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Hanapepe water rights ruling still eddying in court

By Gerald Kato
Advertiser Government Bureau

Nine years after issuing its historic water rights decision, the state Supreme Court yesterday grappled with the same issues in attempting to clear up uncertainties surrounding the ruling.

The five justices sat through a two-hour hearing called to assist them in responding to legal questions posed by the federal appeals court now reviewing the state water case.

How the justices answer those questions could affect the outcome of the review by the U.S. 9th Circuit Court of Appeals in San Francisco.

The case became a landmark in Island water law when the Supreme Court in 1973 declared the state to be the owner of the excess surface waters flowing in the Koula and Mauahi streams into the Hanapepe Valley on Kauai. The court threw out the longstanding assumptions of Kauai's major sugar plantations that they were owners of the precious water rights.

In issuing this far-reaching ruling, then-Justice Kazuhisa Abe further stated that the plantations could not transfer the water out of the Hanapepe Valley for use elsewhere. Since diversion and transportation of water through the use of irrigation ditches is the basis on which the sugar industry was built in the



in court

Islands, enforcement of this provision would prove disastrous for not only Kauai's plantations but others across the state.

Then, in 1977, federal Judge Martin Pence overturned the state's high court, saying its ruling was unconstitutional. It is the state's appeal of Pence's decision which is now before the 9th Circuit judges.

Because of the role of water in sugar growing, there are big long-term stakes in the so-called "Hanapepe case," which started out in 1959 as a dispute between two big Kauai plantations — McBryde Sugar Co. and Gay & Robinson. Each claimed ownership of the water that was eventually ruled to be state property. Both have banded together along with Olokele Sugar Co., which bought water from Gay & Robinson to ship out of the valley, and small farmers on Kauai, challenging the Hanapepe case.

Their attorneys argued yesterday that water rights in Hawaii until this case clearly supported their rights to use, sell and divert surface waters in the Islands. Pence's ruling

overturning the Supreme Court, they contend, is recognition of this, and the only reason the 9th Circuit has questions is because of doubts about the meaning of the case raised by special deputy attorney general Williamson Chang.

Chang, a University of Hawaii professor of law, represented Chief Justice William Richardson in arguments before the federal appeals court. Among other things, Chang suggested that while the case talks about the state owning water, it could be interpreted to mean that the court intended to use the term to imply that the state is public trustee for the water, to imply that the state can control and regulate usage rather than claim ownership of the water in the way that a person can claim ownership of a piece of property.

That's not the way the state is looking at the situation. Queried by Justice Herman Lum on how the state would enforce the court ruling, deputy attorney general Andrew Lee said:

"I would think the state would get in touch with McBryde and Gay & Robinson and negotiate on water use and sell water for the sugar plantations. If they refuse and persist in taking water, then we would petition the circuit court on Kauai and seek an injunction."

But because of the continuing series of court actions, Lee said, the

state has never sought enforcement.

Lee said that despite earlier cases suggesting that the plantations owned the excess surface waters, there was no clear ruling on the matter until Hanapepe. Lee suggested that Hanapepe defined the water rights of the state and private owners.

Attorneys for the sugar companies said the questions of ownership had been long settled by the territorial and federal courts. Hanapepe, they said, was a totally unexpected ruling since it raised issues that were never in dispute in the original court case between the two plantations.

Former Gov. William Quinn, representing Olokele Sugar, said there was no doubt that the Supreme Court intended to deal with ownership and diversion of water whether the issue was before the court or not.

J. Russell Cades, attorney for McBryde, told the court that he could not believe it would answer the federal appeals court questions in such a way that would prevent the plantations from using the water as they had before the Hanapepe decision. This practice, Cades said, is intimately tied to the growth and development of sugar in the Islands.

"You bought the water rights that entitled you to a certain quantity of waters from the river. You diverted

it from the river and you turned it on to your sugar. That's the history of Hawaiian sugar," he said.

Unravelling exactly what the court meant in 1973 won't be an easy task. Chief Justice Richardson is the only member left on the court who participated in the original decision. The court turned down a request by attorneys for the plantations that Richardson not participate in this hearing.

Justice Lum asked if the current court could substitute its judgment, and even go so far as to reverse itself on the Hanapepe case in responding to the 9th Circuit. Quinn indicated that the court could take such action.

The five justices said they will study the matter and later send their formal response to the federal appeals court.