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IN THE SUPREME COURT OF THE STATE OF HAWAII

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KAUAI SPRINGS, INC., Petitioner/Appellant-Appellee,

vs.

PLANNING COMMISSION OF THE COUNTY OF KAUAI, Respondent/Appellee-Appellant.

SCWC-29440

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29440; CIV. NO. 07-1-0042)

FEBRUARY 28, 2014

CONCURRING AND DISSENTING OPINION BY RECKTENWALD, C.J.

This case requires us to further define the contours of the public trust doctrine with respect to water resources. The public trust doctrine in Hawaii is a matter of "constitutional mandate." In re Water Use Permit Applications ("Waiāhole I"), 94 Hawai'i 97, 131, 9 P.3d 409, 443 (2000). The doctrine is enshrined in article XI, section 1 of the Hawaii Constitution, which declares that, "the State and its political subdivisions

shall conserve and protect . . . all natural resources, including . . . water . . . and shall promote the development and utilization of these resources . . . in a manner consistent with their conservation," and which further mandates that "[a]ll public natural resources are held in trust for the benefit of the people." It is beyond dispute that the public trust doctrine applies to all water resources in the State, without exception or distinction. In re Water Use Permit Applications ("Waiāhole I"), 94 Hawai'i 97, 133, 9 P.3d 409, 445 (2000). It also is beyond dispute that public trust doctrine imposes on the State and its political subdivisions a serious and significant duty to protect the natural water resources of the State. Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 224, 140 P.3d 985, 1004 (2006).

This case requires us to address how that doctrine should be applied by governmental entities other than the Commission on Water Resource Management (Water Commission), in light of our decision in Kelly. The Intermediate Court of Appeals, in addressing that issue, adopted an approach that (1) starts with an analysis of the statutory or regulatory duties placed upon the relevant agency (here, the Kaua'i Planning Commission, or KPC), and then examines the additional duties imposed by the public trust doctrine, and (2) requires the agency to reasonably assess, in light of its regulatory duties,

compliance by the applicant with potentially applicable regulatory requirements imposed by other agencies. Kauai Springs, Inc. v. Planning Comm'n, 130 Hawai'i 407, 429-33 312 P.3d 283, 305-09 (App. 2013). In contrast, the majority's approach requires that the applicant prove that all potentially applicable regulatory requirements, including those applicable to third parties not under the applicant's control, have been satisfied. Majority opinion at 88-99.

The difference in the two approaches is most clearly highlighted by the question of whether Grove Farm, which supplies the water that Kauai Springs seeks to use, is subject to regulation by the Public Utilities Commission (PUC). The PUC here did not express any interest in regulating Kauai Springs. It noted that it might have a regulatory interest in Grove Farm, but added that additional information was needed to determine whether Grove Farm was a public utility and that a petition for declaratory relief would need to be filed to resolve that matter definitively. Significantly, the PUC's comments did not suggest that water resources would be affected, Kauai Springs, 130 Hawai'i at 433, 312 P.3d at 309, but rather expressed interest in Grove Farm's possible function as a public utility, see Hawai'i Revised Statutes chapter 269. The ICA held that the significance of PUC regulation was a factual matter that could be resolved by KPC in the first instance. Id. at 431-32, 312 P.3d at 307-08.

In contrast, the majority holds that Kauai Springs must affirmatively demonstrate that all potentially applicable requirements have been met, effectively requiring Grove Farm -- which is not a party to the application -- to seek a declaration from the PUC on its status as a utility. Majority opinion at 91-100. It is unclear, however, how that additional regulatory review will further the purposes of the public trust doctrine. And, if Grove Farm decides not to pursue it, Kauai Springs' application will be at an end.

