

IN THE SUPREME COURT OF THE STATE OF HAWAII

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In the Matter of the Water Use Permit Applications,
Petitions for Interim Instream Flow Standard
Amendments, and Petitions for Water Reservations
for the Waiāhole Ditch Combined Contested Case
Hearing

NO. 21309

ORDER OF AMENDMENT

(CASE NO. CCH-OA95-1)

NOVEMBER 29, 2000

MOON, C.J., LEVINSON, NAKAYAMA, JJ. AND
CIRCUIT JUDGE IBARRA, IN PLACE OF KLEIN, J. RECUSED
AND RAMIL, J., DISSENTING

The opinion of the court, filed on August 22, 2000, is hereby amended as follows: (deletions bracketed, additions underlined):

Page 3, tenth line from the bottom: "Parties on appeal include: . . . Hakipu'u 'Ohana"

Page 13, footnote 9: ". . . and Del Monte was profitably using its own ground water wells to irrigate lands for which it sought ditch water, FOFs 793-[7]94." Also in the same footnote: "FOFs 677-786; D&O at 8."

Page 28, last line: "[As stated previously] In this case, two commissioners withdrew from the case at the outset"

Page 31, footnote 23: "In its objection to the Commission, [Hawaii's Thousand Friends] HTF demanded that the Commission disclose any *ex parte* communications"

Page 43, line 13: "To the contrary, as discussed in Part III.[D] C.2[.], *infra*, the legislature appears to have engrafted the doctrine wholesale in the Code."

Page 48, line 12: "In its ancient Roman form, the public trust included 'the air, running water, the sea, and consequently the shores of the sea.'"

Page 49, line 15: "Their [argument] position rests almost entirely on one decision, *City Mill Co., Ltd. v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929)."

Page 56, third line from the bottom: "See Laws of 1[9]842, reprinted in Fundamental Laws of Hawaii 29 (1904)."

Page 59, first line: "*National Audubon*, 189 Cal.Rptr. 346, 658 P.2d at 723-24 (citations omitted); see also Hayes v. Bowman, 91 So.2d 795, 799 (Fla. 1957) ("As at common law, this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money.").

Page 63, footnote 37: "See FOFs 915-23."

Page 65, footnote 42: "FOFs 968-70."

Page 83, second paragraph: "As the textual basis for its argument that the Code limits the Commission to only one interim standard per stream, DOA/DLNR relies on passing references to "modification" appearing in the [instream flow] permanent standard provisions"

Page 91, first line: "See, e.g., . . . *Lead Industries*, 647 F.2d at 1154-55 (relying on the statutory 'margin of safety' requirement in rejecting argument that agency could only authorize standards designed to protect against 'clearly harmful health effects')"

Page 119, second paragraph: "In classifying golf course irrigation as 'nonagricultural use,' the Commission apparently decided that [it] golf course irrigation raised different policy considerations than those uses typically associated with 'agricultural use.'"

Page 143, section 5: "Having reviewed the legal foundation of KSBE's claims of right, we address KSBE's allegation that the Commission has effected an unconstitutional 'taking' of KSBE's property without just compensation by denying KSBE's request to use [such] Waiawa ground water and allocating [it] that water to other leeward parties. First of all, we have held that the Commission properly denied KSBE's permit application for noncompliance with the statutory conditions, see

supra Part III.[I]H.1.”

Page 157, second paragraph:: “The proposed reservation, as its name [suggests] indicates, merely offers a suggested amount, contingent on proper approval through rule-making.”

Page 162, third line from the bottom:: “. . . 5) the practicability of Campbell Estate and PMI using alternative ground water sources, see supra Parts III.F.3.c & III.F.4.d”

The Clerk of the Court is directed to incorporate the foregoing changes into the original opinion.