Hawaii Water History Prior to the 1978 Con Con - Jon Van Dyke

The following excerpts provide an overview for this presentation. The excerpts are from Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagamori, and Yukumoto, Water Rights in Hawaii, which appeared in Land and Water Resource Management in Hawaii (Hawaii Dept. of Budget and Finance, 1979).

THE ANCIENT HAWAIIAN WATER SYSTEM

Conclusion

Perhaps the essential feature of the ancient water system was that water was guaranteed to those persons who needed it, provided they helped in the construction of the irrigation system. Because agriculture was a matter of great importance to the Hawaiians, they were, in general, willing to contribute their efforts to the water system. The konohikis aimed to secure equal rights for all the maka'ainana and to avoid disputes. Beneficial use of water by the maka'ainana was also essential to the continued delivery of the water. The natives were subject to compulsory maintenance work on the auwais under the supervision of the konohiki. The konohiki, on the other hand, was reluctant to impose unreasonable burdens on the tenants because they were normally free to leave the particular plot if unhappy with the konohiki. Hence, a "spirit of mutual dependence and helpfulness prevailed, alike among the high and the low, with respect to the use of the water."71/

71. Perry, Hawaiian Water Rights, in Thrum's Annual, 1912 at 90.

THE DEVELOPMENTS FROM 1778 TO 1978

Conclusions

1. The 200 years that separate us from the traditional Hawaiian approach to water rights and other property questions were years of unusual turmoil and change. Cultures based on vastly different experiences came together on these islands and struggled to deal with the economic and human problems that existed. Change occurred rapidly. Traditions were lost. New institutions were created, not always with the support of the majority of those living here. The islands were annexed to one of the most powerful nations in the world, and new laws and institutions were imposed on the residents. Only recently has full self-government been restored and only recently have the native peoples begun to petition for a full redress of their grievances. It is probably more appropriate, therefore, for the "law" to be re-examined and restructured here than it would be in a community where change had been achieved more gradually and with the full participation of the citizenry.

2. The review of the decisions of the Hawaii Supreme Court on pages 176-200 concludes that the law on water rights was not "settled" prior to 1973 when the Hawaii Supreme Court rendered its decision in McBryde Sugar Co. v. Robinson.682/ The Hawaii Supreme Court reversed itself several times in its early cases involving water rights,683/ and the Territory at several points argued that it had rights to water greater than those that had been recognized.684/ Native claims to water were not fully articulated until recently and were rarely considered by the court. Although several commentators tried to codify Hawaii's water law,685/ they all viewed the law in Hawaii as unique and presented their summaries with caution. Many questions never reached the courts. The

1917 decision 686/ was based on different principles than those that had governed the 1904 decision,687/ and the 1930 decision 688/ rejected the principles that had guided the 1917 court. Even the important 1930 case of Territory v. Gay 689/ was decided by a divided court with each of the three justices having different views on the issues. The majority's holding in this case appears to be based on principles that differ from those used by the same court in another water case the year before.690/ The law has been actively disputed for years and cannot be described as "settled."

3. The majority opinion of the Hawaii Supreme Court's 1973 decision in McBryde looks at the entire history of Hawaiian law and attempts to integrate its inconsistent features into a coherent whole.691/ Although reasonable persons can disagree on the details of the court's opinion, and on the result, it was certainly proper for the court to try to reconcile conflicting themes in Hawaii's jurisprudence. The court acted within its jurisdiction, and the result should not be viewed as unreasonable, arbitrary, shocking, or particularly surprising. The majority opinion bases its conclusions on an interpretation of statutes and states that the legislature is free to enact new statutes if it prefers a different result.692/

4. The law in Hawaii on water rights prior to McBryde (1973) was unique in the United States. No other jurisdiction permitted private ownership of water to the extent claimed by the sugar companies and apparently authorized by the Hawaii Supreme Court in 1904 and 1930.693/ Water is generally viewed elsewhere as a resource that cannot be "owned" because it is free-flowing and is thus not subject to possession. The debate over "ownership" of waters may not be as significant as some advocates have claimed. As we explain at pages 216-17, above, the conclusion in McBryde that the State owns the water may mean only that the State can control and regulate the water--a power the State has always had. Under this interpretation, it would not make sense to say that anything was "taken" from other parties. Other states where water is scarce allow private water use by issuing permits for such use or by allowing an "appropriation" of the water by a private user who generally must register the appropriated claim. This right to use "appropriated" waters is not an ownership right. It cannot be bought and sold as freely as land. It does not necessarily last forever. It is a right to use the water that is valid either for a specific number of years or for as long as the water is being put to a beneficial use.694/

