPEAL FROM THE COMMISSION
ON WATER RESOURCE
MANAGEMENT'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER DATED
JUNE 10, 2010

SCAP-30603

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**APPELLEE/CROSS-APPELLANT COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY'S UNIFIED REPLY BRIEF**

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**APPELLEE/CROSS-APPELLANT COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY'S UNIFIED REPLY BRIEF**

COMES NOW Appellee/Cross-Appellant COUNTY OF MAUI, Department of Water Supply ("County"), by and through its attorneys, PATRICK K. WONG, Corporation Counsel, JANE E. LOVELL, Deputy Corporation Counsel, and JON M. VAN DYKE, Special Counsel, and hereby submits its Unified Reply Brief. This reply brief addresses two points made in the answering brief of Hui O Na Wai Eha and Maui Tomorrow ("Appellants") as shown below. As for all other points, County stands on the arguments and authorities in its Opening Brief and by not addressing such points further here, does not intend to waive any such arguments.

I. ARGUMENT

A. The Appellants Failed To Raise The Issue Below

The Answering Brief filed by Appellants Hui O Na Wai Eha and Maui Tomorrow, which was joined in by Appellant Office of Hawaiian Affairs, argues that the County's use of stream water to provide water to the public is not entitled to consideration under the public trust doctrine because it is not for "domestic use" as Appellants choose to narrowly define that term. Appellants ignore the fact that the Commission on Water Resource Management ("CWRM") made specific factual findings that the County's withdrawals from the Iao-Waikapu Ditch were for domestic use: "In addition to water from the Iao Tunnel (Well No. 5332-02), MDWS receives water from the Iao-Waikapu Ditch, which is treated at its Iao Water Treatment Facility for domestic use." ROA Doc. No. 192, Finding of Fact No. 238, Bates p. 12755. CWRM also found that

the majority of the County's water use is for domestic uses of the general public, a public trust purpose: "At least the majority of MDWS's uses are for 'domestic uses of the general public,' another public trust purpose. COL 13, supra." ROA Doc. No. 192, Finding of Fact No. 240.(b), Bates p. 12893. CWRM's decision recognized that among the public trust purposes are "domestic water use of the general public": "The purposes of the water resources trust are . . . 2) domestic water use of the general public" ROA Doc. # 192, COL No. 13, Bates p. 12831.

In other words, CWRM found, both as a matter of fact and a matter of law that the County's uses were domestic uses that serve a public trust purpose. CWRM did not draw any distinction between individual withdrawals for domestic use and the County's withdrawals to serve a larger number of domestic users. Moreover, Appellants did not cite to any place in the record where they objected to any of these findings or conclusions. Therefore, they are foreclosed from objecting now. Even if they had properly preserved their objections on the record, however, the Appellants' legal analysis is flawed, as shown below.

B. CWRM Was Correct In Finding That The Distribution of Stream Water For Public Domestic Use By The County of Maui's Department of Water Supply Is Consistent With The Public Trust Doctrine.

In In the Matter of Water Use Permit Applications . . . for the Waiahole Ditch Combined Contested Case Hearing (Waiahole I), 94 Hawaii 97, 137, 9 P.3d 409, 449 (2000), this Court recognized that "domestic water use" of the general public is among the "purposes of the state water resources trust." At

page 3 of the Answering Brief, Appellants argue that the County’s Department of Water Supply has wrongfully sought to “shoehorn its municipal offstream diversions . . . into the definition of ‘domestic’ uses.” The Appellants’ brief then offers a very brief summary of Hawaii water law, which is misleading in key respects. Although some Hawaii opinions refer to the riparian system as providing the underlying concepts governing water rights in Hawaii, Hawaii has never adhered strictly to this system, and Hawaiian law has never limited the definition of “domestic use” in the fashion argued by Appellants.

In Peck v. Bailey, 8 Haw. 658 (1867), this Court permitted those with appurtenant rights to water to use water to irrigate taro fields. Because the Court noted that riparian principles had “very little practical application to this case,” *id.* at 670, the Court’s discussion of riparian rights in Peck may be considered to be dicta. Carter v. Territory, 24 Haw. 47 (1917), was the first reported decision of this Court to adjudicate riparian rights, but Carter was restricted by Territory v. Gay, 31 Haw. 376, 398 (1930), which found that Carter had not adjudicated riparian rights with respect to the normal surplus flow of the stream. In Gay, the Court ruled that such waters could be diverted to lands beyond the primary watershed, to ensure that such waters would not be “unused and wasted.” The opinion written by Chief Justice Perry criticized the Carter decision as being based on reasoning that would “endanger the foundation of the whole Hawaiian system and perhaps eventually the system itself.” *Id.* at 403. More recently, this Court explained in Waiahole I that under

the ancient Hawaiian system, “diversions of water out of watershed boundaries were allowed in certain cases.” 94 Hawai‘i at 142 n.42, 9 P.3d at 454 n.42.