Thus, the majority's approach appears to require each agency that considers a permit application that affects water resources to ensure compliance with every other agency's potentially applicable regulatory requirements without reference to whether doing so furthers the purposes of the public trust. Respectfully, because I believe that the ICA's approach fully implements the purposes of the public trust doctrine without imposing on applicants additional regulatory requirements that do not have a clear relationship to the protection of water resources, I respectfully dissent from the majority opinion with regard to that issue.¹

As a preliminary matter, the majority's disposition of this issue -- one that essentially affirms KPC's denial of the

¹ I concur in the majority's conclusion that Kauai Springs assented to an extension of the time frames for considering the permit applications. Majority opinion at 57-74.

permit applications, although remanding for entry of findings consistent with the majority's analysis -- was not sought in this court by KPC. Indeed, KPC did not challenge the ICA's disposition, which had remanded the case to KPC to apply the principles set forth in the ICA's opinion. To the contrary, counsel for KPC stated at oral argument that the ICA "got it right," and that KPC was satisfied with the ICA's approach. Thus, the approach taken by the majority was not argued for on certiorari by either party.² While not a bar to action by this court, this does mean that the majority is crafting an outcome that neither party sought.

In its analysis of the public trust doctrine, the ICA first held that the doctrine applied to Kauai Springs' use of the water that it was bottling, and not just to Kauai Springs' act of building a bottling facility on agriculturally-zoned land. Kauai Springs, 130 Hawai'i at 427, 312 P.3d at 303. In so doing, the ICA examined the regulatory provisions applicable to KPC's consideration of the application, and in particular, the manner in which those provisions touched upon water resources. Id. at 425-27, 312 P.3d at 301-03. Having determined that the public trust doctrine applied to Kauai Springs' use of the water, the ICA then analyzed whether KPC applied the correct standards and

² Although Kauai Springs did challenge some of the ICA's rulings on this issue, its purpose in doing so was to have this court affirm the analysis of the circuit court, which found in its favor.

criteria in reviewing the application for the permits. Id. at 427-28, 312 P.3d at 303-04. Drawing on this court's analysis in Kelly, the ICA noted that the correct starting point was the statutory and regulatory provisions applicable to each of the requested permits' impact on water resources, but it also recognized that the public trust doctrine required more. It then articulated the relevant test as follows:

that the Planning Commission's decision be initially grounded in the framework of the statutes and regulatory provisions that authorize the Planning Commission to act in this instance; in addition thereto, that the Planning Commission make appropriate assessments and require reasonable measures to protect the water resources at issue in this case; and, because Kauai Springs seeks to use the water for economic gain, this case requires that the Planning Commission give the permit application a higher level of scrutiny and, although Kauai Springs' use of the water is not illegal or improper per se, that Kauai Springs carries the burden to justify the use of the water in light of the purposes protected by the public trust.

Id. at 429, 312 P.3d at 305 (emphasis in original).

In reviewing KPC's application of those principles, the ICA noted that the denial of the permits was not specifically based on the many applicable standards and criteria relating to Kauai Springs' use of the water, but rather on whether other entities (Grove Farm and Knudsen Trust) had complied with potentially applicable regulatory requirements. Id. at 431-32, 312 P.3d at 307-08. With regard to that issue, the ICA held:

it was not a reasonable measure for the Planning Commission to require that Kauai Springs prove that "the proposed use and sale of the water does not violate any applicable law administered by [the Water Commission], the PUC or any other applicable

regulatory agency." This requirement creates an obscure and indefinite burden of proof because it is completely open-ended as to the "applicable law" that is of concern to the Planning Commission and completely open-ended as to "any other applicable regulatory agency" that the Planning Commission believes would have jurisdiction relevant to its permit review.

Id. at 431, 312 P.3d at 307 (brackets in original).

