

Note on Hawaii's Water Rights Litigation

Hawaii has experienced years of litigation over the legal status of private property interests in the fresh waters of the islands. During the period when Hawaii was a territory, the judges (who were appointed by the federal government in Washington) tended to rule that private corporations could obtain vested property rights in the "surplus" waters in Hawaii's streams. After Hawaii became a state in 1959, the Hawaii Supreme Court (appointed by the elected Governor) ruled that these waters could not be privately owned and were part of the state's public trust. This decision drew upon the native Hawaiian approach toward water that was prevalent prior to Westerners coming to the islands. McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, aff'd on rehearing, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed and cert. denied, 417 U.S. 962 (1974).

The private corporations then challenged this decision in federal court, arguing that this judicial decision constituted an unconstitutional taking of private property rights. The federal courts have thus far tended to agree with the private corporations, although the litigation is still ongoing. At one point, the U.S. Court of Appeals for the Ninth Circuit asked the Hawaii Supreme Court to clarify its decision, and in the course of its answer the Hawaii Supreme Court offered the following analysis of the authority of decisions rendered prior to statehood:

Our reference to "Hawaii's caselaw" governing water is perhaps misleading for the volumes of Hawaii Reports represent four separate political regimes. The first was the period prior to 1893, during which Hawaii was a constitutional monarchy and the justices of the Supreme Court were appointed by the king. In 1893, the monarchy was overthrown and a republican form of government was substituted. During this period, the justices were appointed by that government. In 1897, Hawaii was annexed by the United States and until 1959 was a territory with our judges and justices appointed by the President of the United States with the advice and consent of the United States Senate. In 1959, Hawaii became a state.

The only cases treating "surplus water" as private property are to be found during the territorial period, when the judiciary was not a product of local sovereignty. While the decisions of the territorial courts were unquestionably binding upon the parties before it, we doubt whether those essentially federal courts could be said to have definitively established the common law of what is now a state. So long as the federal government was a sovereign its authority to frame the law was

unquestionable, but upon our assumption of statehood our own government assumed the whole of that responsibility, absent any explicit federal interest. And it is from our authority as a state that our present common law springs;

"[B]ut law in the sense in which courts speak of it today [the common law,] does not exist without some definite authority behind it. The common law so far as it is enforced in a State whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else ... [T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own ... should utter the last word."

Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

The only statement of our law governing surplus water since statehood is to be found in *McBryde*.

We recognize that HRS Section 1-1, which was enacted during the monarchy in 1892 and amended only once, in 1903, might be construed to adopt territorial caselaw as among the "Hawaiian judicial precedent" representing the common law of the State. We do not at this time, however, address the question of whether those cases can truly be considered "Hawaiian" rather than federal precedent for we wish only to point out that the development of the law governing surplus water took place during a period when the resources of our land were subject to an authority which did not directly represent Hawaii's people and that the most recent pronouncements on the subject arise more immediately from the authority of those who will be forever affected by it.

Robinson v. Ariyoshi, 65 Haw. 641, 667-68, 658 P.2d 287 (1982).

What do you think of this approach? Who should ultimately win this dispute?