No. 30006

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

In the Matter of the Application	)	APPLICATION NO. 1095
	)	
of	)	L.C. Case No. 08-1-0054
	)	
TRUSTEES UNDER THE WILL OF THE ESTATE OF JAMES CAMPBELL, DECEASED	)	LAND COURT
	)	
	)	HONORABLE GARY W. B. CHANG, JUDGE
to register and confirm title to land situate at Kahuku, District of Koolauloa, City and County of Honolulu, State of Hawaii	)	

REPLY BRIEF OF THE STATE OF HAWAII TO BRIEF AMICUS CURIAE

and

CERTIFICATE OF SERVICE

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I. INTRODUCTION

The question presented by this appeal is whether land court registration of private property can extinguish the State of Hawaii's[1] reservations of minerals and metallic mines, including geothermal rights, and an easement for the free flowage of water in Appellees' property.[2] The answer is no. This case involves the public trust and the unique history of land tenure in Hawaii, both of which provide long standing rules and settled expectations that pre-date, and are not altered by, the land court registration system.

II. ARGUMENT

A. There are Limitations to Land Court Registration

PLF's entire argument is that the State lost its claim to minerals and metallic mines when it failed to assert its interest in the 1938 land court registration proceeding.[3] PLF's Amicus Br. at 4. While it is true that the land court statute states that: "Every decree of registration of absolute title shall bind the land, and quiet the title thereto, subject only to the exceptions stated in section 501-82," the statute provides exceptions. HRS § 501-71. Section 501-82, HRS, states that: "Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good

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[1] Parties. Petitioner-Appellee James Campbell Company LLC, a Delaware limited liability company, owns Lot 1219 as shown on Map 176. Petitioners-Appellees Continental Pacific, LLC, a Delaware limited liability company, and James C. Reynolds, Inc., a California corporation, own Lot 1218 on Map 176. Petitioners-Appellees are jointly referred to as Appellees. Respondent-Appellant State of Hawaii is referred to as the State. Amicus Curiae Pacific Legal Foundation is referred to as PLF.

[2] The State files this reply to the brief amicus curiae filed by PLF pursuant to the Court's order of May 24, 2010.

[3] PLF starts by assuming that the State's "predecessor did not convey- or reserved to itself – mineral and mining rights." PLF's Amicus Br. at 1. All land not awarded or granted remains public land. Kobayashi v. Zimring, 58 Haw. 106, 115, 566 P.2d 725, 731 (1977). Therefore, the State's reply to PLF starts with the assumption that the Territory of Hawaii owned all minerals and metallic mines, including geothermal rights for Lots 1218 and 1219 in 1938.

faith, hold the same free from encumbrances except those noted on the certificate in the order of priority of recordation, and any of the following encumbrances, which may be subsisting..." HRS § 501-82. Section 501-81, HRS, states that: "Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land."[4]

Courts have also carved out exceptions to land court registration. See Hemni Apartments, Inc. v. Sawyer, 3 Haw. App. 555, 558-59, 655 P.2d 881, 884-85 (1982) ("We recognize that HRS § 501-82 (1976) evidences a policy against unregistered encumbrances upon Land Court registered land. However, we disagree with the Sawyers' contention that such encumbrances may never arise. It is well-settled in this jurisdiction that a valid unregistered easement on Land Court registered land may be implied under certain facts and circumstances."); Application of Sanborn, 57 Haw. 585, 591, 593, 562 P.2d 771, 775, 776 (1977) ("Our [land court] statute states certain exceptions to the conclusiveness of land court decrees in both HRS § 501-82 and in HRS § 501-71 ... Such stated exceptions are not necessarily the sole limitations upon a Torrens decree of registration. ... In Hawaii, the public trust doctrine, recognized in our case law prior to the enactment of our land court statute, can similarly be deemed to create an exception to our land court statute, thus invalidating any purported registration of land below high water mark."); Swan Island Club, Inc. v. Yarbrough, 209 F.2d 698 (4th Cir. 1954) (based on

[4] PLF wrongly argues that the State's reservation of minerals and metallic mines pursuant to HRS § 501-81 has no legal support. PLF's Amicus Br. at 7. Specifically, HRS § 501-81 provides that "Nothing in this chapter shall in any way be construed to relieve registered land or the owners thereof ... or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land." The State claims that land courted property is subject to the public trust (free flowage of water) and other laws of the State of Hawaii (e.g., requiring that original land grants be awarded subject to a reservation of minerals and metallic mines in favor of the government). State's Opening Br. at 29-30.