The ICA repeatedly stated that, although Kauai Springs was not required to initiate separate regulatory proceedings, it nevertheless bore the burden to justify its use of the water in light of the purposes protected by the public trust. Id. at 428, 312 P.3d at 304 ("We further recognize that under the public trust doctrine, those seeking the private use of water for economic gain have the burden to justify the use, given the public trust considerations."); id. at 429, 312 P.3d at 305 ("Kauai Springs carries the burden to justify the use of water in light of the purposes protected by the public trust."); id. at 432, 312 P.3d at 308 (noting that denial of the permit would be appropriate if "Kauai Springs failed to show" that its use of the water would implicate the concerns raised by the Water Commission); id. at 433, 312 P.3d at 309 ("Kauai Springs must show that its use of the water for economic gain is justifiable given the public trust purpose."); id. ("[T]he Planning Commission can and should require Kauai Springs to carry the burden of justifying its use of water for economic gain in light of the purposes of the public trust.").

There are several significant differences between the approach taken by the ICA and that adopted by the majority. First, the ICA's approach utilizes the applicable statutory and regulatory provisions as the starting point of the analysis, and requires the agency to refer to those provisions in deciding whether to grant or deny the permit. In contrast, while the majority refers to some of those provisions, they do not figure prominently in its analysis and the majority does not appear to require that KPC explain how they apply to the permits at issue.³

This difference is significant because the approach adopted by the ICA establishes the context for applying the broad principles of the public trust doctrine to the specific task faced by the agency. There are a large and diverse array of agencies that might issue permits or approvals that could in some way affect a water resource. Would the Kaua'i building division, in considering a request by Kauai Springs for a permit to expand its facility, be obligated to consider Kauai Springs' use of the water that would be processed in the expanded facility? What if

³ The majority also asserts that the ICA's proposed test ignores or rejects other aspects of the public trust doctrine. Majority opinion at 102-03. However, nothing in the ICA's test forecloses consideration of additional aspects of the public trust doctrine, where applicable. In the instant case, the ICA appropriately focused its analysis on those factors relied on by KPC. Id. at 427-34, 312 P.3d at 303-10.

Additionally, it is not apparent why some of the factors discussed by the majority, such as the need to consider practicable alternative water sources, are relevant to KPC's evaluation of the permit, given that those factors have their genesis in the State Water Code and thereby fall under the duties of the Water Commission, which did not raise any concerns in this regard in the instant case. See HRS chapter 174C; Waiāhole I, 94 Hawai'i at 161-62; 9 P.3d at 473-74.

Kauai Springs sought to add a second floor to its processing facility, and wanted to install an elevator to access it -- would the Boiler and Elevator Inspection Branch of the Department of Occupational Safety and Health be required to consider the impact of granting an elevator installation permit on water use issues? The answers presumably would depend on the extent to which those agencies had a regulatory interest in water use. Thus, starting the analysis with an examination of the agency's regulatory mandate, as suggested by the ICA, makes sense.

Second, the ICA and the majority take different approaches with regard to KPC's obligation to ensure compliance with other agencies' regulatory requirements. These divergent approaches focus on Conclusion of Law No. 3 in KPC's Findings of Fact, Conclusions of Law, Decision and Order, which provided:

In view of the comments received from [the Water Commission] and PUC the land use permit process should insure that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with prior to taking action on the subject permits. The Applicant, as a party to this proceeding should also carry the burden of proof that the proposed use and sale of the water does not violate any applicable law administered by [the Water Commission], the PUC or any other applicable regulatory agency.

The ICA characterized the second sentence of this finding as imposing an "obscure and indefinite burden of proof" on Kauai Springs, and concluded that it was not reasonable to require Kauai Springs to initiate regulatory action to establish compliance by Knudsen Trust and Grove Farm with "all applicable

requirements and regulatory processes" when the KPC could resolve the relevant issues by making factual determinations. Kauai Springs, 130 Hawai'i at 431-32, 312 P.3d at 307-08. In contrast, the majority states that the burden was a reasonable one, when read in light of the concerns expressed by the Water Commission and the PUC, as reflected in KPC's finding that "there may be outstanding regulatory processes . . . that [Kauai Springs] must satisfy." Majority opinion at 98.