5. The McBryde decision does not state that water can never be transported from one watershed area to another. The majority's opinion holds that the two private landowners, McBryde Sugar Company and Gay & Robinson, cannot transport water out of the Hanapepe Valley because their water rights are appurtenant and riparian water rights which are limited to use within the original watershed area.695/ The court also holds that, because the early Hawaiian statutes were designed to bring the riparian doctrine of water rights to Hawaii, no landowner can divert water to the injury of other landowners who "are entitled to have the flow of water in the Hanapepe River in the shape and size given it by nature."696/ The court explicitly grounded these rulings on the early Hawaiian statutes that were found to govern this subject,697/ and the court invited the legislature "to conduct a thorough re-examination of the area."698/ The legislature can, therefore, consider new legislation that would amend the court's rulings on the transferability question.699/

6. The 1973 decision of the Hawaii Supreme Court on water rights 700/ will probably survive federal court review and stand as a contribution to the law of Hawaii. Although the U.S. District Court issued a stinging rebuke to the Hawaii Supreme Court in its 1977 decision of Robinson v. Ariyoshi,701/ the claim of the federal district court that it has jurisdiction over this controversy is open to serious doubt. If federal courts can review state court decisions whenever the rules of property law are altered, then our dual system of courts will have been drastically transformed. The trend of decisions by the U.S. Supreme Court in recent years has been to reduce federal court intervention into state affairs.702/ The 1977 decision of the U.S. District Court for the District of Hawaii is in conflict with these opinions and will probably be reversed on appeal.703/

7. Whatever the final decision on who "owns" the water, it is clear that the sugar companies have been using the water in recent years and have been producing economic benefit from this use. The sugar companies have helped develop the water resources of the islands by building and maintaining the irrigation ditches. Virtually no one has

argued that the sugar companies should be denied access to this water during the near future. The water situation is probably not yet critical enough to justify reallocation of this water at the present time. Any permit system that is adopted should acknowledge the need for some stability on the part of those who have invested in water during previous years.

8. It would not, however, constitute a "taking" of property for the interest of the sugar companies in water to be converted to an economically equivalent use right through a state-administered program. The State Water Commission has recommended that the legislature adopt a permit system, under which all water users (except domestic consumers) would be required to obtain permits for their use which would be limited in time to a 30- to 50-year period.704/ This time period was selected to allow "the permittee to amortize his investment."705/ "[R]enewals would be subject to review and approval."706/ This proposal is similar to statutes adopted in other states.707/ Such conversion statutes have not generally required compensation and have been accepted as constitutional by the courts.708/ From an economic perspective, a right of ownership of water--which is a right to use that water forever--is not significantly different from a right to use the water for 30 to 50 years.709/ This period should be adequate to justify new capital investment to exploit water sources. Some economists think that if the sugar companies were to sell a right to use water for 30 years, they would receive approximately the same amount they would receive if they sold their "ownership" interest in that same water.710/ If this analysis is correct, substituting a right to use water for 30 to 50 years for an "ownership" right would not involve any discernible economic loss to the sugar companies and hence, would not require any compensation. The State Water Commission's proposal would allow permits to use water to be freely "transferable within the permit period if there were no change in use."711/

9. If the federal district court decision overturning McBryde is sustained on appeal and if the permit system described above were found to constitute a "taking" in violation of the federal constitution, the measure of compensation the State would have to pay the private landowners would be the difference in the value of the land attributable to this change. Courts have consistently used the change in land value as the measure of damages when water rights are altered because water is not freely traded on the open market and hence has no easily measurable fair market value of its own. The burden would be on the private landowners to prove how much the land value has been affected because of the loss of water. In other words, the court would compare the value of the land with water rights to its value without those rights. If the land can be easily converted to a profitable use requiring less water, or if the private landowners are not making much profit by their current use (raising sugar), then the State might not have to pay much compensation for their "taking" of the water.712/

10. Whatever the final result of the federal litigation might be, it is appropriate for the legislature to act--and to act soon--to regulate water uses in Hawaii. The present state of uncertainty has inhibited the state's regulation of water resources, and this uncertainty should be ended as soon as possible. Private as well as public users need certainty regarding the availability of water, and it is in all of our interest to use our water in the most efficient and beneficial manner. No matter what the final outcome may be in the Hanapepe Valley litigation, the State will be able to control most of the water both because the State already owns much of the land in the rainy sections of the islands and because its police power permits the regulation of private water for the public welfare. A great deal of the state's water has been leased to private parties, frequently at rates that seem generous to the private parties.713/ The State could control these waters more carefully. And, the legislature is free to regulate private waters as other states do.714/ No reasons exist why the state legislature needs to wait for the end of the federal litigation before acting.

