

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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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 Waiahole Ditch Combined Contested Case  
Hearing

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NO. 21309

MOTIONS FOR RECONSIDERATION  
(CASE NO. CCH-OA95-1)

SEPTEMBER 27, 2000

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

On August 30, 2000, appellee/cross-appellant The Estate of James Campbell (Campbell Estate) filed a motion for reconsideration and/or clarification of this court's published opinion, In re 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 (August 22, 2000). On August 31, 2000, appellant Kamehameha Schools Bishop Estate (KSBE) filed a motion for reconsideration. Upon due consideration of the motions and supporting documents and arguments, we rule as follows:

Campbell Estate's motion is denied. Campbell Estate should direct any questions and arguments regarding its interim use, pending the outcome of remanded proceedings, to the Commission on Water Resource Management (the Commission). We

refer Campbell Estate to various portions of this court's decision potentially relevant to its concerns. See slip op. at 100 (maintaining that the Commission's failure to establish more definitive standards does not "preclude[] present and future allocations for offstream use" and that the Commission must employ a methodology incorporating elements of uncertainty and risk); id. at 107 (ruling that the Commission did not err in "accommodating existing agricultural uses" at this time); id. at 117 n.70 (holding that the commission did not err in allowing Pu'u Makakilo, Inc. to continue using ditch water pending final decision on its application, notwithstanding the fact that it was not an "existing use").

KSBE's motion is denied. KSBE points out that it previously sold water to leeward parties via a lease that expired on December 31, 1996. Assuming arguendo that such sale of water constitutes "use," under the common law rule of correlative rights, it establishes KSBE, at best, as an "appropriator" of ground water for use on distant lands, and not an existing "correlative" user. See id. at 140 (stating the rule that "parties transporting water to distant lands are deemed mere 'appropriators'"). Accordingly, the points made by this court regarding the scope of KSBE's "rights" stand: 1) KSBE can assert no common law "correlative rights" to ground water because, absent the requisite land use approvals, it has yet to establish a need for reasonable use of such water in connection with the overlying land, see id. at 140; and, in any event, 2) under the controlling Code permitting provisions, KSBE has not established an "existing correlative use" and, thus, cannot claim any

superior priority or entitlement to a permit, see id. at 142-43. Put simply, while KSBE's ability to use water from the Waiāhole Ditch System remains an open question, subject to, inter alia, KSBE's reapplication for such water, KSBE has no underlying superior right or entitlement, "correlative" or otherwise, to use such water.

As for KSBE's arguments that the denial of its permit application amounted to an unconstitutional "taking" of its property without just compensation, we refer KSBE to the relevant discussion sections in this court's published opinion. See id. at 49-53 & n.32 (affirming that public trust applies to all waters, including ground water); id. at 143-48 (rejecting KSBE's argument on ripeness grounds and reviewing the nature of usufructuary rights, statutes in other jurisdictions modifying common law water rights, case law upholding such statutes, and the effect of the public trust on claims of vested water rights).

Associate Justice Ramil, having dissented from the opinion of the court, does not concur.

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The Estate of James Campbell

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