The Gay opinion defined the term “domestic” water broadly, to include water for animals as well as for humans, and also referring to “other domestic purposes.” Id. at 395. More recently, this Court recognized in Waiahole I that water for the Waiawa Correctional Facility could be characterized as serving a “domestic” purpose. 94 Hawai‘i at 140 n.37, 9 P.3d at 452 n.37.

The Kingdom and Territorial cases were, of course, reexamined in McBryde Sugar Company v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973), aff’d on reh’g, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed and cert. denied, 417 U.S. 962 (1974), and were eventually superseded by Hawaii’s Water Code. But the confusing back and forth nature of Hawaii’s early decisions on water rights refute the assertion by Appellants at page 4 of their Answering Brief that Hawaii had “a settled, black-letter rule of water law.” Hawaii’s water law was hotly-contested for decades, and only now is being brought to some order through the Water Code, the rulings of the Commission on Water Resource Management, and the decisions of this Honorable Court.

Appellants assert that the County of Maui’s Department of Water Supply is trying to “resurrect the argument the California Supreme Court rejected in” National Audubon Society v. Superior Court, 33 Cal.3d 419, 658 P.2d 709, 189 Cal.Rptr. 346 (1983), but as this Court explained in Waiahole I when discussing Audubon, the public trust in Hawaii’s water resources has a “dual nature;” that “practical requirements” must be considered in allocation

decisions; and that “the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection.” 94 Hawaii at 140-41, 9 P.3d at 452-53.

Finally, in light of Hawaii’s unique history, importation of water law developed in other jurisdictions is of limited utility. Whatever the “black letter law” in California or New Jersey is, in Hawaii, the state Constitution, the state Water Code, the Commission on Water Resource Management’s administrative rules, and the most recent pronouncements of this Court on the subject govern this case.

The County acknowledges that it, “like other offstream diverters, must bear the obligation of justifying its own uses in light of the purposes protected by the trust,” Appellants’ Answering Brief at 6. However, the Department of Water Supply’s distribution of water to the residents of Maui County must be viewed as part of the public trust and must be given a priority over certain other uses, particularly those of a commercial character. The Department of Water Supply is, after all, ultimately overseen by elected officials who make decisions as representatives of the voters and residents of Maui. In making such decisions, Maui’s elected officials must balance the competing needs of Maui’s natural environment with the domestic requirements of its residents, much as the Commission on Water Resource Management does. The County has throughout this contested case and appeal repeatedly supported the return of water to all of the streams of Na Wai Eha, including Iao and Waikapu Streams. At the same time, however, the County has the responsibility to


ensure adequate water to the County's residents who depend on the County's water system. The County's decisions involving water distribution – made after accommodating competing claims to water – serve the public trust purposes underlying Hawaii's water law, as the Commission on Water Resource Management acknowledged in its decision. ROA Doc. No. 192, Finding of Fact Nos. 238, 240(b), Bates pp. 12755, 12893; COL No. 13, Bates p. 12831. The Commission's findings in this regard are entitled to due deference.

II. CONCLUSION

Therefore, for the reasons stated above, the County of Maui's Department of Water Supply requests that should this Court reach the issue, it uphold the finding of the Commission on Water Resource Management that the County's Department of Water Supply serves the "domestic uses of the general public,' and that such domestic use is a 'public trust purpose'." ROA Doc. No. 192, Finding of Fact No. 240.(b), Bates p. 12893.

DATED: Wailuku, Maui, Hawaii, July 25, 2011.

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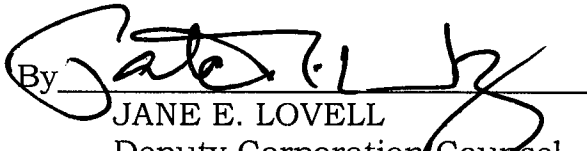
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