the court's declared public policy that navigable waters and the land beneath it are held in trust by the state, they are exceptions to the Torrens Act); Echols v. Olsen, 347 N.E. 2d 720 (Ill. 1976) (judgment creditor who registered its judgment with registrar of titles could not attach its interest to the property that judgment debtor had previously deeded to a transferee who had not registered the deed); Jackson v. Knott, 640 N.E. 2d 109, 113 (Mass. 1994) ("If an easement is not expressly described on a certificate of title, an owner, in limited situations, might take his property subject to an easement at the time of purchase: (1) if there were facts described on his certificate of title which would prompt a reasonable purchaser to investigate further other certificates of title, documents, or plans in the registration system; or (2) if the purchaser has actual knowledge of a prior unregistered interest."); Daly v. Town of Swampscott, 421 N.E. 2d 78 (Mass. 1981) (land was registered subject to the town of Swampscott's prescriptive rights in beach property for public purposes); Puffer v. City of Beverly,187 N.E. 2d 840 (Mass. 1963) (public landing place established by immemorial usage was excepted from a registration of title); Armstrong v. Lally, 296 N.W. 405 (Minn. 1941) (mechanic's lien attached to Torrens Act registered land upon commencement of improvements, the same as would a mechanic's lien for land not registered under the Torrens Act. Mechanic's lienholder had superior rights to an intervening registered mortgage.); Baart v. Martin, 108 N.W. 945 (Minn. 1906) (court applied general equitable principles to find an implied exception to the Minnesota Torrens Act which did not have an exception for fraud. "It has often been held that the general terms of a statute are subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences."). Therefore, while the fundamental objective of the land court registration system is to afford certainty, there are inherent limitations.

PLF places the blame entirely on the Territory of Hawaii for failing to assert its mineral and metallic mines reservation in the 1938 land court proceeding. PLF's Amicus Br. at 7. The Application for land court registration filed by Appellees' predecessor in title in 1934 also failed to separately identify the Territory's reservation of minerals and metallic mines as an encumbrance. ROA at 88 (Campbell's Supp. Mem., Ex. A at 61) ("That they do not know of any mortgage or encumbrance affecting said land or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion or expectancy, except as follows:..." Minerals and metallic mines were not listed). Both the Application and the Original Certificate of Title, however, described the land being registered by the original land grants. ROA at 88 (Campbell's Supp. Mem., Exs. A, N). At the time of the original land grants, minerals and metallic mines were not being awarded by the King or the Hawaiian government.[5]

> No person holding a certificate of title to registered land ought to acquire title to land not intended to be purchased and conveyed, and for which no consideration was paid, solely on the ground that the basic purpose of the Torrens registration procedure precludes a challenge to the title of lands described in the certificate of registration except in cases of lack of jurisdiction or fraud. This case represents no more than a correction of an error admittedly committed during the registration proceedings. To permit [Appellees] to maintain their registered title to the [State's reserved interests] would exploit the title registration law and would accomplish a manifest injustice.

Estate of Koester v. Hale, 211 N.W.2d 778, 782 (Minn. 1973).

Although the State does not rest its entire claim to a mineral and metallic mines reservation on the case of Application of Robinson, 49 Haw. 429, 421 P.2d 570 (1966), as PLF asserts, the case lends further support to the State's position. PLF's Amicus Br. at 7; State's Opening Br. at 16-17; State's Unified Reply Br. at 6. In Robinson, mineral rights were found to

[5] PLF incorrectly states that the only original grantor of land was the King. PLF's Amicus Br. at 3, 7 fn.3. Appellees' property was originally awarded by either the King, by Kamehameha Deed, or the Hawaiian government, by Royal Patent. State's Opening Br. at 15-17.

be self effectuating by virtue of the original land grant, a Royal Patent. Id., 49 Haw. at 440, 421 P.2d at 577. Thus, the Supreme Court held that reservations of mineral rights set forth in Royal Patents are valid and must be reflected in the land court decree. Id., 49 Haw. at 441, 421 P.3d at 577. The land court erred in failing to recognize the State's ownership of mineral and metallic mines, including geothermal rights for Lots 1218 and 1219.

B. The Public Trust Includes an Easement for the Free Flowage of Water

An easement for the free flowage of water that is not a part of the public trust is easier to defeat than one that is, because "[t]he sovereign never waives its right to regulate the use of public trust property." In the Matter of Water Use Permit Applications, 94 Haw. 97, 141, 9 P.3d 409, 453 (2000) ("Waiahole I"). In its attempt to separate the State's free flowage easement from the public trust, PLF misstates the land court's findings. Nowhere in the Findings of Fact, Decision and Order did the land court state "that the State was required to have raised its claim to a flowage easement in the 1938 proceedings because the public trust does not encompass a flowage easement." PLF's Amicus Br. at 9. The land court actually found that "The State of Hawai`i has asserted, and the Court finds that the State of Hawai`i has reserved an interest in water rights, if any, that may affect the land that is the subject of the Amended and Restated Petition for Consolidation and Resubdivision, Creation of Shoreline Setback Line, and Designation of Easements, but the interest of the State of Hawai`i, if any, is not an easement or encumbrance upon registered title." ROA at 997 (Findings of Fact, Decision and Order, FOF 28). The land court made no finding as to public trust status.