11. The Water Resources amendment recently added to Hawaii's Constitution 715/ requires the legislature to "assure" "appurtenant rights," which are the rights to water needed to grow taro on plots that have historically been used for this purpose. This goal could be achieved by excluding small plots of land (e.g., less than ten acres) from the requirement of obtaining a use permit. New water legislation in Hawaii must also acknowledge the federal commitment to provide sufficient water for the native lands now governed by the Hawaiian Homes Commission and other federal rights to water, which may be superior in some respects to competing claims to water.716/

12. The legislature can and probably should set priorities for water use. Most states do this in quite general terms. Chapter 177 of the Hawaii Revised Statutes, relating to groundwater restrictions in designated shortage areas, grants a priority to "domestic, municipal, and military uses"717/ without going into any greater detail. The Alaska statute, quoted above at page 228, is one of the most specific formulations, but still leaves considerable discretion to the decision-making body. It would seem appropriate for the Hawaii Legislature to spell out priorities of water use in some greater detail, although flexibility should be left for the water agency to meet unexpected future demands after full public hearings. Priorities in Hawaii should include protection of the fragile environment of the islands, and thus should guarantee some minimum stream flow.

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682. 54 Hawaii 174, 504 P.2d 1330 (1973), aff'd on rehearing, 55 Hawaii 260, 517 P.2d 26 (1973), cert. denied, 417 U.S. 962 (1974).

683. See pages 176-94.

684. See, e.g., Carter v. Territory, 24 Hawaii 47 (1917), and Territory v. Gay, 31 Hawaii 376 (1930).

685. See, e.g., W. Hutchins, Hawaiian System, supra note 23.

686. Carter v. Territory, 24 Hawaii 47 (1917).

687. Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co., 15 Hawaii 675 (1904).

688. Territory v. Gay, 31 Hawaii 376 (1930).

689. Id.

690. City Mill Co. v. Honolulu Sewer and Water Comm'n, 30 Hawaii 912 (1929).

691. For a full analysis of McBryde see pages 194-98.

692. McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 189 n. 15, 504 P.2d 1330, 1340 n. 15 (1973).

693. Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co., 15 Hawaii 675 (1904); Territory v. Gay, 31 Hawaii 376 (1930).

694. See pages 218-41 for a full discussion of water rights in other jurisdictions.

695. McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 191, 198, 200, 504 P.2d 1330, 1341, 1344, 1345 (1973).

696. Id. at 199, 504 P.2d at 1345; see also id. at 198, 504 P.2d at 1344.

697. Id. at 185-87, 191-97, 504 P.2d at 1338-39, 1341-44.

698. Id. at 189 n. 15, 504 P.2d at 1340 n. 15.

699. See pages 213-15 for a more detailed analysis of this issue.

700. McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973), aff'd on rehearing, 55 Hawaii 260, 517 P.2d 26 (1973), cert. denied, 417 U.S. 962 (1974).

701. 441 F. Supp. 559 (D. Hawaii 1977).

702. See, e.g., Warth v. Seldin, 422 U.S. 490 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974); Rizzo v. Goode, 423 U.S. 362 (1976); Reetz v. Bozanich, 397 U.S. 82 (1970); Lake Carriers' Association v. MacMullan, 406 U.S. 498 (1972).

703. See pages 200-18 for a full discussion of the current federal litigation.

704. State Water Commission, supra note 680, at 34-36.

705. Id. at 35.

706. Id.

707. See pages 221-22.

708. See generally, Ausness, supra note 573, at 253-54 (citing State ex rel Emery v. Knapp, 207 P.2d 440 (Kan. 1949) and Knight v. Grimes, 127 N.W.2d 708 (S.D. 1964)).

709. Conversations with Professor Robert Anderson, of the University of Hawaii Economics Department, and his task force on the management aspects of water use, August, 1978.

710. Id.

711. State Water Commission, supra note 680, at 35.

712. See pages 230-37 for a full discussion of judicial decisions in other states that have faced this issue.

713. See pages 167-69 for examples of this phenomenon.

714. See pages 218-41.

715. Hawaii Const. art. XI, sec. 7 (added 1978).

716. See pages 255-59.

717. Hawaii Rev. Stat. sec. 177-33(a)(2)(A) (1976); see also id. sec. 177-22.