Respectfully, the concerns articulated in this case by the Water Commission and the PUC do not require the initiation of separate regulatory proceedings, but instead can properly be resolved on remand by KPC, with Kauai Springs bearing the burden of proof. Kauai Springs, 130 Hawai'i at 432, 312 P.3d at 308. With regard to the PUC, the concern expressed was that Grove Farm might be a public utility subject to regulation by the commission because it distributed water from its system to various users; the PUC suggested that if further clarity on that issue was needed, a declaratory judgment action could be initiated, presumably by Grove Farm. However, as the ICA observed, "there is nothing in [KPC's] order or the PUC's comments that suggests the water resources are in jeopardy or affected without PUC regulation of Grove Farm as a public utility."⁴ Id.

⁴ Respectfully, the majority is incorrect in stating that this passage improperly shifted the burden of proof from Kauai Springs. See dissenting opinion at 98-99 n.45. We have previously held that applicants before the Water Commission have an affirmative duty to demonstrate that their

Additionally, the Water Commission identified several conditions that could require further permitting if they occurred: if the source was modified, a well modification permit might be required; if a pump was installed to induce additional flow, a pump installation permit would be required; and, if the modification results in impact to surface waters, a petition to amend the interim stream flow standard for affected surface waters would be required. However, nothing in the record suggests that any of those things had happened or were planned, and to the extent there is any doubt, those could be resolved as a factual matter by KPC on remand, id., or alternatively, appropriate conditions could be imposed on the permit.

KPC also noted that a concrete stem wall had been constructed and a steel panel installed at the bottom of the tunnel entrance in the mountain, where the water originated that eventually flowed downstream to Kauai Springs. In light of these modifications to the tunnel, KPC opined that there may be "outstanding regulatory processes" with the Water Commission that Kauai Springs was required to satisfy. KPC stated, "[I]t should

proposed use of water will not interfere with any public trust purpose. In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 508-09, 174 P.3d 320, 347-48 (2007). In addition, the ICA correctly recognized that, in additional circumstances, requiring "compliance with the law by non-parties supplying water may . . . be a proper burden if such compliance will help to protect and conserve water[.] Kauai Springs, 130 Hawai'i at 433, 312 P.3d at 309. However, we have never held that the public trust imposes a burden to disprove all potentialities unrelated to the protection or conservation of water resources. Here, there is no indication that a declaratory ruling from the PUC was necessary for the protection or conservation of water.

be [Kauai Springs'] responsibility to confirm and determine the need for any permits that may be required for the construction of the concrete stem wall and the steel panel mounted over the tunnel entrance." Yet there is nothing in the record to suggest that the stem wall and steel panel were of recent vintage (the water system in question dated to the 1890s, and had been registered with the Water Commission) or that any permits were required.

In sum, the majority establishes a burden that will be difficult if not impossible to satisfy in many cases: the applicant must first prove that all potentially applicable regulatory requirements have been met, including those that involve third parties not under the control of the applicant and agencies other than the one that is considering the application.⁵ The public trust doctrine is a centerpiece of this state's efforts to protect its scarce natural resources. The doctrine imposes significant duties on those who would use water resources, and the government agencies charged with protection of

⁵ It would appear that, in at least some cases, the process of obtaining declaratory rulings to substantiate that all regulatory requirements have been met would exceed the time limits for the permit approval process. Thus, an applicant may be required to seek out such declaratory rulings before filing an application for the desired permit.

Additionally, under the majority's analysis, an agency may be reluctant to issue any type of regulatory clearance until it has assurance that all other regulatory concerns have been resolved. In other words, a permit may be indefinitely delayed because no agency is willing to act first in approving the project, since doing so without assuring that all applicable requirements and regulatory processes relating to the public trust are complied with could constitute a violation of that agency's public trust duties.

those resources. In my view, the approach set out by the ICA appropriately balances the government's weighty responsibilities with respect to public trust resources with the need for a functioning regulatory system. Accordingly, I would affirm the judgment of the ICA.

/s/ Mark E. Recktenwald