The State also disagrees with PLF's assertion that the public water trust is "unlike navigable waters which operates like an easement." PLF's Amicus Br. at 9. The public trust for navigable waters was recognized by the Supreme Court of the Republic of Hawaii in King v.

Oahu Railway & Land Co., 11 Haw. 717 (Haw. Rep. 1899). The Court held that "the people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their own common use." Id. The Hawaii Supreme Court has observed that the trust over the water resources of this state is "akin to the title held by all states in navigable waterways which was recognized by the United States Supreme Court in Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)." Waiahole I, 94 Haw. at 129, 9 P.3d at 441 (quoting Robinson v. Ariyoshi, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982). "The extent of the state's trust obligations over all waters of course would not be identical to that which applies to navigable waterways. That such powers and obligations exist, however, is not open to question." Ariyoshi, 65 Haw. at 675, 658 P.2d at 310. "The reassertion of dormant public interests in diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of **the public's interests in the utilization and flow of those waters.**" Id., 65 Haw. at 676, 658 P.2d at 311 (emphasis added). "These parameters [of the State's authority and interests in Hawaii's waters], we believe, should be developed on a case by case basis or by the legislature as the particular interests of the public are raised and defined." Id., 65 Haw. at 676, 658 P.2d at 312.

There has been no taking. In Hawaii, all flowing water, both over and under Appellees' property, has always been subject to the public trust. See Kahookiekie v. Keanini, 8 Haw. 310 (Haw. King. 1891) (the court ordered a landowner with springs on his land to take down a flume that was diverting water from its natural water course because a reduction in stream flow would affect the condition of a lower auwai). "Thus by the Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not transferred to the awardee, and **the ownership of water in natural watercourses streams and rivers remained in the people of Hawaii for their common good.**" McBryde Sugar

Company , Ltd. v. Robinson, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973) (emphasis added). The State has not created an easement on property that has never previously been burdened. Nor can the free flowage easement be categorized as a physical invasion taking because Appellees still have the right to possess, use, and dispose of their property. But see Maunalua Bay Beach Ohana 28 v. State of Hawaii, 122 Haw. 34, 55, 222 P.3d 441, 462 (Haw. App. 2009) (law granted the State ownership of existing accreted lands not registered or recorded as of the effective date of the statute, or for which no application for registration or petition to quiet title was pending).

PLF's taking claim is based entirely on speculation that a free flowage easement will someday allow the State to flood Appellees' property. PLF's Amicus Br. at 10. Water overflow does not constitute a taking unless it is an "actual, permanent invasion of the land amounting to an appropriation thereof, and not merely an injury to the property." In re Condemnation by the Commonweath of Pennsylvania Dept. of Transp. of Certain Property in the Borough of Bellevue, 827 A.2d 544 (Penn. 2003). More importantly, any claim arising from the State's future enforcement of its free flowage easement is not ripe for adjudication. There is no evidence of flooding, much less flooding caused by the State. Appellees have not shown that they will experience hardship if judicial review is withheld until there is ever such a finding. See Office of Hawaiian Affairs v. Housing & Cmty. Dev. Corp. of Hawaii, 121 Haw. 324, 338, 219 P.3d 1111, 1125 (2009) (ripeness inquiry has two prongs: (1) fitness of issues for judicial decision and (2) hardship to parties of withholding court consideration). A free flowage easement does not constitute a taking.

The land court erred in failing to find that Lots 1218 and 1219 are subject to an easement for the free flowage of water.

For all other points, the State respectfully refers the Court to its opening and unified reply briefs.

III. CONCLUSION

The land court's order and decree should be reversed. The State of Hawaii respectfully requests that this Court find that Lots 1218 and 1219 are subject to the State's (1) ownership of minerals and metallic mines of every kind or description on the property, including geothermal rights, and the right to remove the same; and (2) and easement for the free flowage of any waters through, over, under or across the property. The State further requests that this Court order the case be remanded to the land court, and that the land court be directed to note the State's interests on the certificate of title.

DATED: Honolulu, Hawaii, June 28, 2010.

Respectfully submitted,

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I certify that on June 28, 2010, one copy of the State of Hawaii's Reply Brief to Amicus Curiae was mailed first-class, postage-prepaid to:

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